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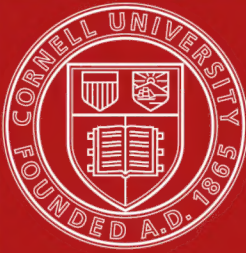
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**A treatise on the modern law of evidence**



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# A TREATISE


ON THE

# MODERN

LAW OF

## Read—Important.

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 To understand the object and scope of the present work, it is essential that the Introduction, immediately succeeding the Table of Contents, should be carefully read throughout.

An encyclopaedic Synopsis at the beginning of each chapter will serve as a guide to the contents of the present volume. With the appearance of Volume II, will be submitted an Index to the contents of Volumes I and II.



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1911





A TREATISE  
ON THE  
MODERN  
LAW OF  
EVIDENCE

BY  
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Of the Boston and New York Bars

American Editor of Best's Principles of the Law of Evidence,  
American Editor of the International Edition of Best on Evidence,  
American Editor of Taylor on Evidence.

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VOL. I  
ADMINISTRATION



ALBANY, NEW YORK:  
MATTHEW BENDER AND COMPANY

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SWEET & MAXWELL, LIMITED

1911

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To

MR. CHARLES LEWIS PRINCE

This work is respectfully and affectionately  
dedicated.





THE  
MODERN LAW OF EVIDENCE

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VOLUME I



## PREFACE.

---

The modern law of evidence owes its inception (if this may properly be predicated of a stage in continuous evolution) to the combined efforts of an English judge and an American jurist. Surely, much may be hoped for the world-power of Anglo-Saxon jurisprudence from a circumstance so auspicious! The Englishman is the Honorable Sir James Fitzjames Stephen. The American protagonist is Professor James Bradley Thayer of the Law School of Harvard University at Cambridge, Massachusetts. The fundamental contribution of Stephen lies in the conception of logical relevancy as the underlying, limiting and yet harmonizing element in the law of evidence. Through him first came the clear announcement that reason, the logic of experience, is the true test of admissibility. In this deep-reaching suggestion is to be found the characteristic basis of the modern stage of the law of evidence. Its instant acceptance, both in England and America, constitutes the surest guarantee for the scientific development of this branch of law.

But the fact of such a recognition goes further. It gives assurance of the enhanced usefulness of judicial administration in meeting the reasonable requirements of advancing civilization. Transcendent above all other forces to this end is the social power of truth. Litigants may be interested to suppress it. Witnesses may prefer to be excused from revealing it. Historical developments or moribund lines of political thought may even, in a way, cast a glamour from the torch of Liberty over the right to silence which defeats it. But the price society is called upon to pay for all such concessions is unmistakably heavy. Hu-

manity to the unfortunate, reformation of the perverted, are of high consequence indeed; but no object, however excellent, can gain by being sought upon the basis of a lie.

On the other hand, in view of the educational influence of legal institutions, enhanced, as this is, by the power of the press, it is of no small consequence that the law of the land should openly announce that a citizen may be justified in concealing the truth for his own protection, that the punishing of guilt or the redressing of wrongs may rightly be rendered impossible by excluding rational proof of the real occurrences, or that the mechanical enforcement of a general rule of law is deemed by courts, even of last resort, of higher importance than specific justice. It is within the power of Stephen's insistence upon the use of reason to prevent much of this mischief, to provide that judicial administration, in an age where science in every direction is seeking the truth as its single object, should thus be made to come more closely in touch with other forms of human activity.

Splendid in achievement as is the work of the Englishman, the American contribution to the modern law of evidence has been by no means meagre. Stephen's genius is essentially that of the pioneer. He blazes, as it were, a practicable path through a tangled jungle. His road, however, is not always smooth; nor are its grades easy. In broad outlines, it is found to be well planned and eminently serviceable. Details of construction, however, must frequently be altered or even, at times, altogether supplied. Such corrections Professor Thayer has, in many instances, been able to suggest. He has, for example, formulated qualifications necessary to perfect Stephen's broad doctrine of relevancy. In a field which he has made his own, the alert and discriminating mind of Thayer has pointed out various meanings in which the legal profession is constantly using many of the most familiar terms known to evidence. The fellow-worker with Stephen has even been privileged to throw into clear relief against the background

of the early law the historical development of the jury and of the various rules of procedure or administration by which it was sought to guide it.

Seeking to build upon the broad and generous foundation thus deeply laid by the Englishman, with materials in large measure provided by his American associate, the author of the present treatise has had two main objects. His first purpose has been to erect, so to speak, a storehouse which might be practically adapted to the needs of his profession. In orderly arrangement and with easy accessibility it should readily furnish all the contents which it might well be expected to supply. The second, though by no means subordinate, objective has been that the building should present so much of precision in design and symmetry of arrangement as might supplement, and in a sense increase, its utilitarian advantages. To attain one of these results without the other would be greatly to impair the desired usefulness of such a structure.

To these ends, it has been necessary to sacrifice much that it would have been pleasant to keep. For example, to present at once to the busy practitioner whose time may be assumed frequently to be scant, the latest case in any American, English or Colonial jurisdiction upon any appropriate subject, has been felt to be inconsistent with any considerable indulgence in the delightful work of tracing historical developments or establishing true perspectives. The reader must bluntly be introduced into the present and the specific. The past and the general, so far as they are stated at all, are as a rule left to him to examine or not, as he may see fit. He is not led to seek the present *through* the past or approach the specific by way of the general, as might, under other circumstances, be deemed preferable. This is the less to be regretted by reason of the fact that the extremely valuable material collected by the industry of scholars like Pollock, Stubbs, Maitland, Thayer, or Wigmore is readily accessible in treatises whose aim, in this particular, is not so severely practical as is that of the work here presented.

Another concession to this necessity for extreme economy in the use of time has been a reluctant indulgence in repetition and the employment of a high degree of condensation. In a work of this kind, used often for purposes of reference merely, the sustained attention of the reader to an extended discussion can scarcely be expected. A single section or, at best, two or three, is the most that the reader can reasonably be required to examine if his pressing need is to be served. The attempt has been made to relieve this situation by comprehensive chapter headings and the submission of a copious index covering both text and notes. With the same object, an indication has usually been given in the opening sentence or two of each section as to the *result* at which it arrives. The inquirer is thus left to find, in a strongly inverted way, the reasoning upon which the conclusion is based or the authorities by which it is supported only after he has already been made acquainted with the outcome itself. The hope, of course, is that it may thus be made possible for the seeker to avoid reading whatever may fail to concern his immediate purpose. It has been felt, however, that even with these and similar aids it was further necessary to make each section, so far as practicable, complete in itself. The consequence, as seems unavoidable, has been an amount of repetition which would scarcely be justified in any work which might fairly be expected to be more continuously read or examined at greater leisure.

In connection with this practical aspect of the subject, as in other respects, constant use has been made of the many helpful suggestions which have come from a great variety of sources. These it would be difficult, if not impossible, to enumerate. A life-long interest in a particular subject, while it has its embarrassments in the exercise of a profession so jealous as that of law, carries with it at least the partial compensation of disclosing the good will of one's brethren. To all these gratitude is due, coupled with regret that a single name should necessarily represent the work of so many. In such a situation, it may

seem invidious to mention individual names. Yet special appreciation is felt for the valuable assistance given by the Honorable Howard P. Nash, City Magistrate of the City of New York, and by James D. Kenny, esquire, of the Irish Bar. Highly valued cooperation, especially in matters of detail, has been received from former associates now with the Edward Thompson Company of Northport, Long Island, or with the American Law Book Company of New York City, who have advanced an effort, in aid of the professional value of the present treatise, to acquire the marked condensation and disregard of negligible matters characteristic of the encyclopedic form of legal writing. Above all, a sense of indebtedness is felt to John Henry Wigmore, Dean of the Law Faculty of the Northwestern University of Chicago, whose splendid industry, sound learning and dialectic skill have placed the legal profession, in both its teaching and practicing branches, under a heavy weight of obligation.

While the effort has thus steadily been made to aid the legal practitioner to advance his business by the ready discovery of the latest cases upon given points, economizing, so far as possible, his valuable time in so doing, it cannot, as has been intimated, be said that this has been the sole, or even the leading, motive for the work now submitted. The wider and, if the phrase may be used without offense, the higher professional outlook upon the mission of law has not been forgotten. The need of the time for a more efficient, because more flexible, administration of justice seems unmistakable. In this connection, as in many others, modern life is turning in no uncertain way from the domination of Individualism (under the inspiration and in aid of which many of the rules of law relating to evidence have found their sole and sufficient warrant) if not, indeed, to Socialism, at least to an insistence that individualistic action shall be directed to socially beneficial ends. It is recognized that the social interests in litigation far outweigh in importance the personal fortunes of the litigants themselves. Nothing could well be more in ac-

cordance with this view than the objectives which the law has prescribed to its tribunals. As the modern law of evidence proposes the ascertainment of truth as the objective for the work of the jury, so does the attainment of justice constitute the social mandate for the court. Practical experience is teaching how this may best be done. Rules of procedure having the force of law, always a necessary ingredient in every system of jurisprudence, are seen, when so minute in regulation or excessive in number as to defeat these social ends for which courts were established, to spell general disrespect for law or even practical lawlessness. The panacea invoked by individualistic democracy as a remedy for all social evils — that the legislature should pass a law on the subject — is perceived to have its limitations and that these have long been reached. A vast increase in the volume of judicial business, the growing complexity in mercantile affairs, an impenetrable tangle of statutory law badly codified or not codified at all, judicial decisions so numerous as to render their full consideration by overworked judges practically impossible, enforce the view that the element of positive law, the controlling force of statutory enactment or judicial precedent, is far too large in our present jurisprudence for the best social results. To look to the legislature for any continuous relief from this situation is, so far as the law of evidence is concerned, simply an act of folly. Essentially, the judicial office is an executive one and adequate power to attain desired results, coupled with immediate definite responsibility to the people for any failure to reach them, is the simple rule for making such a trust efficient for the public good. As the element of administration is permitted by the people to come into greater efficiency in the work of courts, the markedly beneficial results of judicial responsibility become manifest. Clearly, sound administration cannot justly be demanded of those who are without power to furnish it. In the absence of such ability, judicial machinery lacks the impelling force essential to smooth and accurate working.



To suggest a practical method for reducing, within the present lines of legal thought, this undue proportion of substantive or procedural law without failing to show the rules themselves, is the primary object of the following treatise. To *state* the law of evidence, as it now exists, however successfully this may be done, has not been regarded as sufficient. The attempt has also been made to *simplify* it by insistence upon the rational basis postulated by Stephen. Incidental simplification through the selection of a definite meaning for particular terms and the elimination, so far as possible, of ambiguities and confusions has, indeed, been undertaken, as is more fully stated in detail in the immediately succeeding explanatory chapter. In main, however, it may be said that the object has been to clarify the law of evidence by stating it, not in the secondary rules of prudence or maxims of good judgment, like those discountenancing hearsay, opinion, *res inter alios acta*, or the like, which, under the influence of the notion of the individualistic democracy that law was the panacea for all abuses, were hardened into precepts of substantive law involving reversal for violation; but rather in terms of the few and simple primary canons of judicial administration under which reason is exercised for the proper discharge of the executive functions of the judicial office. The rules themselves are considered fully; but as illustrations of these principles.

In thus emphasizing the few and simple as contrasted with the many and complex, in substituting the reasoning of justice for the memory of technical enactments or rulings, much professional gain may easily result. Few things, for example, would aid trial practitioners more immediately or tend more strongly to develop a class of efficient jury lawyers than for them to be able to remember a small number of master rules controlling the effect of all others. To the community at large, the substitution of judicial reason controlling the rules of evidence in place of their technical and rigid enforcement would mean cheaper, speedier and more exact justice; not the elimination of law,

but a more complete compliance with the higher social mandate establishing the objectives for judicial administration. It is even permissible to go a step further. Between the various states of the American Union, as between England and her self-governing colonies, legislative activity has introduced, in very large number, points of difference as to judicial procedure which tend to keep these jurisdictions apart, retarding the growth of commercial intercourse and the spirit of mutual helpfulness. Yet the canons of rational administration are precisely identical not only as between the component parts of each set of national sovereignties but as between the two great branches of the English speaking race. Procedural law and judicial administration must continue to co-exist in the law of evidence used by any civilized nation. The only open question is as to the proportion in which they shall be employed.

In considering such a matter in any scientific way, it may well be borne in mind that by magnifying in enactment or emphasizing in practice the legal or procedural element of the judicial compound, force is given to points of difference and disharmony. On the other hand, any rational increase in the influence conferred upon sound judicial administration enhances, to no inconsiderable extent, an agency which makes for harmony among the most potent factors in the elevation of mankind. The Anglo-Saxon has no gift for the dormant, but now awakening, nations of the earth greater than the intelligent and purposeful administration of exact justice between man and man or between the citizen and the state. In perfecting such a gift, it would be the highest privilege, well worthy the labor of years, to be able to co-operate with our profession, in ever so slight a degree, though only as one who

“ Shall draw the thing as he sees it,  
For the God of things as they are.”

CHARLES F. CHAMBERLAYNE,  
Schenectady, New York.

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## INTRODUCTION.

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The appearance of another treatise on the Law of Evidence may seem, in view of the many excellent works on the subject already before the profession, to warrant a word or two by way of explanation. It is hoped that so far as justification may be required, it is to be found in the fact that the present treatise approaches the subject from what is practically, as related to other works on the same subject, a different viewpoint. In a word, it considers the adjective law of evidence rather more fully from the standpoint of administration than from that of procedure, as these terms are defined later on in this chapter (p. cxvi). The difference in treatment, however, will be found to be one of stress and emphasis, what should be regarded as of primary or secondary importance, rather than as indicating a clearly marked line of distinction between two great component factors in this branch of the law. It has been customary to treat the law of evidence as consisting, almost exclusively, of certain more or less fixed *rules* of procedure having the force of law. Certainly, there is ample warrant for holding that there are such rules and that they are also of great importance in connection with the subject. This does not admit of question. It may even be conceded that much statutory legislation, especially by way of codification, has produced an overwhelming influence in the element of substantive or procedural law.

Yet it is quite possible to go too far in this direction. Substantive law, statutory or judge-made, establishing and defining the right or liability involved in the action, is constantly and very properly mistress of the situation in which the servient or ancillary law of evidence acts confessedly as a handmaiden. To a certain extent, it is essential and desirable that the positive law should have a further influence. Rules of procedure necessarily contribute a substructure and an element of firmness and fixity which is of great value. All portions of the tribunal are distinctly conscious of regulations such as these. In accordance with the popular will in various jurisdictions it is required that such

rules be controlling on the action of its courts. It needs, however, only a cursory view of the actual work of a trial employing the English law of evidence to convince the observer that an element other than the procedural is constantly operative and frequently controlling. At all points, this influence is incessantly felt. The presence of tradition, idealism, prescribed objective, necessity for complying with certain rational requirements lies, entirely undisguised, on the very surface. With the presiding judge resides a power without the continued exercise of which the proceedings must soon stop. It is not *above* the law. Arbitrary discretion has no place in a modern judicial system. Equally with the most rigid rule of procedure, the power of the presiding judge to which reference is being made is directly conferred by the positive law. It is an executive right implied in the delegation to certain persons constituting a branch of the government of the judicial power of a sovereign state. As part of the law of the court's being, the social mandate is a purely legal one essential to the highest social usefulness of the people's judiciary in giving the community the benefits, so far as humanly possible, of speedy, complete and exact justice. Herein resides the element of flexibility, adaptability to equitable or ethical considerations, in judicial proceedings. It is clearly broader than any possible scope of the law of evidence. It is manifested in all forms of judicial action. For the presiding judge, it is, as it were, his function of functions, the supreme power permeated with and obedient to legal reasoning by which the entire official conduct of a presiding magistrate is properly regulated.

Necessarily, the procedural rules of evidence, these propositions of substantive law, come under review of this all-pervasive judicial power. It must of necessity continue to be so. When, for example, a particular piece of evidence is tendered, it is essential to its reception that the court should be able to perceive that some proposition in the right or liability involved in the action might be, in some degree of remoteness, proved or disproved by it. Should a fact be presented upon which the jury could not rationally act, the court's duty to enforce the rules of sound reasoning requires its rejection. As other situations of fact present themselves, the presiding judge must determine what procedural rule, if any, is properly applicable and, if more than one, in what proportion relative force and effect should

be accorded to each. Should these rules of procedure conflict, it is for the judge, under the rules of law and certain established canons of administration, to decide what course is indicated by the opposing rights of the parties. Such, in brief, is the nature of the judicial power which, operating under and through the rules of law, including those of evidence, confers, as has been said, an element of flexibility in the operation of these procedural rules. This function of the judge recognizes the social, as distinguished from the personal, interests in litigation. Its object is to make the administration of law efficient in the attainment of justice. To it, it has seemed appropriate to apply the term Administration.

Whatever may be deemed the proper relative importance of these two elements in the law of evidence, the rigidity of procedural law or the flexibility of legal or rational administration — as to which some observations have been made in the preface — it is believed that to treat the law of evidence entirely from the standpoint of procedural rules, omitting any adequate reference to the constantly moulding and, at times, dominating influence of judicial administration, is to present such an inadequate view of the subject as results in unfortunate consequences of no slight juridical importance. To venture upon simile by way of illustration, it seems scarcely too much to say, with all deference to opposing views, that to attempt formulating the modern English law of evidence without making due allowance for the element of judicial administration would be not unlike an effort to state the nature of a man instinct with life and the power of growth, vitalized by aspiration and purpose, in terms merely of his bones. As constituting the foundation and form-creating portion of the entire organism, it is not doubtful that such a rigid framework is of the highest value. Without its very rigidity and fixedness a soft and flaccid mass incapable of high achievement might well result. Even the growth of this rigid framework, at its various stages of development, embryonic or rudimentary, may well be deemed worthy of attention. As a study, it may become highly fascinating. There is, however, the obvious danger that in thus describing a man other important elements of his organism as a whole, the spirit by which he is actuated, the motives which govern his conduct, his latent or half-developed powers, the direction of his future growth and even the true nature of his present work may be obscured by directing exclusive attention to his

anatomy. An inference may even arise in the mind of an observer that, as such value is to be found in the skeleton, the more completely nerves, muscles and tendons can be replaced by bones, the better will be the work which the organism can accomplish. Thus, a partial ossification of the entire structure may supervene.

The order of treatment observed in the present work is, as seems natural, determined by the extent to which the operation of this judicial function of administration is present in the practical handling of various branches of the law of evidence. The first volume (§§ 1-929) defines administration itself (§§ 174 *et seq.*), states the canons under which it is rationally exercised (§§ 332-569), the general relations between matters of fact and rules of law (§§ 65-162) as these are understood in English jurisprudence and, also, the varied functions of judge and jury, not only in respect to the distinction between law and fact but to the proper position of each branch of the tribunal to the other as these are modified or controlled by the function of judicial administration itself (§§ 163-331). Certain definitions, a dangerous task, but one essential to any satisfactory precision in statement or understanding have been undertaken in the opening chapters (§§ 1-162). Its final chapters seem properly appropriated to a limited consideration of the vast subject of *Knowledge*, divided, for convenience, into *Judicial* (§§ 570-690), *Common* (§§ 691-869) and *Special* (§§ 870-929). These furnish at once both an excellent example of the practical working of judicial administration and an indispensable element of that sound *reasoning* which is both a test of administration and for the subject-matter of evidence properly to be affected by procedural rules.

The second volume, following out the same line of treatment, discusses the branches of the law of evidence in which the element of administration, always unavoidably present, is least operative. From the nature of the situation, it is clear that this is precisely the same thing as saying that in these connections the influence of substantive law, rules of procedure, legislative or judicial efforts to control the operation of the reasoning faculty, are most strongly influential. This is the citadel, as it were, of Substantive Law in the law of evidence. Here the formal procedure of Norman and sub-Norman times (§§ 269-271) and the period of storm and stress through which the institutions of English procedure passed under the Tudors, Stuarts and early Georges (§§ 304, 305, 458-462, 1543-1544c) have left their most

permanent marks. It will be necessary to return shortly to the same matter in a slightly different aspect. It may be sufficient, at this time, to notice the brief list of subjects where this element of substantive law was most clearly obvious at the time when the modern expedient of conferring legislative sanction upon codified procedural rules was inaugurated.

Like the subject of Knowledge with which the first volume closed, that of Burden of Proof, in its double aspect of Burden of Establishing (§§ 930-966) and Burden of Evidence (§§ 967-1025), with which the second volume opens, have no distinctive relation to the law of evidence but pertain rather to the field of reasoning in general. As Knowledge furnishes in its accumulation of past inferences or observations the basis of the reasoning faculty, Burden of Proof concerns itself largely with *Pleading*, the branch of adjective law which formulates the objective toward proof of which the processes of the reasoning faculty are to be directed in the use of evidence. Prominent among topics in the law of evidence in which the element of procedural law seems most efficient in resisting the inroads of rational administration is that of Presumptions of Law (§§ 1082-1158). These relate, correctly speaking, to various branches of the substantive law, civil or criminal, to which they are properly attached. Carefully to be distinguished from them are certain other so-called "presumptions" which have little in common except the indifferent use of a single name or term. They are, on the one hand, Inferences of Fact (§§ 1026-1081), a matter of logic and, on the other, Assumptions of Administration (§§ 1184-1231), with which logic has nothing whatever directly to do. Contrasted with both these, Inferences of Fact and Administrative Assumptions, is a third class, maxims of jurisprudence, rhetorical paraphrases of existing rules of law usually stated in another way. To them the term Pseudo-Presumptions (§§ 1159-1183) seems properly to have been applied. They are responsible for most of the confused learning relating to "Conflict of Presumptions" (§§ 1224-1231). Admissions seems also to be a topic in which the procedural as distinguished from the rational element in the law of evidence is unduly large. Whether taken in its Judicial (§§ 1232-1287) or in its Extra-Judicial (§§ 1288-1391) form, the distinction between the two consisting in the circumstance as to whether the statement was or was not made in the course of

the trial in which it is offered, the declarations of a party including those made for him by Agents (§§ 1337-1350) or Privies (§§ 1329-1336), seem manifestly affected in a large degree both as to admissibility and probative force by the influence of early procedure. This observation seems scarcely to apply to so-called Admissions by Conduct (§§ 1392-1438), which though usually treated in this connection, seem devoid of special procedural efficiency and merely to constitute a convenient term for logically probative circumstantial evidence of acts done by a party. A topic in which a once powerful procedural element seems rapidly shading into questions of logical impairment due to the operation of a desire to buy peace appears to be that of Offers of Compromise (§§ 1439-1471). Procedural influence, i. e., that of substantive law operating through rules of procedure, apparently culminates in intensity in connection with the subject of Confessions (§§ 1472-1618). Into the baffling intricacies of the operation of the Misleading Inducements of hope or fear (§§ 1483-1539), the privilege against involuntary Self-Incrimination (§§ 1540-1557), or the power of Duress (§§ 1558-1563) in making certain statements of an accused person "involuntary" as it is called, it has seemed necessary to follow the tangled threads of law and logic. By comparison, the procedural rules, largely yielding to the influence of rational administration, under which the Evidence of a witness given at a Former Trial (§§ 1619-1708) is received seem simple and practically illustrative of the normal operation of judicial administration where a primary grade of evidence must be supplied by facts of a secondary nature.

What this normal principle of judicial administration may be more fully appears as the influence of the administrative element in the law of evidence becomes more strongly marked. This occurs in the third and fourth volumes of the present treatise where attention is given to the operation of the four so-called exclusionary rules — Opinion, Hearsay, *Res Inter Alios*, and Character. Speaking of these exclusionary rules as a whole, it has been found necessary to insist upon a consideration, constantly overlooked, which is yet of the highest consequence in this connection. No fact can properly be said to be affected by the operation of these or any other *exclusionary* rules of evidence unless it first appear to have been either probatively or constitu-



ently, i. e., logically or legally, relevant to the truth of some proposition placed in issue by the pleadings. Precisely what is meant by these qualifications of the term relevancy will be made to appear in an appropriate place. It may be sufficient for present purposes to insist upon the obvious circumstance that an exclusionary rule of evidence can apply only to that which is already evidence. A fact that is not evidence excludes itself, as it were, requiring no specific rule for the purpose. Only that which is relevant is evidence and can, therefore, be excluded by some special rule. Irrelevant facts are not evidence. Yet courts are constantly in the habit of speaking of these exclusionary rules as mere grounds of irrelevancy, assignments, as it were, of the reasons why a particular statement in a given connection is entirely devoid of probative force. A most perplexing habit on the part of certain judges is what might be called stating the second reason first. An unsworn statement, for example, from a person clearly without adequate knowledge on the subject is offered in evidence. Counsel object to it as hearsay. It is rejected on that ground. Yet the want of adequate knowledge on the part of the declarant, depriving, as it does, the declaration of all probative force, will alone be sufficient for the purpose. The judge is conscious, however, that, even were the statement relevant, it would be rejected as hearsay. He, therefore, deems it convenient to exclude it on that ground. Again: a witness is asked to state his judgment as to the existence of an immaterial mental state. It is objected that this is "opinion." The court excludes it as such although entirely aware that the most unexceptionable species of testimony if offered to prove the same fact would equally be rejected. This is more than a mere infelicity encumbering the reports in digests with a mass of legally inert material. Its influence is formidable because it tends to obscure the real nature of the situation.

Assuming that the exclusionary rules apply only to relevant facts, the method in which they are treated by judicial administration is simple, rational and scientific. With the exception of certain applications of the hearsay rule, the exclusion effected by any exclusionary rule is merely *conditional*. In case the proponent can furnish more satisfactory evidence of the fact in question or, perhaps, he can prove his case in some other way, effect is given to the rule. Should it appear, on the other hand, that the pro-

ponent is powerless to prove his case without it, his right to use secondary evidence (§§ 339 *et seq.*) is regarded as paramount and the previously rejected evidence, under suitable conditions of relevancy, will be received. In other words, with the exception stated, the exclusionary rules operative upon relevant matter are deemed to shut out certain classes or species of inferior or secondary evidence until the necessity for resorting to them has been suitably established.

The "Opinion Evidence Rule" treated in the third volume well illustrates this familiar regulation of judicial administration. Witnesses are not to reason about the facts to which they testify. Reasoning, whether by inference from facts or observation of the demeanor of witnesses, the declarations of documents or the like, is part of the judicial function of the jury. Into this field witnesses are not to be permitted to intrude their inferences. They are simply to state the facts to the jury and the latter will draw such deductions as may be necessary (§§ 1791-1796). Still, the rule, broadly viewed by administration, amounts merely to this: The declaration of the witness as to the facts observed by him is the primary evidence of the phenomena to which his attention has been directed. As such, it must be placed before the jury, evidence of inference being excluded so long as this can be done. If, however, in the opinion of the presiding judge, the witness is unable to state the facts observed by him or some considerable portion of them, except by giving the inferences which his mind drew from observing them, the reasoning of the witness, under proper administrative restrictions, may be placed before the jury. Administration may even permit a proponent to go further in his use of inference as secondary evidence from observation. Should a professional or technical matter be involved in the observation of the witness in such a manner that the common knowledge of the jury would not enable them to form a rational judgment upon the facts presented, even though the witness were able to detail them in their completeness the judge may permit the observer himself, if found suitably qualified to do so, to state the inference or conclusion which he has drawn from the facts presented to his mind.

Nor is this all. Should the matter prove one of such intricacy or technical difficulty that the jury might fairly be regarded as inadequate, without assistance, to reason correctly with regard to

the facts observed, the judge may permit the jury to receive, even upon the precise point covered by their deliberations, the judgment of one skilled or expert on the subject, though he has made no particular observations upon the facts of an individual case but is basing his judgment in this respect upon a detail, stated in a hypothetical question, of facts observed by others. In connection with this treatment of the subject, it has been deemed expedient, by way of defining the terms used, to consider briefly the general subject of Judicial Reasoning (§§ 1709–1720). The practical Incorporation of Logic (§§ 1721–1741), science of the laws of thought, which the requirement of this reasoning implies, has also received attention. This has been deemed a reasonable preliminary to the consideration of the general subject of Reasoning by Witnesses which constitutes the balance of the volume. The latter topic has been thought to be conveniently divided into three main classes of mental operation or result, varying from each other in the progressive involution of the element of reasoning or inference when compared with that of intuition or observation. It being confidently assumed that the entire elimination of inference from the results of observation is practically impossible (§ 1801), the question still remains as to the proportion which reason plays in the blended whole, as compared with sense-perception. Though the division is confessedly arbitrary, it is perhaps not unreasonable, in such a classification, to apply to the instinctive, automatic, reflex action of the mind upon the presentation by the senses of a familiar object, the general title of the first of these specimens of reasoning, viz., Inference (§ 1802 *et seq.*). Such mental results may be drawn by either an ordinary (§§ 1836–1946) or by a skilled (§§ 1947–2041) observer, the latter being one acquainted with the art or science, trade or calling, related to the subject-matter. Although the gradations, except in marked cases, are difficult to trace, the involution of reasoning may be said to increase from the reflex, automatic inference to that which is more *reasoned* (§§ 1843 *et seq.*), and so continues, ever presenting a larger involution of the element of reasoning until it develops into what may be called Conclusion. These, as a class, are readily separable into Conclusions of Fact (§§ 2291–2324) or Conclusions of Law (§§ 2325–2370), according as a rule or standard of law is or is not involved in the reasoning. In such a connection, the basis of specific observation

relating to the phenomena directly submitted to sense-perception becomes greatly affected by the use of other data — observations on distinct occasions by the witness, communicated statements, general knowledge and the like. In case of a Conclusion, the element of direct observation may diminish almost to the vanishing point, the operation of inference becoming correspondingly exclusive. When the stage of Judgment (§§ 2371–2450) is reached, Observation has become entirely eliminated. Inference alone is operative. Here is the field of the Expert, exercising merely the function of reasoning upon facts observed by others and detailed to him by means of the Hypothetical Question (§§ 2451–2497). Only to a witness who testifies in connection with acts of judgment upon the basis of assumed fact has it been thought best to apply the term “expert.” A skilled observer may need for reaching his conclusions the same training and experience which the expert, properly so-called, would require for rendering a helpful judgment. The mental process of the former is, however, essentially distinct from that of the latter. It seems to fall into the same category with the mental process of the ordinary observer. In dealing with these three mental acts of Inference, Conclusion or Judgment the foregoing rule of rational administration is seen to apply. As the objectionable element of reasoning by the witness becomes greater, a corresponding necessity for receiving it as secondary evidence of the facts themselves must be established by their proponent. He is entitled to prove his case as best he can. To do so it is essential that he should be able to place the facts before the jury so far as possible in their entirety and in such a manner that the jury can rationally act upon them. If the proponent in any case can show to the court that the primary evidence of these facts cannot be thus submitted to the tribunal, he may offer them in the secondary form of the result to which they have led the mind of the witness. The necessity shown by the proponent must, however, in any case, be commensurate with the extent to which the normal function of the jury would be invaded by the reception of the evidence. It must, therefore, be greater in the reasoned than in the automatic inference, more pressing in case of the conclusion than in that of an inference of either variety, most inevitable of all, where a judgment is tendered. In connection with these rulings, the court resumes, as in many other matters relating to the examination of witnesses, its early

and more normal powers (§ 267) and an excellent instance is furnished of the delicate adjustment of conflicting rights in the interest of substantial justice which would be impossible to a fixed rule of law but is readily accomplished by the flexibility of rational judicial administration. Nothing could well be more sane or socially salutary.

The fourth volume considers the other exclusionary rules dealing with Unsworn Statements, *Res Inter Alios*, and Character. With one exception, or, at most, two, it will be found that the same underlying principle of a rational administration, that relevant secondary evidence will not be excluded where a proponent can prove his case in no other way, continues to apply. In other words, one would in main be justified in saying that these exclusionary rules have merely the mission of establishing the primary grade of evidence (§§ 466 *et seq.*). Only in connection with the matter of Unsworn Statements used as Hearsay does not substantive or procedural law effect a serious breach in the truth of the statement. The rule against Hearsay (§§ 2698-2761) arbitrarily rejecting relevant testimony without which a proponent is impotent to prove his case is the distinctive anomaly of the English law of evidence. It is interesting, however, to notice that the anomalous result was not directly intended (§ 486). Like the unanimity of the jury, the surprising result is apparently an unexpected by-product involved in trying to do something much more rational. Even here, however, the breach is by no means so serious as might at first sight appear; for certain distinctions should at once be drawn. In the first place, the scope of the anomaly is seen to be greatly lessened when it is observed that the Hearsay Rule applies only to the unsworn statement when used in what may properly be called its *assertive* capacity, i. e., when offered as evidence proving the truth of the facts asserted in it. Should the statement be Independently Relevant (§§ 2474-2697), that is, relevant *per se* by reason of its mere existence independent of the truth of what it states, the declaration, or as it is sometimes called the "verbal act," is simply a fact like any other and entirely beyond the application of the Hearsay Rule. A second mitigation of the practical results of the unscientific doctrine is happily to be found in the so-called exceptions to "hearsay." These are numerous and important. In connection with them — Declarations against Interest (§§ 2762-2789), Declarations as to Matters of

Public and General Interest (§§ 2790-2810), Dying Declarations (§§ 2811-2869), Declarations in Course of Business (§§ 2870-2909), Declarations concerning Pedigree (§§ 2910-2981),— the principle of judicial administration just mentioned continues, in substance, to apply. The Hearsay Rule is regarded as establishing the statement of the original declarant under oath as primary evidence. Where, however, a suitable forensic necessity for relying upon secondary evidence is shown by the proponent, the report of the declarant's unsworn statement will, under suitable conditions of relevancy, be received as evidence of the facts asserted. Formal tests, characteristic of the technical procedure of the period, may, indeed, be used for determining what shall be regarded in certain cases as proof of relevancy. Adequate knowledge on the part of a declarant may, for example, be shown exclusively by membership in a family or residence in a given community. Absence of controlling motive to misrepresent may, in the same way, conclusively be established by the fact that the declaration was made *ante litem motam*, while the contrary circumstance may exclude it beyond all hope. In general, however, the rule of administration in question receives large classes of declarations to which the Hearsay Rule might otherwise be fatal. These exceptions to hearsay are comparatively ancient, practically contemporaneous with the rule which is itself of no very early origin.

Two very important modern rules have operated still further to reduce the range over which that excluding hearsay holds unquestioned supremacy. Scarcely was it to have been anticipated that a system of evidence so largely characterized by reason and a desire for better scientific symmetry, should tamely permit so great an anomaly as that relating to hearsay without some effort at extruding it. A noteworthy peculiarity is presented at this point. This modern impairment of the scope of the hearsay rule has not proceeded by way of the establishment of additional exceptions treating unsworn statements as secondary evidence. It has, on the contrary, advanced by direct attack upon the rule itself in its exclusion of relevant testimony. In at least two important particulars, the doctrine is distinctly announced that where relevancy of a certain kind is shown, an unsworn statement is primary evidence of the facts asserted, notwithstanding the rule against hearsay. The required relevancy is furnished where the

declaration in question may be said to have been *automatic*, i. e., reflex, instinctive, not the result of conscious thought or deliberation. Customarily, this automatism is the result of one of two causes, (1) overwhelming emotion, (2) force of habit. The witness may, in the first place, have had his meditative and reflective faculties temporarily suspended, numbed, as it were, by the force of a shock. Some startling event, a railroad casualty, for example, the seizure of sudden terror, or the like, may reduce a human being to a condition of practical *automatism*. What he says until the reasoning faculty, for the time dethroned, has resumed its normal control, may be taken as true. Indeed, in such an event, it is rather the force of facts which is speaking, through the mouth of the declarant. This may be called the relevancy of Spontaneity, best illustrated in the law of evidence by modern rules relating to the use of Declarations part of the *Res Gestae* (§§ 2982-3050). In the second place, the relevancy of the automatic utterance, most frequently, perhaps, in writing, may be due to the machine-like precision arising from the continued repetition of a limited number of acts. Where a witness, for example, is shown to have been in the habit of repeating, in discharge of some private or public duty, a given action with no bearing known to him, upon his own interest, it may well be taken to have been made with competent knowledge and without motive to misrepresent. To the probative force of a declaration made in this semi-mechanical way the phrase Relevancy of Regularity may, with apparent propriety, be applied. Prominent illustrations of the probative force of facts possessing this relevancy may be seen in the case of routine acts done in the discharge of official duty, or in connection with the use of Shop-Books and Books of Account (§§ 3051-3149). When unsworn statements are shown to have been made under the reflex action of either spontaneity or regularity they are accorded admissibility by the modern law of evidence. It is worth observing, however, that this use of the statement in its assertive capacity is not, as in case of "exceptions to hearsay," admitted as secondary evidence. The proof is primary. The proponent need show no forensic necessity for introducing it. The declarant may be available as a witness or even present in court. The doctrine, therefore, announces the fundamental rule, entirely inconsistent with that excluding hearsay, that an unsworn statement, if relevant for the purpose, may be used as evidence of the facts asserted. In other words, no essential difference

exists, in the nature of things, between statements and other acts, or between the inference of truth and any other deduction which may logically be drawn from the existence of such a statement. The scientific importance to the modern law of evidence is obvious.

Judicial administration in dealing with the remaining exclusionary rules, *Res Inter Alios* and Character, follows, in main, the same principle or canon as was applied to Opinion and to the Exceptions to Hearsay. With a possible exception in case of Character, no relevant testimony is excluded which is necessary to proof of the proponent's case. Some distinctions, however, seem worthy of attention. As was said above, only facts which are probatively relevant, in some degree of remoteness, to the truth of a proposition in issue can properly be said either to be rejected under these rules or accepted as secondary evidence under the canon of administration. Yet much which is said to be rejected by virtue of these rules seems clearly to be of no probative relevancy. This is particularly true in case of Character, or, as it might perhaps more properly be called, Reputation. Few, indeed, are the instances in which it can fairly be said that the circumstance that a man possessed of or by a particular trait of character, *proves*, or even tends to prove, that he did an appropriate act. The most which can rationally be asserted in such cases is, that he is rather more likely to have done so on this account. In other words, the relevancy of character, such as it is, is rather *deliberative* (§ 1714) than directly *probative* (§ 1712). Possibly, the character of the accused in criminal cases may, under exceptional circumstances, be fairly thought to be logically probative. Should such a case arise and the defendant decline, as he may properly do (§ 3277), to open the issue, the rule excluding Character may truly be regarded as rejecting relevant testimony offered in proof of the proponent's case, for no forensic necessity of the prosecution, however great it may be, will suffice to admit evidence on the subject. Apart from this rather remote contingency, the Hearsay Rule stands alone, as stated above, in the anomaly of rejecting probative evidence essential to the proponent's case.

It may be noticed, further, that much which is said to be excluded by virtue of the rule of *Res Inter Alios* is, in reality, not affected by it, because intrinsically irrelevant. That an act was done, or an event occurred, because the person did a similar act



at another time or an analogous event happened on a previous occasion requires for any logical force, something more than a general similarity between the two acts or occurrences. That the happening of one event or the doing of a particular act on a given occasion should tend, in any just sense, to *prove* the occurrence of a distinct event or the doing of a certain act at a different time some clearly marked relation of causation must be shown to have been exhibited on the two occasions. A law of causation, an invariable or fairly uniform succession of antecedent and consequent, a normal uniformity of nature or of mind, must be exhibited. Varying degrees of probative force may well attend the proof of the happening of a given event or the doing of a particular act by showing that, even under precisely similar circumstances, the like event happened or the same act was done on another occasion. Where the uniformity is that of nature (§§ 3150-3206), this logical relevancy of similar occurrences may be of very considerable probative force. Where the uniformity relied upon is moral in its nature (§§ 3207-3264), the force of the inference of present from past conduct may diminish to the point of disappearance. Nice questions of degree like these are quite within the function of judicial administration, however difficult it would be to control the matter by a rigid rule of procedure. The canon of administration in the matter appears to be this. Should the evidence furnished by the similar transaction be shown, under all the circumstances, to be such that the jury could rationally act in accordance with it and it further appears that the proponent can prove his case in no other way, it will be received. The ground for excluding such evidence in the absence of a forensic necessity for receiving it is not, as in case of evidence of inference, that it tends to violate the right of a party to have the reasoning on the facts of his case done by the jury (§§ 411 *et seq.*), nor, as in case of unsworn statements, that the jury may give undue weight to them (§§ 2711 *et seq.*); but rather that the jury may be misled (§ 386) and the trial unduly protracted (§§ 544 *et seq.*) by raising collateral issues (§§ 3154). If it appears that this danger must be met if the proponent is to have a reasonable opportunity of proving his case, judicial administration, under the canon above frequently referred to, does not hesitate to incur the hazard. The right of a party to prove his case is paramount from the standpoint of administration (§§ 334 *et seq.*).

The progressive influence of the element of Administration during the unfoldment of the topics of the third and fourth volumes thus becomes apparent. In regulating the use of the *media* of evidence, Perception, Documents, and Witnesses, the power and practical efficiency of this element in the law of evidence becomes still more marked.

The power and flexibility of judicial administration is manifestly due to the circumstance that it embodies the use of reason (§ 176) as applied to the facts of individual cases. The rules of procedure, on the contrary, with which, as is illustrated above, administration is constantly called upon to deal, in connection with the use of evidence, represent the operation of positive laws applicable to all cases. The modern law of evidence basing itself, in part, upon Stephen's theory and definition of relevancy (§§ 1716 *et seq.*), imposes the use of reason upon all branches of the tribunal, whether it be the jury in its search for truth or for the court in discharge of its mandate for the doing of justice. Such seems to be in the line of legal evolution. Reason has, at all times, since judicial procedure was employed in England for the discovery of truth with regard to disputed questions of fact, been, in some way or other, used in connection with the process. It will readily be observed, however, that the actual relation of reason to procedure has so greatly varied at different times as practically to present three several stages of progress. In the first of these, that of formal procedure (§§ 269 *et seq.*), the reason of man could merely suffice to recognize that the discovery of truth, when complicated by contradiction or mystery, must of necessity be left to God alone. Reason thus at first yielded to faith. The revealing of so high a thing as truth might, it was thought, safely be committed to the *arbitrium Dei* invoked in various forms of ordeal. Timidly the judicial mind of later centuries, culminating in the early half of the nineteenth, ventured to give a somewhat wider scope to the operation of reason in connection with matters of evidence. In this second epoch, which may be termed that of technical procedure, reason is not as yet trusted as being in itself a guide to truth. In a hesitating and halting way, it was employed to detect other tests as to what may be assumed to lead the mind of the tribunal in the right direction. Trust in a rule, a fixed mode of doing things, the prop of precedent was, and, to a certain extent, still is, comforting to the judi-

cial mind. Certain classes of fact, regarded as objectionable in the average case, because for some reason likely to mislead, were absolutely excluded regardless of their effect in any particular instance. Reason thus simply ventured to supply general tests for exclusion. Both of these lines of thought, the formal and the technical, are conspicuous in the English law of evidence to-day. The oath-ordeal, surviving in the swearing of witnesses, is an example of the former. Exclusion of confessions induced by threats or promises or the so-called "rule against hearsay" may fairly represent the latter. In this process of growth toward higher social efficiency, reason is increasingly employed; not as a guide to tests for truth, but as itself constituting the sufficient standard of admissibility. However much the guidance of this principle of reason, as the touch-stone for truth, may be confused or complicated by the influence of antecedent epochs in legal growth, it is destined ultimately to become supreme.

Can it be said with any approximation to truth that the importance in the law of evidence of this associate of the substantive law is being accorded by state legislatures or even by judges and the profession generally the influence which its social effectiveness would seem to warrant? The question is not one for dogmatism. Yet suggestions bearing on the matter are to be found, scattered here and there, through the present treatise. In the main, the question as to whether the element of substantive rigidity or administrative flexibility should be given increased power in the law of evidence is much the same as asking whether the community can best look for the blessings of a sound administration of justice to its legislature or to its judges. It would seem, as has been incidentally pointed out, that experience has something to teach as to the fitness of legislative bodies to prescribe details of judicial administration. Laws in plenty have been passed as a panacea for all evils in the body politic, including the ineffectiveness of the courts. A sacramental potency has been supposed to attach to the will of the people expressed through its duly appointed representatives. Yet it has come to be perceived that laws can scarcely enforce themselves and that a multiplicity of statutes may, in the absence of some definite responsibility for practical results imposed upon some one adequately equipped with power, be entirely consistent with an actual break-down in the work of the judiciary. For the past 300 years the growth of democracy has meant an increase in legislative power, and

its tendency to absorb to itself the regulation of other departments of government has become highly developed. Yet a legislature, after all its usefulness is admitted, is but a clumsy machine for doing continuous justice or even providing, beyond general regulations, in what way it should best be done. To prescribe rights or liabilities or, in other ways, to establish objectives toward which the exercise of the reasoning faculty is to be directed (§§ 1718 i, 1719 *et seq.*), is fairly within the appropriate work of the legislature. But to fetter reason itself is quite a different matter. To regulate the precise means by which the judicial branch of government is to discharge its appropriate social mandate would seem as pernicious as for the legislature to undertake to predetermine in what manner the supreme executive of the sovereignty should discharge his duties as commander of the military power of the state. To confer with one hand a supreme essential mandate upon a particular branch of government and with the other render its discharge impossible by a series of petty restrictions seems but little calculated to advance the public interest. Clearly the best results are to be obtained only by the loyal social service of men whose powers within their appropriate legal sphere are adequate to the purpose.

Upon what theory, then, of the public good does America distrust and persistently cripple the work of its judges? It is impossible that the inquiry should not present itself to the mind: Why does English democracy in America so persistently turn in its search for sound administration to the legislature which has so constantly failed it and away from the judiciary which for generations has had no adequate opportunity to serve it effectively? If an answer could be had it would probably be to the effect that judges had been agents of tyranny in the past and could not be trusted with power. In other words, magistrates elected by practically universal suffrage for short terms and small salaries or appointed by an executive magistrate elected by and directly responsible to the entire people of the state or nation are not to be clothed with social effectiveness in an enlightened age and under purely democratic institutions to punish crime or award justice because Coke, Jeffreys, or Scroggs, under different social conditions, were too faithful to an autocratic king in the punishment of political offenders. The cause is plain. The successful political party has petrified its prejudices into constitutional law and enacted its fears into statutes. Exceptional causes,

as has been observed (§§ 304, 304), have made this result particularly noticeable in the United States. Here the love for having rules of law as a safeguard against arbitrary tyranny greatly accentuates the early influence of formal rule and regulations, arrangement into definite classes, semi-mechanical precision of thought, rigidity and fixedness of general life and philosophy in past times. The ghost of political or religious oppression has continued to haunt the uneasy dreams of statesman and citizen alike long after all vitality and power have departed from it. Is it quite clear that this mental Reign of Terror is fully past? The evils to the sound administration of justice which are crippling the power of the judge at every turn by constitutional restrictions or statutory enactments "in favor of liberty" are sufficiently obvious (§ 1718 m). It is much more difficult to recognize the actual dangers against which society is being protected. We have solemnly secured to one accused of crime the right of confrontation (§§ 458 *et seq.*), although the day of the Star Chamber or the Court of High Commission has long been over and the principal effect is to trap the judge into supposing that the defendant has waived a privilege of which the appellate court may say he had no constitutional right to deprive himself. We confer a privilege not to answer incriminating questions and direct the jury to draw no inference from the failure of an accused to testify. This is for no better apparent reason than that at a particular stage of English history (§§ 1543 *et seq.*) those who were in revolt against the government found it convenient to claim the benefit of a Latin motto of doubtful authenticity. This is done entirely oblivious of the fact that the political sympathizers of these persons are now the government needing protection against criminals of a different character and that as soon as a prisoner is given the right to testify no rational tribunal can fail to draw inferences from his neglecting to do so. The judge is forbidden to comment upon the facts of the case (§§ 281 *et seq.*), seemingly because at this particular period of storm and stress in the development of democracy the only hope of the accused lay in exalting the power of the jury at the expense of that of the court. Is it of no consequence that such a course is to subordinate intellect to emotionalism (§ 301) and place the social interests in litigation below those which are purely personal (§ 303) or that the judge, obliged to sit silent while he sees the jury misled by sophis-

ticated arguments, should be compelled to declare, by ordering a new trial (§§ 306 *et seq.*), that the whole expenditure of time, money and effort, has resulted only in a miscarriage of justice? To committing magistrates is denied, except under special circumstances, the right to interrogate a person accused of crime and any confession so induced is to be rejected as involuntary because, forsooth, merciful judges acting under a bloody penal code, happily now repealed, deemed it wiser to make sure that the prisoner's confession should have been absolutely voluntary (§ 1568). This is done in apparent disregard of the impressive circumstance that by holding confessions made to "persons in authority" (§§ 1521 *et seq.*) to be involuntary the administration of law deprives itself of a valuable opportunity for detecting and punishing crime and, while it forbids impartial judicial action invaluable to an innocent man, turns him instead, entirely defenceless, over to the newspaper reporter, amateur detective or the eavesdropper (§§ 1538 *et seq.*).

In short, it may be fairly said that much of the intervention of substantive or procedural law into the field of evidence (§§ 1719 *et seq.*) is not only irrational but positively harmful to the body-politic under whatsoever soothing expression regarding the so-called rights of man it may chance to be expressed or defended. It may be regarded as a truism that modern conditions have long since made it difficult to convict an innocent man of a serious offence. The problem is rather as to how far it is possible, under such restrictions upon rational administration, to punish a guilty one. The work of legislation in this respect is, as it were, to erect massive battlements and lofty watch-towers against perfectly imaginary foes, training heavy cannon to bear against enemies who can never come, while at the same time there is rioting and disorder within the walls and general discontent among those for whose supposed defense the costly armament has been provided.

Should the proportion of the influence of substantive law or procedure to that of administration or reason seem unduly high the judiciary itself cannot justly be said to be without blame in the matter. To many judges the legislative or constitutional restrictions upon normal judicial administration seem part of the established order. The fruits of this legislative activity are, in the apparent opinion of many magistrates, not only to be cherished but supplemented by reinforcement on their own part. Indeed, it is to be doubted whether the rigidity of the adjective law of

evidence, its inability to respond quickly and fully to social needs, is not quite as much due to the effect of according to administrative rulings the force of precedent as to any legislative desire to avoid obsolete dangers. The doctrine of *stare decisis* (§§ 267, 1618 n. 2) is one very largely, so far as the adjective law is concerned, within the administrative control of the court. It is very evident that many salutary rules of executive caution, maxims of prudence as to reception of evidence, need of corroboration, as to when the trust imposed by confidential relation should be violated in the interests of justice, have become part of the volume of substantive law and its lack of flexibility correspondingly increased by the automatic ossification due to the entirely unwarranted force accorded to precedent. On the other hand, in the absence of statutory regulation, much of this difficulty would be immediately removed by the simple expedient of regarding such rulings as mere matters of practice. It is probable that in making this change appellate courts would not only promote judicial efficiency and lighten their own labors but forestall an attitude which will otherwise soon be forced upon them by the vast bulk of minutely conflicting decisions with which digests, encyclopedias and textbooks are at present bursting.

In the hands of the legal profession, however, lies the only permanent remedy for any evils which may have come from the legislative curbing of the functions of the court. Lawyers are its officers, interested in its highest efficiency, dedicated to social service in a most important branch of human activity. The presence in the law of evidence of a large number of technical rules, however devoid of rational basis, may well appear to the profession to be a powerful mental stimulus, gratifying to the lust of combat or a source of financial profit. Not thus, however, will the highly ethical profession of law regard its own discharge of the most God-like function committed to man. It realizes that social service, not personal profit, is the aim of its existence. In the fullness of time, therefore, it may safely be relied upon to provide for the community at large the blessings of a faithful judiciary equipped with executive powers adequate to the full discharge of the duties of its high social commission (§ 95). Popular confidence due to the general recognition that lawyers appreciate their true relation to the attainment of justice would make their leadership in promoting judicial reform as satisfactory as it is essential.

Scientific administration manifestly demands a reliable nomenclature in which to express itself. It has seemed essential, therefore, that an attempt be made to define certain of the more familiar terms with which the law of evidence is called upon to deal. The situation is undoubtedly a sorry one. Many of its terms are distinctly ambiguous by reason of various well-established meanings. Selection among several connotations must, at times, be arbitrary, for the Gordian knot can only be cut. The theory that legal terms are best defined by their use is but a pleasing fallacy as the present state of this branch of the law abundantly demonstrates. The most obvious suggestion in entering upon the task of definition would be that of coining a novel nomenclature to which a definite scientific meaning could be once for all attached. So inviting a short-cut to precision must reluctantly be disregarded. As Pollock and Maitland (2 Hist. Eng. Law, p. 30) say: "The licence that the man of science can allow himself of coining new words, is one which by the nature of the case is denied to lawyers." The most which it has seemed proper to attempt is the selection of a single meaning among several, primary being preferred. It will then become necessary to call attention to any use of the word carrying a different meaning. A few prominent examples of the manner in which this has been done may be given in this connection.

The relation of Administration to Procedure, involving as it does a definition of both terms, has been established in this somewhat arbitrary manner. Procedure itself seems to have been properly defined (§ 166) as the law of actions. In adopting this definition, the very common distinction that the substantive law relates to rights or liabilities while procedure applies to the use of the *remedy* by which these rights or liabilities are utilized or enforced, has been disregarded. For this there have been several reasons. In the first place, the line between rights, liabilities and remedies is one extremely difficult to draw. In fact, what may be called a verbal metabolism (§ 170) may be employed between rights and liabilities on the one hand and remedies on the other. That is to say, rights may usually be expressed in terms of remedy or *vice versa*. Legal reasoning, apparently circular, though in reality more nearly spiral, is constantly arguing from the existence of a right to that of a remedy and back again from remedy to right. (See Pollock & M., 2 Hist. Eng. Law, p. 31). In the second place, so far at



least as the law of evidence is concerned, the important distinction is not between right or liability and remedy; rather is it between the existence of a rule having the force of law and its absence. Thus, so far as the rights of a proponent are concerned, if the evidence which he offers is rejected under a rule of law, it is a matter of indifference whether this rule is said to be one of substantive law as part of the right or liability to proof of which evidence is alone legally to be directed, or is one of procedure prescribing absolutely that such evidence as his shall in no case be received. In either event, the judge has no option, discretion, opportunity for administrative action. Only when his ruling is not predetermined and controlled by a precept of law can a function of administration be exercised. It has seemed appropriate, therefore, to apply the term Administration (§§ 174 *et seq.*), to that part of procedure in general which is not directly controlled by a rule of law. Indirectly, the most unfettered exercise of administration can exist only by virtue of some provision of law. Procedure and Administration are to be taken therefore as standing to each other in relation of genus and species or as different species under the generic term Procedure. Under the definition, a rule of court which left no option to the presiding judge would be a matter of procedure. Custom or practice would be, on the contrary, a matter of administration.

As has been incidentally suggested above, the use of the term Burden of Proof (§§ 930-966) has been confined to its original and primary meaning of the burden of establishing the affirmative of the issue formulated by the pleadings. Unshifting *onus* has been segregated from the necessity which from time to time according to the vicissitudes of a trial rests upon one or the other of the parties of introducing more evidence if he is to succeed in the litigation. To the latter forensic requirement the phrase Burden of Evidence (§§ 967-1025) has been assigned. In other words, the relation between Burden of Proof and Burden of Evidence is much the same as that between Procedure and Administration. Burden of Proof, as commonly employed, is a generic term covering also Burden of Evidence. Specifically considered, however, Burden of Proof is used in contrast with Burden of Evidence, both being classed under the general term Burden of Proof. The terms Judicial Knowledge, Judicial Notice and the like apparently cover two classes of knowledge which have noth-

ing in common except the designation. (1) It denotes a knowledge of the rules of domestic law which the judge has because, as a branch of the government established by the sovereignty of the forum, he is required to enforce it. The possession of such knowledge is not so much a fact as a function. The judge does not, for obvious reasons, share it with the jury. He instructs and informs them with regard to it. The judge, and he alone of all in the court room, has this knowledge. It is his, as judge, simply because he is judge and for no other reason. This is Judicial Knowledge, properly so-called (§§ 570-636). The presiding magistrate, as part of the knowledge of the law which it is his duty to apply and enforce, knows also the direct and primary results which these laws have established (§§ 637-690) — e. g., as to the office of Chief Executive Magistrate, his duties and the like. (2) The phrase Judicial Knowledge is so used as to cover facts which the judge, the jury and every other intelligent member of the community knows. These, when not part of the *res gestæ*, a judge will not require to be proved. Indeed, he will not waste time in hearing evidence to establish facts of this kind. It has seemed unwise to classify facts so dissimilar in their nature under a single designation. The term "Judicial Knowledge" has, therefore, been reserved for facts of the first class;— those which the judge knows *ex-officio*, by virtue of the mere fact of his position. Knowledge of the second variety is spoken of as Common (§§ 691-869). Common knowledge has been further subdivided into that which, as has been said, is general among judges, jurors and the average well informed members of the community (§§ 691-869) and the class or species of knowledge regarding technical matters which may be fairly deemed to be common among members of any particular profession, trade or calling. Facts of this nature have been designated as Special Knowledge (§§ 870-929). Unlike the knowledge common to the community at large, which is not required to be proved, Special Knowledge is the subject of testimony. More frequently than not, a witness qualified to inform the judge and jury upon such matters is spoken of as an "expert." As the use of this term has been reserved in the present treatise exclusively for a witness testifying to his Judgment in response to hypothetical questions (§§ 875 *et seq.*, 1805, 2374, 2462), it has seemed desirable to segregate, to a certain extent, the work of the skilled witness in stating the facts of his special calling

rather than drawing inferences from phenomena observed by him (§§ 1947–2041). The convenience of the reader has, it is hoped, been assisted in this connection by the rather elementary expedient of arranging the very numerous cases relevant to the subject into the branches of human activity, alphabetically stated, such as Business Affairs (§ 880), Carpentering and other Building (§ 883), Chemistry (§ 884) and the like, in which illustrations of the rule most frequently occur. The same arrangement has been adopted in connection with Business Affairs as part of Common Knowledge (§§ 809–847), the Inferences of Skilled Observers (§§ 1958–2041) or the Judgments of Experts (§§ 2382–2450).

The meanings of the term *Presumption* (§§ 1026–1231) are so numerous and so widely diverse as to invite and almost necessitate a somewhat more radical treatment. Laying aside mere rhetorical paraphrases of rules of procedure or substantive law — as that every one is presumed to be innocent of crime (§§ 1172–1176d) or to know the law (§ 1169 *et seq.*) — to which the general term of *Pseudo*-Presumptions (§§ 1159–1183) has been applied, there still remains the so-called Inferences of Fact (§§ 1026–1081) and the Presumptions or Assumptions of Law (§§ 1082–1158a). The first of these has been spoken of as an inference of fact — a creation of logic based upon human experience. No special treatment is apparently required for presumptions of this class. All probative facts give rise to inferences or presumptions of this type. The presumption of law, on the contrary, seems, in and of itself, to be entirely devoid of probative force. It is, in fact, merely an assumption of procedure with which logic has nothing to do. This assumption may relate to the probative force of an inference of fact; or it may not. In the first case, the assumption is spoken of as one of Procedure (§§ 1082–1158), in the second, as one of Administration (§§ 1184–1231). Assumptions of procedure — the typical presumption of law — are to the effect that a given inference of fact possesses a *prima facie* quality. This assumption, though stated in terms of evidence, is, in reality, part of the substantive law of the subject to which it appertains. Thus, the rule that the inference that a child born in wedlock was the legitimate offspring of the married pair (§§ 1089a–1089f) shall be deemed *prima facie* correct, is most properly regarded as part of the positive law of persons. In like manner, in a criminal case,

the proposition that one found in possession of recently stolen goods for which he cannot account in a satisfactory manner, is *prima facie* the thief, is one in the law of larceny (§§ 1121–1136b). On the contrary, the Assumption of Administration (§§ 1184–1231) does not apply to the logical strength of an inference of fact and has no direct relation to any particular branch of the substantive law. It is a purely forensic or administrative expedient for expediting trials (§§ 544 *et seq.*), by developing the *crux* or hinge of the case. It assumes that the regular, the normal, the legal, the proper, takes place; at least, it does so to the extent of calling upon one who disputes the proposition in any individual case to show grounds for his claim. The presumption against fraud (§ 1221), in favor of regularity (§§ 1193–1210) or good faith (§ 1219) are of this non-probative, administrative nature. Assumptions of procedure and those of administration — both usually denominated presumptions of law — possess, indeed, the common feature that they operate to sustain the burden of evidence for the party in whose favor they exist. The *purpose* which they seek to attain is, however, somewhat different. The assumption of procedure — the true presumption of law — aims at an increase of certainty or comprehensiveness in the substantive law (§ 556) of the subject of which the so-called “presumption of law” is a part. The assumption of administration, on the other hand, is content with a purely administrative achievement — placing the burden of evidence upon the party whose activity will best conduce to reaching a correct issue without unnecessary waste of time.

A somewhat similar necessity for classification arises in case of the term *relevancy*. The word is one of *relation* (§ 1715). It cannot, therefore, well be used unconditioned by some qualifying expression. Of these there are several. The difference between direct (§ 57), or indirect (§ 58) relevancy, varying as the relevancy is that of evidence in the direct line of proof or more nearly relates to those collateral or remote facts which tend rather to test than to establish; the contrast between objective (§ 55) and subjective relevancy (§ 56) as the relation between the *factum probans* and the *factum probandum* (§ 51) is that found in objective nature or one which accrues by reason of the knowledge and *animus* of the witness or other declarant; the distinction between logical

(§ 59) and deliberative (§§ 60, 1714) relevancy, according as the act of reasoning in aid of which the fact is offered be that of *proving* or of *weighing*, these apparently speak for themselves. A somewhat more complicated situation is presented, however, where the distinction is between probative or logical (§§ 59, 1712) relevancy on the one hand and, on the other, that which is legal or constituent (§§ 47 n. 1, 61, 1713). When the statement of a witness, the declaration of a document or any other probative fact is said to be relevant to one in the *res gestæ* or to any other intermediate fact by which that in the *res gestæ* is established, the reference is to experience, logical or probative relevancy, as defined by Stephen in his Digest of the Law of Evidence (§§ 1717 *et seq.*). When, however, a *res gestæ* fact or set of them is said to be relevant to some proposition in issue by which a right or liability is, in whole or in part stated, the relevancy is *legal*, the question raised is one of law, appropriately tested by a demurrer to evidence or a motion to order a verdict. The relevancy is no longer that of experience or logic; it is the use of the term in its Scotch sense, ability to stand the test imposed by the application of a rule of law in measuring a particular set of facts or propositions or expressions of fact. To this latter form of relevancy the designation *constituent* has been applied;—the former being known as probative. Upon the successful elimination of legal or constituent relevancy from the field of evidence (§§ 1718d *et seq.*), as seems readily possible, any clear demarkation of the scope of this branch of the law seems entirely dependent.

Finally, it may be said that few terms commonly employed in connection with the law of evidence are more notoriously ambiguous than the phrase "*res gestæ*." Only by the connection, and by no means always then, can it be known in which of its several distinct meanings the term is being used by a speaker or writer. Its primary meaning is apparently that of the particular portion of the world happenings on which the right or liability involved in the inquiry is said to depend — out of which it arises, if at all (§ 47). The expression denotes the class of facts which in case of a direct contempt in open court the judge would perceive for himself. The arbitrary nature of such an exclusive use is beyond question. Its general acceptance by the profession, however, would appear likely to have juridical results

of no small value. Prominent among these are four. (1) It would tend to distinguish the actual occurrences themselves out of which a right or liability arises from the testimony of witnesses and the other probative facts by which it is sought to reproduce or establish these facts to the tribunal, whose only need for evidence lies in the circumstance that it has not observed their occurrence for itself. (2) It clearly defines the extent of the law of evidence by limiting its direct scope to proof of the *res gestæ* facts as above defined. (3) It clearly differentiates the proper province of the jury from that of the judge by confining the former to finding the *res gestæ* facts or, perhaps more properly, to ascertaining those hereafter denominated *constituent* (§§ 47, 47 n. 1, 61, 1713). (4) It would effectively secure attention to a fact which is of much more than technical importance; — that the term “relevancy” is itself one of ambiguous or equivocal meaning.

More customary and accepted definitions of the various terms employed in the law of evidence appear in the following chapter.

# THE MODERN LAW OF EVIDENCE.

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## CHAPTER I.

### LAW OF EVIDENCE.

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§ 1. **Definition in General.**—The late Prof. James Bradley Thayer, of the Harvard University Law School,—*clarum et venerabile nomen*—in essaying to define the term "fact" as formerly and at present used in the law of evidence<sup>1</sup> and quoting from the Year Books, speaks of his attempt as a "perylous chose." The eminent authority need not have limited his characterization to any particular definition in the law. All definition is perilous. His distinguished associate in formulating the modern law of evidence, Mr. Justice James Fitzjames Stephen,<sup>2</sup> states the broader view on which the quotation from the Year Book rests: "*Omnis definitio in lege periculosa est.*" In venturing to disregard this danger in the definitions of the "Digest," Mr. Justice Stephen encountered the severe animadversions of a very acute, if occasionally misguided, professional critic in the Solicitors' Journal.<sup>3</sup> "A definition," said this critic, "is the most difficult of all things. There is far greater probability of a correct use of terms than of a correct definition of them. The best definition, therefore, is that by use. A correct use renders definition unnecessary, because the law will speak plainly without it. And where it is unnecessary to define it is also dangerous, because an incorrect definition will confound the correct use, and introduce the very difficulty it was designed to avoid, while a definition which is arbitrary (and for that reason only cannot be called incorrect) will be probably forgotten and departed from in the use."<sup>4</sup>

Of these suggestions, Professor Thayer remarks:<sup>5</sup> "That is a true utterance of the inherited instinct of English-speaking law

1. Thayer, Prelim. Treat., 189.

2. Stephen, Dig. Law of Ev. (1st ed.) Introd., xvi.

3. Solicit. Jour., Vol. 20, p. 869.

4. Again the same gentleman writes: "If well-known words are used in a new sense, it is no doubt plainly necessary to define them; but, as plainly, to use well-known words in

a new sense is the very last thing which should be done. If, on the other hand, the word is a new one, or is not well-known, it should not be used at all, unless the subject-matter of the legislation is so new that it requires new terms." Solicit. Jour., Vol. 20, p. 869.

5. Thayer, Prelim. Treat., 190n.



yers and judges. But it is quite certain that as our law grows it must be subjected more and more to the scrutiny of the legal scholar, and that it will profit by any serious and competent effort to clarify and restate it."

*Whatever may be true* of this ancient maxim in other connections, one who, like Mr. Justice Stephen, is seeking to render the law of evidence intelligible, cannot well refrain from incurring the danger of violating it. As part of the law of procedure, the ancient subject of evidence traces a long descent from a dim and distant past over a period during which its familiar terminology has had varied, though frequently interblending, meanings which show in the older among them a wonderful vitality and tendency to recrudescence. The further difficulty presents itself. The constant necessity of adapting familiar technical terms to the apprehension of a popular, ever-changing, tribunal like the jury, and the careless, inexact — sufficiently accurate for immediate purposes — action of the courts in their use of terms have a constant tendency to break down any remnants of scientific precision in the use of terminology, and to develop numerous connotations for each term or phrase commonly employed in connection with the subject.<sup>6</sup> That any treatise on evidence should be understandable, this confusion must, so far as practicable, be eliminated by a careful definition of the terms about to be employed. It has, however, been deemed advisable not to attempt incumbering the subject with the additional complication of a new terminology. The only course, therefore, would seem to be the selection of one among several connotations of the multifold-meaning terms. While this has, wherever possible, been done, the process of excluding the discarded connotations, which insisting upon the meaning of the one selected, has made necessary a somewhat more extended discussion of the meaning of terms than would have been required in the mere act of defining a newly-coined term or one with a single signification.

**6. Nothing but confusion can attend** the use of varied meanings for the same term or phrase. As Mill says, referring to the errors of Plato and Aristotle: "Even the strongest understandings find it difficult to believe that things which have a common name, have not in some respect or

other a common nature; and often expend much labor very unprofitably (as was frequently done by the two philosophers just mentioned) in vain attempts to discover in what this common nature consists." Mill, *Logic* (8th ed.), bk. I, c. IV, § 1.

**§ 2. Law of Evidence.**—The “rules of evidence” are such precepts in the general subject of judicial administration as determine the manner in which a designated fact submitted to judicial decision may be proved;<sup>1</sup> whether such a fact may be proved at all; if so, who are competent to prove it and under what conditions. In the aggregate, these rules constitute the “law of evidence.” Mr. Justice Stephen thus defines the law of evidence:<sup>2</sup>

“All law may be divided into Substantive Law, by which rights, duties, and liabilities are defined, and the Law of Procedure, by which the Substantive Law is applied to particular cases.

“The Law of Evidence is that part of the Law of Procedure which, with a view to ascertain individual rights and liabilities in particular cases, decides:

“I. What facts may, and what may not be proved in such cases;

“II. What sort of evidence must be given of a fact which may be proved;

“III. By whom and in what manner the evidence must be produced by which any fact is to be proved.”

The author is wisely careful to state at once his clause I—“What facts may and what may not be proved in such cases”—so as to indicate that the law of evidence determines not what individual facts, but what classes or species of facts, may be proved. “The facts which may be proved,” he says, “are facts in issue, or facts relevant to the issue;”—to which, for reasons stated elsewhere, we shall therefore assign the terms, respectively, of constituent<sup>3</sup> and probative<sup>4</sup> facts. No countenance is given by Mr.

1. *Lapham v. Marshall*, 51 Hun (N. Y.) 361, 3 N. Y. Suppl. 601 (1889).

**Thayer's definition.**—“What is our law of evidence? It is a set of rules which has to do with judicial investigations into questions of fact. . . . These rules relate to the mode of ascertaining an unknown, and generally a disputed, matter of fact. But they do not regulate the process of reasoning and argument.”

“When one offers ‘evidence,’ in the sense of the word which is now under consideration, he offers to prove, otherwise than by mere reasoning from what is already known, a matter of fact to be used as a basis of inference

to another matter of fact. . . . In giving evidence we are furnishing to a tribunal a new basis for reasoning.”

“Evidence, then, is any matter of fact which is furnished to a legal tribunal—otherwise than by reasoning or a reference to what is noticed without proof—as the basis of inference in ascertaining some other matter of fact.” Professor J. B. Thayer, “Presumptions and the Law of Evidence,” 3 Harv. Law Rev. 142 (1889).

2. Stephen, *Dig. Law of Ev.* (May's Am. ed.), *Introd.*, 6.

3. *Infra*, § 47.

4. *Infra*, § 51.

Justice Stephen to what is perhaps the most fundamental and far-reaching error that beclouds the subject of evidence, to wit, the conception, more often implied than expressed, that it is part of the subject-matter of the law of evidence to determine what individual facts are admissible in a given case; — i. e., that the *facta probanda* of the inquiry are to be determined by the rules of evidence. Nothing could well be further from the fact. The ultimate *facta probanda* are the constituent facts, i. e., those parts of the *res gestæ*<sup>5</sup> which are rendered material to the inquiry only in so far as these natural happenings tend to establish or constitute some right or liability prescribed by the substantive law. Assume that a fact may be proved, and the law of evidence indicates how it may be done. It has no function to decide the ends to which the evidence shall be directed. That is, as Mr. Justice Stephen, by implication says, the province of the substantive law.<sup>6</sup>

The *perplexities and ambiguities* of the English law of evidence begin with the definition of the term "evidence." As pointed out by a careful writer<sup>7</sup> the word "evidence" has at least three legitimate meanings, as denoting:

- (1) The *science* of proof or the fundamental, natural principle which regulate the art of proving.
- (2) The *art* of proof or the rules and methods employed in the application of that science to practice.
- (3) The *physical means* or agencies by which that art is carried into effect.

5. *Infra*, § 47.

6. "The question, on what facts the decision turns, is a question, not of evidence, but of the substantive branch of the law; it respects the *probandum*, not the *probans*; it does not belong to the inquiry, by what sort of evidence the facts of the case may be proved; it belongs to the inquiry, what are the facts of which the law has determined that proof shall be required, in order to establish the plaintiff's claim." Bentham, *Rationale of Jud. Ev.*, bk. IX, pt. VI, c. V. (Bowring's ed., vol. VII, p. 560) (1827).

"The principles of substantive law which have been established by the courts are believed to have been somewhat obscured by having presented

themselves oftenest in the form of rulings upon the sufficiency of evidence." Mr. Justice Oliver Wendell Holmes, *The Common Law*, 120 (1881).

"It is then fundamental that not all determinations admitting or excluding evidence are referable to the law of evidence. Far the larger part of them are not. An innumerable company of questions, of the sort just alluded to, very often — more often than not, nay, much oftener than not — are dealt with in our text-books and cases as belonging to the law of evidence, when in real truth they ought to be carried to the border line of this subject and respectfully deposited on the other side." Thayer, *Prelim. Treat.*, 515 (1898).

7. Gulson, *Philosophy of Proof*, § 1.

*The present treatise concerns itself primarily with evidence in its third sense. Neither as denoting a science nor an art is the term "evidence" customarily employed, but as covering the physical means by which the art of producing belief in the truth of a given proposition or of verifying a fact by the use of reason, is carried on. This aspect of the term "evidence" is the special subject of this treatise. This third meaning of the term as classified by Mr. Gulson will be treated as the primary meaning of the term, to be first considered; reserving for evidence considered either as a science or as an art, such brief consideration as secondary meanings of the term<sup>8</sup> as is rather imposed by the limitations in scope which the present work proposes to itself than warranted by the great importance to the interests of general jurisprudence of the subject when considered in these aspects.*

**§ 3. Scope of the Law of Evidence.**—The scope of the law of evidence is thus stated by Professor Thayer:<sup>1</sup> "It must be noticed, then, that 'evidence,' in the sense used when we speak of the law of evidence, has not the large meaning imputed to it in ordinary discourse. It is a term of forensic procedure; and imports something put forward in a court of justice. When men speak of historical evidence and scientific evidence and the evidences of Christianity, they are talking about a different sort of thing. The law of evidence has to do with the furnishing to a court of matter of fact, for use in a judicial investigation. But how 'has to do?' (1) It prescribes the manner of presenting evidence; as by requiring that it shall be given in open court, by one who personally knows the thing, appearing in person, subject to cross-examination, or by allowing it to be given by deposition, taken in such and such a way; and the like. (2) It fixes the qualifications and the privilege of witnesses, and the mode of examining them. (3) And chiefly, it determines, as among probative matters, matters in their nature evidential,—what classes of things shall not be received. This excluding function is the characteristic one in our law of evidence."

**§ 4. Evidence Defined.**—In its original sense, the term "evidence" is that which causes the state of being evident or plain.<sup>1</sup>

8. *Infra*, §§ 32 *et seq.*

1. Thayer, *Prelim. Treat.*, 264.

1. *Holland v. Ingram*, 6 Rich. L. (S. C.) 50, 52 (1851); *State v. Ward*,

61 Vt. 153, 185, 17 Atl. 483 (1888);

*Gordon v. Denison*, 24 Ont. 576, 583

(1893). See also 3 Black. Comm. 367.

"Its primary obvious meaning is

As at present employed, the term "evidence," in general, covers all facts from which an inference may logically be drawn as to the existence of a fact under investigation.<sup>2</sup> For judicial purposes, evidence may conveniently be divided, in the order in which a fact may present itself to observation, into *extrajudicial* and *judicial*.<sup>3</sup>

that which makes evident or manifest; the ground of belief or judgment; conclusive testimony; a statement which contains proofs, as the 'evidence' of our senses; 'evidence' of truth or falsehood. Webster, Dict. It is frequently said of a proposition that it furnishes the evidence of its truth, or carries with it evidence of its own truth. 'Self-evident,' 'evidently,' are employed to express the idea of full proof; conviction." *McWilliams v. Rogers*, 56 Ala. 87, 93 (1876).

"Evidence is said to be that which demonstrates and makes clear a question of fact at issue." *Mallery v. Young*, 94 Ga. 804, 807, 22 S. E. 142, 143 (1894).

"'Evidence' is defined to be that which makes a matter in dispute clear, evident." *Holland v. Ingram*, 6 Rich. L. (S. C.) 50, 52 (1851).

Mr. Best points out, that the primary use of the term applied rather to the effect produced than to the means employed for producing it. "The word evidence (*evidentia*) signifies, in its original sense, the state of being evident, i. e., plain, apparent or notorious. But in an almost peculiar inflection of our language, it is applied to that which tends to render evident or to general proof." Best, Ev., § 11. *Conf.* The popular usage by which a conspicuous or notorious person or thing is said to be "very much in evidence," or the like.

Blackstone's definition (3 Comm. 367) adopts the same etymological view point. He defines evidence as "that which demonstrates, makes clear or ascertains the truth of the very fact or point in issue, either on one side or the other."

**2. California.**—*Schloss v. Creditors*, 31 Cal. 201 (1866).

*Georgia.*—*Tift v. Jones*, 77 Ga. 181, 3 S. E. 399 (1886).

*Kentucky.*—*Miles v. Edden*, 1 Duv. (Ky.) 270 (1864).

*Louisiana.*—*State v. Thomas*, 50 La. Ann. 148, 153, 23 So. 250 (1898).

*Michigan.*—*Auditor Gen. v. Menominee Co. Sup'rs*, 89 Mich. 552, 618, 51 N. W. 483 (1891).

*Mississippi.*—*Glenn v. State*, 64 Miss. 724, 726, 2 So. 109 (1887).

*New York.*—*Lapham v. Marshall*, 51 Hun (N. Y.) 361, 3 N. Y. Suppl. 601 (1889).

*South Carolina.*—*Hill v. Watson*, 10 S. C. 268, 274 (1878).

*Texas.*—*Horbach v. State*, 43 Tex. 242, 249 (1875).

"Fact" and "Evidence" not really synonymous.—Though frequently so used, the terms "fact" and "evidence" are not in reality synonymous. *Gates v. How*, 150 Ind. 370, 372, 50 N. E. 299 (1897).

More properly speaking it is the *inference from the fact* to which the fact gives rise rather than the physical fact itself which is the probative or evidentiary force. The mind of the observer, whether in or out of court, cannot directly be influenced to belief or any material mental state by a physical fact. Only by changes in consciousness which the fact produces is evidence furnished.

**3. An element of confusion is introduced** when the existence of probative fact is said to be "evidence" of a constituent one. The relation of relevancy recognized by the mind as subsisting between the two facts exists merely by virtue of a process of reasoning, based on experience. Nothing

"Judicial evidence is that which is produced to the court; it comprises all evidential facts that are actually brought to the personal knowledge and observation of the tribunals. Extrajudicial evidence is that which does not come directly under judicial cognizance, but nevertheless constitutes an intermediate link between judicial evidence and the fact requiring proof."<sup>4</sup>

**§ 5. (*Evidence defined*); Other Definitions.**—The Supreme Court of the United States, speaking through Mr. Justice Miller, gives the following excellent definition of "evidence."<sup>1</sup> Evidence "as a part of procedure, signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted." The close parallelism between the various definitions is well illustrated by a statement of the Supreme Court of Nebraska, which, it will be observed, uses the definition of Bentham and Greenleaf, and also that which is given in the present treatise. "Evidence, as defined by lexicographers and law-writers, includes all the means by which, in a judicial trial, it is sought to establish or disprove any material allegation of a civil or criminal pleading. Any circumstance which affords an inference as to whether the matter alleged is true or false is therefore 'evidence,' and is commonly understood to be within the meaning of that term."<sup>2</sup> A simpler, if less accurate, definition is that given by the Supreme Court of California. "Evidence is simply the means of proving a fact; that which tends to establish a fact."<sup>3</sup>

except a fact can properly be said to be relevant to another. The statements of witnesses, production of documents, perception by the tribunal, and other facts of evidence constitute the "matter of evidence" of earlier English law; the raw material, as it were, from the existence of which the existence of constituent facts might be inferred by such process of reasoning either on the part of the judge or by the jurymen. See, for example, *Littleton's Case* (cited in 10 Coke 56b), where the jury, it is said, are not [by a special verdict] to leave matter of evidence to the court to adjudge but are them-

selves "to adjudge upon that evidence concerning matter of fact."

4. Salmond, *Jurisp.* (2d ed.) 447.

1. *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 306, 2 S. Ct. 443, 452 (1882).

2. *O'Brien v. State*, (Nebr. 1903) 96 N. W. 649, 650.

"Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied." Mr. Justice Edward Livingston, *Draft Code, Book of Definitions* (Works, ed., 1872, II, 646) (1823).

3. *People v. Bowers*, (Cal. 1888) 18 Pac. 660, 665.

*Bentham.*—In this latter meaning, the term, as Bentham sagaciously points out,<sup>4</sup> “is a word of relation.” A definite relation must, in the nature of things, exist between a *factum probans* and a *factum probandum* so as to make the existence of the one render probable, in a greater or less degree, the existence of the other. In other words, Bentham limits “evidence” to what we have called probative facts;<sup>5</sup>—neither constituent facts, nor deliberative facts—the two other classes of admissible facts having the necessary proving element which is characteristic of evidence. By the term “evidence” he says, “seems generally to be understood any matter of fact, the effect, tendency or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact—a persuasion either affirmative or disaffirmative, of its existence.”<sup>6</sup> These physical means by which belief of the existence of a given fact is created have been described, in a general way, by authorities on the subject—all being, more or less directly, based upon the definition of Jeremy Bentham.<sup>7</sup>

*Greenleaf.*—Upon this statement of Bentham was modeled the celebrated definition of Professor Greenleaf, which is the accepted definition in the American jurisdictions: “The word evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation is established or disproved.”<sup>8</sup> Of this definition, it may be sug-

4. Bentham, *Rationale of Jud. Ev.*, bk. I, c. I.

5. *Infra*, § 51.

6. Cook v. New Durham, 64 N. H. 419 (1887).

7. Bentham, *Rationale of Jud. Ev.*, bk. I, c. I.

8. Greenleaf, *Ev.*, § 1.

*California.*—Schloss v. His Creditors, 31 Cal. 201, 203 (1866).

*Georgia.*—Tift v. Jones, 77 Ga. 181, 3 S. E. 399 (1886); Hotchkiss v. Newton, 10 Ga. 560, 567 (1851).

*Indiana.*—Roberts v. State, 25 Ind. App. 366, 58 N. E. 203, 205 (1900); Nelson v. Johnson, 18 Ind. 329, 332 (1862).

*Louisiana.*—State v. Thomas, 50 La. Am. 148, 23 So. 250, 252 (1898).

*Michigan.*—Auditor General v. Me-

nominee Co. Sup'rs, 89 Mich. 552, 51 N. W. 483, 505 (1891).

*New York.*—Lapham v. Marshall, 51 Hun 36, 3 N. Y. Suppl. 601, 603 (1889); McEntyre v. Tucker, 5 Misc. 228, 25 N. Y. Suppl. 95, 96 (1893).

*Wyoming.*—Wyoming Loan & Trust Co. v. W. H. Holliday Co., 3 Wyo. 386, 24 Pac. 193 (1890).

See, also, Cook v. New Durham, 64 N. H. 419, 13 Atl. 650, 651 (1887) (citing 1 Bentham, *Rationale of Jud. Ev.*, 17); State v. Ward, 61 Vt. 153, 17 Atl. 483, 487 (1888) (citing 1 Best, *Ev.*, § 11).

“In its wider and universal sense, it [evidence] embraces all questions by which any alleged fact, the truth of which is submitted to examination, may be established or disproved.”

gested: (1) That unless "matter of fact" may be regarded as something different from "fact" the definition of Bentham that the *existence* of a fact should be shown is the more accurate phraseology. Truth cannot well be predicated of a mere fact. Only when existence or some other attribute is predicated of a fact can its truth be affirmed or denied, or it be made the subject of proof or the object of belief.<sup>9</sup> (2) The "means" for producing belief in the truth of a given proposition or expression of fact with which the law of evidence proposes to deal are those which are *physical*. The definition "all means" would include the use of mere argument which is assuredly not evidence.

*Stephen.*—Mr. Justice Stephen says these means for inducing belief as to the truth of a proposition of fact are two: (1) Oral statements by witnesses, and (2) the use of documents. "'Evidence' means: (1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry; . . . (2) documents produced for the inspection of the court or judge."<sup>10</sup>

Dissenting opinion in *Hubbell v. United States*, (U. S. 1879) 15 Ct. Cl. 546, 606.

9. "Whatever can be an object of belief or even of disbelief, must, when put into words, assume the form of a proposition. . . . In every act of belief *two* objects are in some manner taken cognizance of; that there can be no belief claimed, or question propounded, which does not embrace two distinct (either material or intellectual) subjects of thought; each of them capable, or not, of being conceived by itself, but is capable of being believed by itself. I may say, for instance, 'the sun.' The word has a meaning, and suggests that meaning to the mind of any one who is listening to me. But suppose I ask him, whether it is true; whether he believes it? He can give no answer. There is as yet nothing to believe, or to disbelieve. Now, however, let me make, of all possible assertions respecting the sun, the one which involves the least of reference to any object besides itself; let me say, 'the sun exists.' Here, at once, is something which a person can say he believes. But here, instead of only one,

we find two distinct objects of conception: the sun is one object; existence is another." Mill, *Logic*, (8th ed.) bk. I, c. I. § 2. See, also, Mill, *Logic*, (18th ed.) bk. I, c. VI, § 1.

10. Stephen, *Dig. Law of Ev.*, c. I, art. 1.

The critic of the Solicitors' Journal thus comments: "If counsel were asked, 'What evidence do you propose to give of the authority of such a one to pledge the credit of the defendant?' he would not reply, 'The statements of the witnesses who will say that the defendant has habitually paid for goods ordered on his account by that person;' meaning that the fact of the defendant's having so paid would be the substance of the evidence which he was about to adduce. This would almost certainly be his meaning, although it is possible that he might refer to the fact itself as evidence, in the sense of a means of proving, that the person in question had authority to pledge the defendant's credit, passing over in his mind altogether the statements of witnesses by which that fact would itself be proved." *Solicit. Jour.*, vol. 20, p. 857.



This definition seems faulty in failing to include facts of which the judge or jury are the original percipient witnesses — inferences drawn from their own perception.<sup>11</sup>

**§ 6. (Evidence Defined); Extrajudicial Evidence.**—“Extrajudicial evidence includes all evidential facts which are known to the court only by way of inference from some form of judicial evidence.”<sup>1</sup> Extrajudicial evidence is part of the order of nature — as distinguished from the art of investigating reports of the natural occurrences. It is the field of objective relevancy.<sup>2</sup> Every judicial inquiry arises out of and involves the existence of a certain section of the world’s happenings — hedged about by time, space and causation. These are the *res gestæ* of the case, the facts which constitute the right or liability asserted;<sup>3</sup> so far, at least, as it is constituted at all. Under the direction and within the limitations of objective relevancy, i. e., along the lines of natural causation, run various lines of probative facts<sup>4</sup> each *factum probans* establishing its respective *factum probandum*, the latter, in turn, becoming a *factum probans*, until it reaches some ultimate or constituent fact — some fact in the *res gestæ*, which are the ultimate *facta probanda*. For the *res gestæ* do not, in turn, become *facta probantes*. The chain of cause and effect stops.

**§ 7. (Evidence Defined); Judicial.**—Judicial evidence includes all testimony given by witnesses in court, all documents produced to and read by the court, and all things personally examined by the court for the purposes of proof.<sup>1</sup> Stephen’s definition of evidence in general, if supplemented by the evidence which the judge and jury obtain by perception<sup>2</sup> is true, if limited to *judicial* evidence.<sup>3</sup> “‘Evidence’ means: (1) All statements which the judge permits or requires to be made by witnesses in court, in relation to matters of fact under inquiry; such statements are called oral evidence; (2) all documents produced for the inspection of the court

11. See EVIDENCE BY PERCEPTION.

1. Salmond, Jurisp. (2d ed.), 417.

2. *Infra*, § 55.

3. It is not necessarily true, though usually it happens, that the *res gestæ* should be extrajudicial. The entire transaction may take place in presence of the court — *coram judice* — as where a presiding judge inaugurates proceedings to punish the par-

ties, or one of them for an affray committed in his presence.

4. *Infra*, § 51.

1. Salmond, Jurisp. (2d ed.), 417.

2. See EVIDENCE BY PERCEPTION.

3. “The means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.” Cal. Code Civ. Proc., § 1823.

or judge; such documents are called documentary evidence.”<sup>4</sup> Judicial evidence is the domain of subjective relevancy;<sup>5</sup> of the use of deliberative facts;<sup>6</sup> of the balancing in mental scales, of the *weight* — the true probative force — of the statements of witnesses or of the declarations of documents. The *res gestæ*, established either by direct evidence, or if this cannot be obtained, by the circumstantial facts which tend to prove or disprove the existence, in an objective point of view, of these *res gestæ* are to be laid before the tribunal through the subjective mental condition of declarants, either speaking orally to the ear as witnesses or by written characters through the sense of sight, to the tribunal. It is only as to these facts that the mental state of the declarant, testifying orally or in writing, is of importance in the inquiry. But in judicial evidence the question is not one as to natural connection as in case of extrajudicial testimony, but a question of psychology is presented. The inquiry is not as to what the objective facts, if established, prove in point of fact, but rather as to what inference the tribunal will draw as to whether the objective facts are themselves established in view of the statements made by witnesses having certain knowledge, intelligence, powers of observation or reasoning and acting under a certain bias, prejudice, interest or motive to misrepresent the truth. It follows that all judicial testimony or documents establish the *res gestæ* facts, or the probative facts leading up to their inferential establishment, in a circumstantial manner. Unless the tribunal observes the *res gestæ* for itself, they must be proved to the tribunal circumstantially, through

4. Stephen, Dig. Law of Evid. (1st ed.), c. 1, art. 1.

While it is common, as in Stephen's Definition of Evidence, to speak of the physical statement of the witness or the physical words of the declarant set out in the document as being the evidence, it seems obvious that if evidence be that which produces conviction, belief or other mental state the probative force is not physical. Matter cannot act directly upon mind. Only mind can do that. The probative belief-compelling force lies neither in the vocal sound set in motion during the statement of the witness, nor in these physical air vibrations as they strike upon the

physical ear of the tribunal. This is all vehicle, means of communication. What causes belief — so far as it is caused — in the mind of the tribunal is the mental, intangible *inference* which the mind of the segregated units of consciousness which compose the tribunal shall draw as to the mental state of the declarant; — the inference as to how far it is probable that, in view of the mental and moral equipment of the witness, he would have made the statement which he did make were the fact other than he states it to be.

5. *Infra*, § 56.

6. *Infra*, §§ 47, 52.

the witnesses who testify to them; their statements are the probative facts which tend to establish them. In case of direct evidence, so called, the witnesses testify to the *res gestæ* directly and not to probative facts from which the existence of the *res gestæ* facts may itself be inferred.

§ 8. "Proof" and "Evidence." — The terms "evidence" and "proof" have been used as synonyms — that is, as indicating the means by which mental certainty on the part of a tribunal is created.<sup>1</sup> When properly employed, "proof" sustains to "evidence" the relation of an end to the means used in attaining it. Proof is the state of mind which it is the object of evidence to produce.<sup>2</sup> The most pernicious effect of using the word "proof" as meaning either (1) the end of mental certitude, or (2) the means by which a party seeks to attain that end lies in connection with the phrase "burden of proof," where the two senses of the term proof are interchangeably employed in a bewildering way.<sup>3</sup>

§ 9. "Testimony" and "Evidence." — By colloquial use of technical terms which has almost of necessity affected a branch of law involving the coöperation of a jury, "evidence" and "testimony" have frequently been used as conveying the same meaning.<sup>1</sup> More

1. O'Reilly v. Guardian, etc., Life Ins. Co., 60 N. Y. 169, 172, 19 Am. Rep. 151 (1875); Hill v. Watson, 10 S. C. 268, 273 (1878).

Reverse confusion.—Under a New York statute a certain certificate was declared to be "evidence without further proof." These words were construed to mean that the certificate was proof without further evidence. Albany County Savings Bk. v. McCarty, 149 N. Y. 71, 83, 43 N. E. 427 (1896).

2. California.—Schloss v. Creditors, 31 Cal. 201 (1866).

Georgia.—Powell v. State, 101 Ga. 9, 21, 29 S. E. 309, 65 Am. St. Rep. 277 (1897); Tift v. Jones, 77 Ga. 181, 190, 3 S. E. 399 (1886).

Iowa.—Perry v. Dubuque, etc., R. Co., 36 Iowa 102 (1872).

Kentucky.—Miles v. Edelen, 1 Duv. (Ky.) 270 (1864).

Michigan.—Jastrzembksi v. Marx-

hausen, 120 Mich. 677, 683, 79 N. W. 935 (1899).

New York.—Buffalo, etc., R. Co. v. Reynolds, 6 How. Pr. 96, 97, 98 (1851).

South Carolina.—Hill v. Watson, 10 S. C. 268, 273 (1878).

3. *Infra*, § 936.

1. California.—Mann v. Higgins, 83 Cal. 66, 23 Pac. 206 (1890).

Connecticut.—Appeal of Crandall, 63 Conn. 365, 28 Atl. 531, 38 Am. St. Rep. 375 (1893).

Illinois.—People v. Henckler, 137 Ill. 580, 27 N. E. 602 (1891); Jones v. Gregory, 48 Ill. App. 228 (1892).

Indiana.—Harris v. Tomlinson, 130 Ind. 426, 30 N. E. 214 (1891).

Nebraska.—Woolworth v. Parker, 57 Nebr. 417, 77 N. W. 1090 (1899).

New York.—People v. Armour, 18 N. Y. App. Div. 584, 46 N. Y. Suppl. 317 (1897).

Washington.—Noyes v. Pugin, 2 Wash. 653, 661, 27 Pac. 548 (1891).

properly, "testimony" is that part of judicial evidence which comes to the tribunal through the medium of witnesses — i. e., by means of their verbal statements.<sup>2</sup>

§ 10. *Subdivisions of Evidence.*—Before attempting to define the term "fact," without which the foregoing definitions of the term "evidence" are without meaning,<sup>1</sup> and entering upon the further effort of making such a classification of facts in general, as may be helpful for the present purpose,<sup>2</sup> it may be convenient to consider, as briefly as seems possible, certain of the more important of the classifications which have been made in the generic term "evidence." No general system of classification has been adopted by those who have sought to create these classes. In most cases, the classification is, as it were, *modal*, i. e., the classes are differentiated according to the *mode* or method by which the evidence operates in creating belief in the existence of a given fact, e. g., direct and circumstantial evidence; or *probative*, i. e., as indicating the evidentiary force — belief-generating effect — of the facts in question as related to the facts involved in the inquiry — as material evidence, competent evidence and the like. To the more scientific classification announced by Bentham and more generally known through the treatise of Best, and very interestingly discussed by Mr. Gulson, a somewhat more extended consideration will be given.

§ 11. (*Subdivisions of Evidence*); *Admissible Evidence.*—Evidence which the court receives in the course of a trial, or might properly receive, is admissible evidence. Admissible evidence relates to proof of three classes or species of facts: (1) Constituent, or *res gestæ* facts; (2) probative or evidentiary facts; (3) deliberative facts.

§ 12. (*Subdivisions of Evidence*); *Best and Secondary Evidence.*—The important subject of "best and secondary" evidence — which so constantly attracts the attention of the court and so

2. *Indiana.*— Woods v. State, 134 Ind. 35, 41, 33 N. E. 901 (1892).

*Louisiana.*— Carroll v. Bangker, 43 La. Ann. 1078, 1085, 1194, 10 So. 187 (1891).

*Nebraska.*— Columbia Nat. Bank v. German Nat. Bank, 56 Nebr. 803, 77 N. W. 346 (1898).

*New York.*— People v. Kenyon, 5 Parker Cr. (N. Y.) 254, 288 (1862).

*Wisconsin.*— Nash v. Hoxie, 59 Wis. 384, 18 N. W. 408 (1884).

1. *Infra*, § 38.

2. *Infra*, § 43.

constantly taxes the ingenuity of trial counsel and the patience of appellate judges, is one which it seems easy to misunderstand. It indicates no absolute division between facts of one class and facts of another. The classification, in any particular case, is conditioned upon a number of variables, e. g., the evidence which it is fairly within the power of a proponent to produce, the nature of the case or investigation, the stage of the trial, the state of the evidence, and the like. It therefore indicates a *relative* rather than an absolute line of demarkation. What would be secondary under one set of circumstances may be deemed primary in another. Evidence may be excluded under it, in one case, or at one time in a case, which might properly be received in the next case or even at a subsequent stage in the same proceeding. Such a division of relation is obviously not a rule of law or even a rule of procedure. It is rather a guide to the discretion of the court in admitting testimony, i. e., a canon of judicial administration. It is so treated elsewhere,<sup>1</sup> especially in its very important application to the use of documents.<sup>2</sup>

**§ 13. (*Subdivisions of Evidence*); Competent Evidence.**—Facts which, under these rules of procedure or the canons of administration, will be considered by a judicial tribunal, have been designated as “competent,”<sup>1</sup> though the term has been used as equivalent to sufficient to warrant action by the tribunal.<sup>2</sup>

**§ 14. (*Subdivisions of Evidence*); Conclusive Evidence.**—Where the evidence of a probative fact or set of facts amounts to a demonstration of the *factum probandum* to which it is directed, where the evidence is uncontrovertible, it is said to be conclusive.<sup>1</sup> This conclusive evidence has been spoken of as “either a presumption of law, or else evidence so strong as to overbear all other in the case to the contrary.”<sup>2</sup> Such a statement would be appropriate, in reality, only of a mathematical demonstration, the ultimate basis of which is the existence of an axiom not admitting of dispute; or a direct act of perception where the existence of the

1. *Infra*, § 339.

2. *See* DOCUMENTARY EVIDENCE.

1. *Ryan v. Bristol*, 63 Conn. 26, 36, 27 Atl. 360 (1893); *State v. Johnson*, 12 Minn. 476, 93 Am. Dec. 241 (1867); *Porter v. Valentine*, 18 Misc. (N. Y.) 213-215, 41 N. Y. Suppl. 507 and cases cited (1896).

2. *Niles v. Sprague*, 13 Iowa 198, 204 (1862).

1. *Wood v. Chapin*, 13 N. Y. 509, 515, 67 Am. Dec. 62, per Denio, C. J. (1856).

2. *Haupt. v. Pohnaan*, 1 Rob. (N. Y.) 121, 127, per Robertson, J. (1863).

thing observed as distinguished from the inferences to be drawn from it — being a state of consciousness, cannot admit of doubt. “Whatever is known to us by consciousness is known beyond possibility of question. What one sees or feels, whether bodily or mentally, one cannot but be sure that one sees or feels. No science is required for the purpose of establishing such truths; no rules of art can render our knowledge of them more certain than it is in itself. There is no logic for this portion of our knowledge.”<sup>3</sup> That one who perceives knows his actual state of consciousness is conclusively shown to him. But it is not *proved* to him. Moral evidence and the reasoning from phenomena or the statements of witnesses can never in the nature of things, amount to a demonstration, to conclusive proof. At most, it can legitimately result only in a very high degree of probability.

*The phrase, conclusive evidence*, may be used to state a proposition as to which the law of evidence has nothing whatever to do, though couched in the appropriate phraseology of the subject; — the equivalence between two things prescribed by the substantive law. Thus, the rule of substantive law that prescriptive user of a non-corporeal hereditament for a period of twenty years bars the right of action, may be announced by saying that proof of such a user is *conclusive evidence* of a lost grant,<sup>4</sup> or by the equivalent expression that a lost grant is conclusively presumed from the fact of such user.

**§ 15. (*Subdivisions of Evidence*); Direct and Circumstantial Evidence.**—As commonly used, direct evidence is the immediate perception of the tribunal<sup>1</sup> or the statement of a witness as to the existence of a constituent fact. Circumstantial evidence is the statement of a witness as to the existence of a fact in some degree probative as to the existence of a constituent fact. The distinction is generally regarded as important. Where a witness testifies to the existence of a *res gestæ* fact his testimony is direct. Where, on the contrary, he testifies to a probative fact, i. e., to a fact which, either alone or in connection with other facts, renders probable the

3. Mill, *Logic* (8th ed.), Introd., 20.

4. “Adverse, exclusive, and uninterrupted enjoyment for twenty years of an incorporeal hereditament affords a conclusive presumption of a grant or a right, as the case may be, which

is to be applied as a *presumptio juris et de jure*, wherever by possibility a right can be acquired in any manner known to the law.” *Wallace v. Fletcher*, 30 N. H. 434 (1855).

1. See EVIDENCE BY PERCEPTION.

existence of a *res gestæ* fact, the evidence is circumstantial. "Evidence is of two kinds: That which, if true, directly proves the fact in issue; and that which proves another fact from which the fact in issue may be inferred."<sup>2</sup>

*The distinction seems confusing* and misleading rather than helpful. It is an attempt to turn a difference in degree of immediateness in proving a *res gestæ* fact into a difference in kind or nature of evidence itself.<sup>3</sup> It is true that, other things being equal, less chance for error is afforded where but one act of inference is needed for the proof of the constituent fact than where more inferences are asked for the same end. It follows that where the single inference from the statement of the percipient witness to the fact affirmed by him is needed for an act of belief on the part of the tribunal, less danger of mistake exists than where the same tribunal is required to infer from the statement of a percipient witness the existence of a probative fact, or set of facts, and to further infer from the existence of these facts the existence of the constituent fact. But in the matter of degree of probative force, which is the essential difference between classes of evidence, no real comparison is possible. Assuming circumstantial evidence to be inferior in degree of probative force a large and intimately correlated mass of such

2. Hart *v.* Newland, 10 N. C. 122, 123 (1824).

Alabama.—West *v.* State, 76 Ala. 98 (1884).

Dakota.—Terr. *v.* Eagan, 3 Dak. 119, 13 N. W. 568 (1882).

Maine.—Reed's Case, 1 Cen. L. J. 219 (1874).

Massachusetts.—Com. *v.* Webster, 5 Cush. 295, 310, 52 Am. Dec. 711 (1850).

Mississippi.—McCann *v.* State, 13 Smedes & M. 471 (1850).

Missouri.—State *v.* Avery, 113 Mo. 475, 21 N. W. 193 (1892).

Nebraska.—Curran *v.* Percival, 21 Nebr. 434, 32 N. W. 213 (1887).

Nevada.—State *v.* Slingerland, 19 Nev. 135, 7 Pac. 280 (1885).

New York.—Pease *v.* Smith, 61 N. Y. 477 (1875).

Pennsylvania.—Bash *v.* Bash, 9 Pa. St. 260 (1848).

Tennessee.—Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777 (1891).

United States.—U. S. *v.* Cole, 5 McLean 513, 610, Fed. Cas. No. 14832 (1853); U. S. *v.* Gilbert, 2 Sumn. 19 Fed. Cas. No. 15204 (1834).

"Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial." Com. *v.* Webster, 5 Cush. (Mass.) 295, 310, per Shaw, C. J. (1850).

Circumstantial not cumulative as regards direct evidence.—Evidence tending, circumstantially, to establish a fact in issue is not cumulative as regards direct evidence as to the same fact. Vardeman *v.* Byrne, 7 How. (Miss.) 865 (1843).

3. A fact proved by a legitimate inference is proved no less than when it is directly sworn to. Doyle *v.* Boston, etc., Ry. Co., 145 Mass. 386 (1888).

evidence may, in any individual case, produce a deeper sense of mental certitude than a smaller quantity of the intrinsically more probative evidence. Aside from the effect of the oath — a requirement of procedure which, in most cases, has but slight influence on probative force — the logical operation of any statement, in or out of court, is, in the last analysis, a circumstantial one. That is, the statement is believed in proportion as the person to whose judgment it is submitted is led by experience to believe that the statement is true because the declarant, with a certain degree of knowledge and speaking under certain moral or legal sanctions or in certain relations to the parties or the subject-matter, has made it. All statements, therefore, so far as probative at all, carry weight as they satisfy the conditions prescribed by experience.<sup>4</sup> This appeal to experience exists, so far as the fact testified to is concerned, whether that fact is a constituent or a probative one, i. e., whether the evidence is “direct” or “circumstantial.” All that remains, as a distinction between direct and circumstantial evidence, is the essential difference between a constituent and a probative fact. To be effective as an offensive or defensive weapon, circumstantial evidence must satisfy a double appeal to experience. Direct evidence need satisfy but one.

*But circumstantial evidence* has also its claim to credibility of a high order. Under the envioning conditions of time, space and causation certain evils as fabrication, collusion and mistake, to which direct evidence is peculiarly and almost necessarily exposed, can seldom be carried over into the proof of a large number of probative facts, frequently of slight individual evidentiary effect. It cannot well be doubted that grave injury is constantly being done to the cause of justice by insisting upon a distinction which seems to discredit the use of absolutely necessary facts, by affirming that such facts should not be permitted by a tribunal to exert a normal influence in producing the state of mental certainty required for its affirmative action. The value of the distinction does not apparently compensate for the danger involved in emphasizing it, and it might readily be abandoned without injury to any interests of judicial administration.<sup>5</sup>

4. See, however, *Davenport v. Cummings*, 15 Iowa 219 (1863), where the court says: “Direct and positive evidence cannot with a critical regard

to accuracy be spoken of as tending to prove an issue.”

5. This has been done by Stephen. See Dig. Law of Ev., art. 1.



**§ 16. (*Subdivisions of Evidence*); Material Evidence.**—Where a fact offered in evidence is not merely relevant, in the logical sense, but presents the cogency of probative force required for affirmative action on the part of the tribunal,<sup>1</sup> it is “material evidence.”<sup>2</sup> While “material” implies an additional logical persuasiveness to that necessarily carried by the term relevant, “immaterial” and “irrelevant,” as generally used, are practically synonymous. What facts are material to any inquiry will be found to be determined by the nature of the right or liability asserted, i. e., so far as this is expressed in terms of fact, by the component facts of the case. The existence of these component facts differentiates the *res gestæ* facts into those which the material, i. e., constituent, and those which are not.

**§ 17. (*Subdivisions of Evidence*); Oral and Documentary Evidence; Document Defined.**—By “document” is denoted the union of a material substance and the written language carried by it.

The term “document” is one difficult to define, by reason of the very intangible nature of the distinction between the material or physical element and the nonmaterial or intellectual component which are united under it. In other words, a document is a physical thing—a piece of paper, parchment, any material substance, and this physical, material thing is a vehicle, instrument or means by which thought is presented to the mind. Both of these ideas are essential to the conception of the term “document.” A blank sheet of paper would not be a document. The oral testimony of a witness—though it convey thought, is not a document. The stenographic notes by which the testimony of the witness has been placed upon paper would probably constitute the paper containing them a document. When these notes are transcribed into the ordinary written, typewritten or printed characters of language, the material substance carrying the thoughts so represented is clearly one. It is this combination of a material substance and its conveyance of thought which constitutes the essential feature of a document. In other words, the term “document” will be limited to *writings*<sup>1</sup> in the present treatise.

1. *Infra*, § 993.

2. *Porter v. Valentine*, 18 Misc. (N. Y.) 213, 41 N. Y. Suppl. 507 (1896).

1. The recording of words or sounds in significant characters, in the most

general sense, any use of or method of using letters or other conventional symbols of uttered sounds for the visible preservation or transmission of ideas. *Cent. Dict., in verb.*

*Under such a definition*, single words, or even a collection of disconnected words, like the incoherent verbal ejaculations of a person in pain, do not constitute a document, when carried on or presented to the observer by a material substance. Such words *suggest* rather than convey thought. Such a limitation of the characters on a document to language—which conveys thought, rather than to marks or symbols which merely suggest it, from the existence of which it may reasonably be inferred—seems to be in the direction of clearness and precision in terminology. The difference between language and mere facts such as notched sticks, tallies and the like to which private convention has allotted a definite significance, and plans, maps, diagrams and the like, to which significance is given only by antecedent knowledge—is so great in this connection as to amount to a difference in kind. Unless this limitation be adopted, the whole definition of document at once becomes enveloped in a fog—as is abundantly shown by the interesting speculations of Bentham and Mr. Gulson's commentaries upon them which are stated in this chapter.<sup>2</sup> The limitation to language is also in the interest of symmetry and harmony in the subject itself. A very important reason, briefly stated in this chapter,<sup>3</sup> and hereafter to be treated more in detail,<sup>4</sup> why "documentary evidence" is given distinctive treatment in the law of evidence at all is that documentary evidence has been affected in a distinctive way, and in important particulars, both by the substantive law, acting by statutory regulations or preserving the conventions of the parties; or by the law of procedure, acting through canons of administration. These regulations have no application to any form of document except one in *writing*. Unless, therefore, language is employed as the test of a document we have a series of important rules which fail to apply to a large portion of the class. The law of evidence will suffer little and gain much by relegating to the general class of facts, when viewed by the court, as evidence by perception, all other so-called "documents" not in writing, e. g., maps, plans, photographs, private conventions and the like.

*No restriction exists as to the material substance which may thus convey thought.*<sup>5</sup>

2. *Infra*, §§ 23, 27.

3. *Infra*, § 22.

4. *Infra*, §§ 480 *et seq.*

5. *Rowland v. Burton*, 2 Harr. (Del.) 288 (1837), wood; *Kendall v. Field*, 14 Me. 30 (1836), wood.

**§ 18. (*Subdivisions of Evidence; Oral and Documentary Evidence; Document Defined*); Other Definitions.**—Other definitions are less restricted and embrace many matters which, under the definition here adopted, would be excluded, not being documents but falling back into the general class of facts.

*Best.*—Thus Mr. Best<sup>1</sup> uses the term “as including all material substances on which the thoughts of men are represented by writing or any other species of conventional mark or symbol. Thus, the wooden scores on which bakers, milkmen, etc., indicate by notches the number of loaves of bread or quarts of milk supplied to their customers, the old exchequer tallies, and such like, are documents as much as the most elaborate deeds.”

*Wharton.*—Professor Wharton<sup>2</sup> defines “document” as “an instrument on which is recorded by means of letters, figures, or marks, matter which may be evidentially used.”

*Stephen.*—Mr. Justice Stephen presents a definition which is similar—though somewhat more restricted. A document, he says,<sup>3</sup> “means any substance having any matter expressed or described upon it by marks capable of being read.”<sup>4</sup>

*Within these three definitions*, a ring or banner with an inscription, a musical composition and a savage tattooed with words intelligible to himself would all be documents. Photographs, cari-

1. Prin. Law of Ev. (3d Am. ed.), § 215.

2. Wharton, Ev., § 614.

3. Stephen, Dig. Law of Ev., c. 1, art. 1.

4. Mr. Stephen's original definition read as follows: “‘Document’ means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.” Dig. Law of Ev., art. 1. This definition evidently fails to give proper prominence to the material element in the complex conception of a document, an error which was pointed out by the critic of Mr. Stephen's work in the Solicitors' Journal. “The document, therefore,” he says, “is by the definition the matter expressed or described. But this matter is not the

same with, but is different from, the means by which it is expressed or described, and is that which is expressed, understood, and ascertained by those means; and what is produced to the court is the expression of it, or more strictly the substance itself bearing upon it this expression.” After calling attention to certain verbal infelicities involved in the use of the words “intended to be used, or which may be used, for the purpose of recording that matter” which he regards as superfluous or possibly misleading, the writer proceeds as follows: “We would suggest, therefore, that a more accurate definition would be ‘Document means any substance having any matter expressed or described upon it by means of letters, or figures, or marks, or by more than one of those means.’” Solicit. Jour., vol. 20, p. 858.

catures, wooden scores or tallies would apparently be classified as "documents" under all these definitions, except that of Mr. Justice Stephen—which seems in its amended form the most accurate and workable of the three.

**§ 19. (*Subdivisions of Evidence; Oral and Documentary Evidence*); Difficulty of Removal.**—Practical considerations of convenience may, as a matter of administration, excuse the physical production of a document where its size, weight or immobility are such as to render it difficult, if not impossible, to afford the court and jury actual personal inspection of it. In such cases, as is more fully stated elsewhere,<sup>1</sup> the court may take a view or permit the jury to take one if this seems the more satisfactory course; or, witnesses may be permitted to testify as to the contents,<sup>2</sup> or a copy,<sup>3</sup> by photographic or other means, may, upon proper identification, be introduced in evidence. But this inconvenience of production in no way affects the fact that, whatever may be the material substance, it is, so long as it conveys thought, a document. Up to this point, harmony exists among the authorities.

**§ 20. (*Subdivisions of Evidence; Oral and Documentary Evidence*); Symbolical Representation of Thought.**—A divergence of opinion, however, at once arises when the question is asked:—By what signs, symbols, characters, or other means may thought properly be placed in or upon this physical substance, within the meaning of the term "document"? It would seem that, on principle, this question was most readily answered by asking another and closely related one:—What does it mean to *convey* thought? Clearly, it is something more than to *suggest* it or to bring to the mind of the observer the same general idea that the maker of the symbol had in mind. The baggage check attached to

1. See EVIDENCE BY PERCEPTION.

2. Tracy Peerage Case, 10 Cl. & Fin. 154, 180 (1843).

But the difficulty of removal must affirmatively appear.—Otherwise, the evidence will be rejected. Thus, on a motion to show cause why a new trial should not be granted, Parke, B., said: "I think no ground has been laid for this rule. With respect to the notice, it appears to have been a mere portable notice, which might have been taken off the nail and pro-

duced at the trial; and, being a document which was put forward as the basis of the contract between the parties, it ought itself to have been produced. It is different where the thing is a fixture, or where it cannot be produced on account of the public convenience." *Jones v. Tarleton*, 9 M. & W. 675, 677, per Parke, B. (1842).

3. *Slaney v. Wade*, 1 Myl. & C. 338 (1835).

a trunk and carrying a number suggests the thought of a corresponding number which may serve to identify the proper claimant. Yet neither this, nor any similar suggestions apparently suffice to make the check such a conveyor of thought as to constitute it a document.<sup>1</sup> Any conventionalized symbol — e. g., that a bird on the wing shall represent a journey — may cause the same general idea to arise in the mind of an observer which the maker of the symbol had in his own mind. But the idea is rather a fact than a proposition. The propositions or inferences which arise from it may be as varied as are the observers. None among these inferences may establish the precise fact which the delineator of the conventionalized symbol had in his own mind and sought to represent. The thought in the mind of the maker can scarcely, with propriety, be said to have been *conveyed* to the mind of the observer. The elements which formed and conditioned his precise thought cannot be gathered from it. To a certain extent, this failure of precise communication is inherent in the infirmity of human powers of expression. Even the notions conveyed by familiar words will be found to vary somewhat with different individuals. The most that can be done in such a connection is to select the method of thought conveyance most adequate to its proposed object.

*Language preëminent as a thought conveyor.*—For practical purposes the sole method by which thought may properly be said to be *conveyed* with a reasonable approximation to clearness and accuracy from one mind to another, is by the use of *language*. However inadequate, even when most aided by gesture, tone, play of feeling and the like, language is still so far in advance of all other means for communicating thought that it stands alone<sup>3</sup> and in a class by itself. It would seem appropriate therefore that the use of written language should be the sole means of conveying thought which, when joined with a material substance, shall be deemed to constitute a document.

**§ 21. (Subdivisions of Evidence; Oral and Documentary Evidence); Broad Scope.**—In its broad extension the term "documentary evidence" denotes all evidence furnished by documents. Under this heading, such a definition arranges all facts of which the document is the vehicle. Both the physical medium for transmitting thought and the thought transmitted are spoken of as "docu-

1. "The tag referred to was not a      fled." Com. v. Morrell, 99 Mass. 542  
document, but an object to be identi-      (1868).

mentary," and the evidence which either or both these elements furnish is designated "documentary evidence." It is apparently in this sense that the term is used by Mr. Justice Stephen.<sup>1</sup> It would seem that such a classification — placing oral statements on the one side and written ones on the other — is by no means accurate or scientific. The short reason is, that the oral or documentary nature of the medium by which facts are conveyed to a legal tribunal is not a satisfactory or illuminating point of differentiation between such facts. Any classification of the subject-matter embraced in the consideration of any particular branch of human knowledge should, so far as possible, be helpful to the object of the treatment to be accorded to the topic.<sup>2</sup> The basis of classification should be one of importance to the end to which the classification itself is a means.<sup>3</sup> In other sciences than that of evidence, this is readily recognized.

1. "Evidence," says he, "means (1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry; such statements are called oral evidence; (2) Documents produced for the inspection of the court or judge; such documents are called documentary evidence." Stephen, *Dig. Law of Ev.* (May's ed.), c. 1, art. 1.

2. "We said just now that the classification of objects should follow those of their properties which indicate not only the most numerous, but also the most important peculiarities. What is here meant by importance? It has reference to the particular end in view; and the same objects, therefore, may admit with propriety of several different classifications. Each science or art forms its classification of things according to the properties which fall within its special cognizance, or of which it must take account in order to accomplish its peculiar practical end. A farmer does not divide plants, like a botanist, into dicotyledonous and monocotyledonous, but into useful plants and weeds. A geologist divides fossils, not like a zoologist, into families corresponding to those of living species, but into fossils of the paleozoic, mesozoic, and

tertiary periods, above the coal and below the coal, etc. Whales are or are not fish according to the purpose for which we are considering them. 'If we are speaking of the internal structure and physiology of the animal, we must not call them fish; for in these respects they deviate widely from fishes; they have warm blood, and produce and suckle their young as land quadrupeds do. But this would not prevent our speaking of the *whale-fishery*, and calling such animals *fish* on all occasions connected with this employment, for the relations thus arising depend upon the animals living in the water, and being caught in a manner similar to other fishes. A plea that human laws which mention fish do not apply to whales, would be rejected at once by an intelligent judge.'" Mill, *Logic*, bk. IV, c. 7, § 2.

3. "The ends of scientific classification are best answered, when the objects are formed into groups respecting which a greater number of general propositions can be made, and those propositions more important than could be made respecting any other groups into which the same things could be distributed." Mill, *Logic*, bk. IV, c. 7, § 2.

*An Illustration.*—Thus, were the subject-matter that of ethics, it would at once be perceived that to divide the things which may or may not be done, into (1) things which may be done by men, (2) things which may not be done by men, (3) things which may be done by women, (4) things which may not be done by women, would not be a helpful classification. The reason for such a feeling would lie in a perception that the fact of sex was of no importance in determining whether one should do or refrain from doing acts of a certain moral quality; in other words, it would be felt that precisely the same rules for moral conduct applied to an individual entirely irrespective of whether that individual were a man or a woman. Properly to carry out such a classification would practically require the writing of duplicate treatises. To draw a penal code classifying the acts forbidden as “offenses committed by men” and “offenses committed by women” would be recognized as faulty for the same reason.

**§ 22. (Subdivisions of Evidence; Oral and Documentary Evidence); Limited Scope.**—To classify all evidence as (1) oral evidence and (2) documentary evidence seems objectionable in much the same way. In a system of judicial evidence based upon the fundamental principle that all facts logically relevant are to be received,<sup>1</sup> and that no other facts are to be received,<sup>2</sup> a proper scientific method apparently would classify facts into (1) relevant facts; (2) irrelevant facts; (3) relevant facts which are not received; (4) irrelevant facts which are received. In other words, a suitable consideration of the subject of judicial evidence would deal with facts or species of facts classified according to their admissibility or rejection by a judicial tribunal. In treating the questions so raised the fact that a given statement comes to a given tribunal by the medium of sound, as in oral testimony, or by that of sight through writing, printing, engraving, etc., as in documentary evidence is as immaterial as would be the fact of sex in classifying human conduct according to the rules of ethics or to arrange the prohibition of a penal code in accordance with the same basis of classification.

*For example*, an admission is equally competent whether made verbally or by means of a letter.<sup>3</sup> An unsworn statement when offered as evidence of the facts stated in it, is equally hearsay

1. *Infra*, § 1764.

3. *Infra*, § 1366.

2. *Infra*, § 1764.

whether it be made orally or presented to the court in a written<sup>4</sup> or printed<sup>5</sup> form. Properly to give full effect to the broad scope of "documentary evidence" would involve, in many instances, the writing of duplicate and practically identical treatises.

*A Legitimate Use.*—But while the term "documentary evidence" has no proper place as designating one of the two principal species of evidence, it has a distinct and valuable place as indicating certain special features which attend the use of documents as one of the media of proof. In this connection, documentary evidence is distinguished from evidence by perception,<sup>6</sup> or evidence by witnesses.<sup>7</sup> Such a use of the term "documentary evidence" seems in strict accordance with the way in which reference is made to the other media of proof — perception and witnesses. No confusion is created, so far as these media of proof, perception and witnesses, are concerned, by using a single term to cover both the facts conveyed to a tribunal and the means by which they are conveyed. The vehicle is not mistaken for its cargo. Perception in itself is not, as is readily observed, a species of evidence. It is simply the vehicle by which certain facts are gained by the court in a particular way, viz. through the exercise of its own perceptive faculties. Facts so acquired constitute evidence by perception.<sup>8</sup> In like manner it is agreed that witnesses are not in themselves evidence. Only the statements made by them, the facts which they bring to the tribunal, come within that designation, and are spoken of as evidence by witnesses.<sup>9</sup> In documentary evidence alone, is to be found this failure to differentiate the material vehicle from the incorporeal thought which it carries, a peculiarity, as has been said, due to the complex nature of the conception of a document.<sup>10</sup> In reality documents are not evidence. The statements which they, as vehicles, present to the consciousness of the tribunal, are properly to be classified as evidence.

*Viewed as a medium of proof*, as a vehicle for evidence, a definite and limited treatment may, and should, properly be accorded to "documentary evidence" — regarding its distinctive features in this connection — in much the same way that in a treatise on moral philosophy a restricted treatment might with propriety be

4. *Infra*, § 2756.

5. *Infra*, § 2754.

6. *See* EVIDENCE BY PERCEPTION.

7. *See* WITNESSES.

8. *See* EVIDENCE BY PERCEPTION.

9. *See* WITNESSES.

10. *Supra*, § 17.



given to sexual conduct; or, in a penal code, some statement, under a separate heading, might properly be given to questions relating to crimes which can only be committed against women. The proper scope of a treatment of documentary evidence, while restricted, would yet be of importance.

*Substantive law* has made and will continue increasingly to make very sweeping requirements as to documents. This is done either (1) by statutory enactment or (2) by enforcing the conventions of the parties. Considerations of public policy, for example, have seemed to the law-making body to require that certain important acts, such as deeds or wills, should be constituted or evidenced by a formal writing.<sup>11</sup> In much the same way certain contracts, as those relating to sales of land, or for services not to be performed within a year, are required to be in writing. Even where the written form is adopted by the parties, rather than imposed upon them, substantive law prescribes that, having reduced their contracts or other agreements into a documentary form, such arrangements are to be protected against change. With this object it prescribes certain conditions under which, as is commonly said, evidence of extrinsic facts will be received to vary, contradict or control the ascertained import of a valid written instrument, and establishes rigid conditions, on which alone it grants relief, at law or in equity, against the effect of the instrument, when ascertained. It prescribes also the method by which copies of public documents may be authenticated, and received in evidence.<sup>12</sup> These provisions of substantive law affect deeply the use of documents as a medium of proof.

*Not only by substantive law, but also by procedure*, is the use of documents as evidence greatly affected. The judicial administration of evidence has established, as a rule of procedure, that in proving facts by the use of documents, production of the document itself shall be deemed primary evidence of its contents<sup>13</sup> and has further established definite requirements as to the reception of secondary evidence.<sup>14</sup> This also seems properly treated as an incident of the use of documents as an instrument of proof or a vehicle of evidence. Such a treatment more closely resembles proof of documents than proof *by* documents as is the meaning of the phrase "documentary evidence" in its broader scope.

11. See DOCUMENTARY EVIDENCE.

12. See DOCUMENTARY EVIDENCE.

13. See DOCUMENTARY EVIDENCE.

14. See DOCUMENTARY EVIDENCE.

*This limited and yet distinctive treatment*, of documentary evidence — not as a species of evidence but as carrying certain features of the use of documents as a medium of proof — precisely as the special rules attaching to perception as a medium of proof,<sup>15</sup> or the special rules governing the use of witnesses<sup>16</sup> as a vehicle of evidence — may properly receive separate treatment. This constitutes what seems to be a sufficient ground for allotting a distinct place to documentary evidence in any treatise on the general subject.

**§ 23 (*Subdivisions of Evidence; Oral and Documentary Evidence*); Mr. Gulson's View.**—The necessity, or even the propriety of such a course, has been disputed by so careful a thinker as Mr. Gulson.<sup>1</sup> When a document is presented to the court, says he, it becomes real evidence, or, as we have preferred to call it, evidence by perception.<sup>2</sup> The court sees for itself, what the document states, that it purports to be a deed, a will or some other form of constituent<sup>3</sup> instrument, exactly as it would recognize, by looking at it, any other physical object — say, a knife. “Precisely as the tribunal in the latter case perceives the shape, size, and other characteristics of the knife, so, in the former, does it behold the shape and order of the marks or letters imprinted on the surface of the paper. Both appeal equally to its senses, i. e., in both the cases here suggested to its sense of sight.”<sup>4</sup> Proof of the identity of the original document, or its execution or authenticity, the accuracy of a copy and other similar facts regarding the document are established by personal evidence. It thus happening that the document is properly placed before the court by means of personal evidence, i. e., the oral statement of a witness, and that, when offered in evidence, it presents to the court real evidence, i. e., evidence by perception<sup>5</sup> what then, asks Mr. Gulson, remains to be classified as “documentary evidence?” The designation, in his view, is a useless one and should be eliminated, leaving but two classes or species of evidence, (1) real evidence, and (2) oral or personal evidence. To state his proposition in the terminology of the present treatise, it is to reduce all the media of proof to perception and witnesses.

15. See EVIDENCE BY PERCEPTION.

16. See WITNESSES.

1. Gulson, *Philosophy of Proof*, § 313.

2. See EVIDENCE BY PERCEPTION.

3. *Infra*, § 47.

4. Gulson, *Philosophy of Proof*, § 314.

5. See EVIDENCE BY PERCEPTION.

*It is, perhaps, fairer* that Mr. Gulson be allowed to state his view for himself, together with the authorities by which he reinforces it.<sup>6</sup> "If real evidence be truly, as I have endeavored (and I trust successfully) to establish, neither more nor less than the proof acquired by the tribunal through the use of its own faculties of perception, then there is this difference, and this only, between real and 'written' evidence — that in the case of writing, an ulterior meaning is attached by convention to the characters; i. e., to the shape and order of the marks which are seen to be imprinted on the face of the document.

"But this conclusion as to the ulterior meaning of words and phrases, which we draw, in the case of writing, from our perception of the form and arrangement of the letters visible on the paper, if it alters the character of our evidence at all, is simply in the nature of a very obvious and, in most cases, almost *necessary* inference from that which we actually perceive, depending for its validity and correctness on our previous knowledge of the conventional meaning of words and phrases, as expressed by written symbols. Such an inference, if it alters the case at all, merely converts our *direct* real evidence into *indirect* or *circumstantial* real evidence. But the inferring process in such a case is, generally speaking (i. e., where the writing is legible and the language clear), so shadowy in its action, so certain in its results, as to leave our evidence barely, if at all, distinguishable from direct. And in any case, whether we choose to regard the evidence as direct or as indirect, it is still, to the person who peruses the document, 'immediate' evidence, and where the reader is represented by a judicial tribunal, *real*.

"Even Bentham appears to have apprehended in a confused manner the analogy between the two cases, i. e., between the production in court of a written document, and that of any other kind of material object. At page 691 of the second volume of his treatise upon Judicial Evidence the following passage occurs: 'Imprinted upon any subject-matter of property, the proprietor's name at length would be unquestionably an article of written evidence: no less so the initials, as in the case of G. R. for George Rex. But when instead of the G. R. comes the *broad arrow* on timber, or the *strand* in sail-cloth, then comes the doubt (happily altogether an immaterial one) as between written and real evidence.' Now,

though we must not be taken to assent to Bentham's position, that a mark on timber or on sail-cloth is in itself real evidence, since we regard such matters, not in the light of evidence at all, but in that of facts, yet such marks precisely resemble characters written or printed on paper, in being facts of that permanent and continuing kind which are peculiarly capable of being established by real evidence. Not only, therefore, must we cordially agree with Bentham as to the difficulty of distinguishing between the two cases, but further, we must insist that, so far as concerns the *real* quality of the evidence afforded by the production of either, there is no difference whatever between them; not only does the manifestation of such marks, as he describes, to the senses of a judicial tribunal afford real evidence of the marks, but equally does the manifestation of written characters traced upon paper, or the production in court of paper displaying such characters furnish real evidence of the writing. And it is precisely because there is no solid difference in principle between the two cases that the 'doubt,' to which Bentham refers, is, as he observes, 'altogether an immaterial one.' In the following page, also, we find him again forced to recognize the same resemblance. 'Mint marks,' he there observes,<sup>7</sup> 'applied in the same view, wear an ambiguous aspect, being referable either to the head of *real or written* circumstantial or direct official evidence.'<sup>8</sup>

"Mr. Best, too, is compelled to admit the difficulty he experiences in drawing the line (as he expresses it) between *real and documentary evidence*. 'The remaining instruments of evidence,'<sup>9</sup> he says, 'are documents, under which term are properly included all *material substances*, on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol. Thus the wooden scores on which bakers, milkmen, etc., indicate by notches the number of loaves of bread or quarts of milk supplied to their customers; the old exchequer tallies, and such like, are documents as much as the most elaborate deeds. In some instances, no doubt, *the line of demarcation between documentary and real evidence seems faint*; as in the case of models and drawings, which clearly belong to the latter head, but differ from that which we are now considering in this, that they are *actual*, not *symbolical* representations.' As to which distinction I must beg

7. Bentham, Ev., 11, 692.

9. Best, Ev., § 215.

8. Bentham, Ev., 11, 692.

leave again to remark, that the symbolical quality of written characters in no wise alters the nature, as real or otherwise, of the evidence afforded by the production of the writing; but merely interposes a very simple and obvious process of inference between that which is actually verified by perception, namely, the written character or symbol itself, and that which is actually in question, viz.: the *meaning* of the symbol; an inference which, though it may possibly affect the nature of the evidence as direct or indirect, has no influence upon its character as *real*.

“In further confirmation of the principle now under consideration, let us observe also the analogy existing between the evidence afforded by the copy of a writing, and that furnished by the model of any other material object (such, for instance, as the model of a house) produced in court. In the former case, the nature of the contents of the original writing, which is a single fact, capable of being established in its entirety by real or immediate evidence, is, as it were, split or divided for purposes of proof into two components; namely, (1) the identity or correspondence of the contents of the copy with those of the original writing (which fact cannot well be proved by real evidence, for in that case the tribunal itself must institute the comparison, and for that purpose must have the original before them, which would render presence of the copy superfluous and unnecessary); and (2) the actual nature of the contents of the copy, of which latter fact the production and inspection by the court of the copy furnishes real evidence.

“Precisely similar is the process that takes place in the case of the model. The features and details of the actual house — the compound fact — is split into two component facts; viz.: (1) the identity or coincidence of the various features of the model with those of the real house — a fact not capable of proof by real evidence; and (2) the actual details or features of the model, of which latter fact its own production affords real evidence.

“The analogy between these two cases is also alluded to by Mr. Dumont: ‘In real evidence,’ he observes,<sup>10</sup> ‘representations given by drawings, paintings or models, are much analogous to copies of writings.’

“Having proceeded so far, the writers referred to would hardly, I think, have failed to recognize the truth of the principle under consideration, had not their judgment been obscured from the out-

set by the false and confusing view of the true nature of real evidence induced by their definition of it as 'the evidence of which any object belonging to the class of *things* is the source.' " 11

**§ 24 (Subdivisions of Evidence; Oral and Documentary Evidence; Mr. Gulson's View); Mr. Gulson's View Considered.**

— Viewed from the standpoint of a classification of evidentiary facts, i. e., of evidence itself—in its third sense, of the physical means or agency by which the art of evidence is carried into effect,<sup>1</sup> there would be a philosophical propriety in Gulson's classification into real and personal evidence—for, as will be seen,<sup>2</sup> all evidentiary facts are either physical or psychological. If so, the inferences to be drawn from them must be furnished either by (1) persons, or (2) by things. But for judicial purposes, this broad distinction is practically valueless and is conceded so to be by Mr. Gulson himself in very properly abandoning<sup>3</sup> Best's classification of real evidence—the evidence furnished by things—into *immediate* and *reported* real evidence.<sup>4</sup> Reported real evi-

11. *Vide* Best, Ev., §§ 28, 196.

1. *Supra*, § 2.

2. *Infra*, § 43.

3. "From this it follows that what Mr. Best, under Bentham's auspices, calls 'Real reported evidence' is not real evidence at all, but *transmitted*, or rather a particular phase of transmitted evidence. What they both had in their minds when speaking of real reported evidence was, I have little doubt, the transmitted or reported evidence of those continuing facts or *states*, which from their permanent character either are, or might under more favorable circumstances possibly become, capable of being manifested to the actual senses of a tribunal. But evidence is none the less 'transmitted,' none the more real or immediate, merely because the fact with which it has to deal is capable of being manifested, and might possibly have been manifested, to the perceptions of the inquirer, unless it actually be so manifested. For it is not the quality of the *fact* which is the subject of proof, that must determine how evidence should be classed, but

the nature of the *means* employed to prove it. Thus, as we have just seen, even a human action may, under exceptional circumstances, become the subject of direct real evidence in a court of law. Moreover, if the commission of an offense or contempt in the presence of a tribunal affords real evidence of that offense, surely when any other offense is committed, or any other act performed in the presence of a *witness*, and by him reported or communicated to the court, it must follow that his testimony can be nothing else than 'real reported evidence,' as it is defined by those two writers; and if this be so, then in no conceivable respect does their real reported evidence differ, either from *personal* evidence in general, as they describe it, or from what we prefer to designate transmitted evidence; since it appears that it does not of necessity differ from these last even as regards the nature of the fact with which it has to deal." Gulson, *Philosophy of Proof*, § 225.

4. "Evidence is either *real* or *personal*. By *real* evidence is meant evi-

dence is properly classified as personal; and the reason is a fundamental one, and is, in reality, the controlling factor in this matter of classification. It is that the classifications of evidence must, of necessity, be made from the standpoint of the tribunal; i. e., they relate almost exclusively to judicial evidence. When a percipient witness observes a physical object, to him the evidence is *real*. But what, in reporting it, he states to the tribunal is not a physical but a psycholological fact — the mental state of the witness. The evidence is therefore personal.

*The court may, indeed*, and frequently does, occupy as to certain things brought before it the position of the percipient witness; these facts constitute *real* evidence of the *physical* fact. But it would scarcely be possible that the court should be able directly to perceive; by the aid of its senses—and so obtain real evidence of—the psychological fact, of the *thought*, feeling, intention of another person whether itself derived, or not, from what in natural evidence might be obtained from things and so constitute real evidence. The physical manifestations of the psychological fact may, it is true, be perceived by the court and so constitute real evidence, but the existence and nature of this psychological fact would not, properly speaking, be perceived. The mind of the percipient tribunal would, at best, merely draw an *inference*, more or less accurate, from these manifestations as to the psychological state; but the manifestations, coming to it from human beings, would not be real but personal evidence. The inference itself would not usually be classed as evidence at all; the supposition is that evidence is the *physical* means for producing belief—the statements of the witness, his conduct, demeanor, etc., while under observation. The *inference* is treated under such a classification, as a part of the process of reasoning, and is merely the mental result of a relation between the psychological fact and the manifestation, which relation has been termed *relevancy*.

dence of which any object belonging to the class of things is the source, *persons* also being included, in respect of such properties as belong to them in common with things. This sort of evidence may be either *immediate*, where the thing comes under the cognizance of our senses; or *reported*, where its existence is related to us by

others. *Personal* evidence is that which is afforded by a human agent; either in the way of discourse, or by voluntary signs. Evidence supplied by observation of *involuntary* changes of countenance and deportment comes under the head of real evidence.” Best, Ev., § 28.

It is the peculiarity of a document that it is a physical fact or set of physical facts acting as the vehicle or channel for the conveyance, through the sense of sight, of a psychological fact or set of such facts, thoughts or ideas. On its presentation, a court may readily obtain real evidence of the material or physical portion of the document. It may have these in its very substance, as the water mark of the paper, its texture, apparent age, freedom from interlineations and the like. The physical facts may be placed upon the surfaces of the material substance, as the color and freshness of the ink, the formation of the characters, if any, of the handwriting,<sup>5</sup> the form and arrangements of the conventionalized symbols used in the writing. But all these physical facts are also the vehicle for, and, to a certain extent, are the manifestations of certain invisible psychological facts — thought, feeling, intention — any mental state or condition.<sup>6</sup> On scientific or philosophical principles Mr. Gulson appears also to be entirely correct in saying that the judge, in inspecting a document, is shown by the written characters upon the paper as to the meaning of the writer, in an indirect or circumstantial way. In all cases involving sense-perception by the tribunal of the evidence of a witness, whether the witness speaks orally as in giving his testimony in court upon the witness stand in the hearing of the court, or speaks visually through the conventional characters of a document, the really important, the probative thing, that which overcomes the mental inertia of the court and so causes it to act, is not the physical sound or sight which expresses the mental state of the declarant, but this mental state itself. That which acts upon mind is not material objects, objective phenomena; it is rather the mental inference, the exercise of the reasoning faculty, or, perhaps, occasionally the intention, which produces the effect. It is frequently of assistance to remember that the law of evidence in its fundamental conception deals only with probative facts the relevancy of which is that of logic and has no direct concern with what shall be deemed a *res gestæ* or constituent fact, the relevancy of which is that of substantive law. Prominent among these probative facts are the oral statements of witnesses or the verbal declarations of documents when used in their assertive capacity, i. e., as proof of the existence of the facts stated. Clearly, that which produces the conviction that the oral statement or the verbal declaration announces the truth

5. *Infra*, § 2185.

6. *Infra*, § 43.



is not the mere physical fact of the verbal or written utterance, but the proposition of experience, that under all the circumstances of the case, including the psychological facts of knowledge and absence of controlling motive to misrepresent, the utterance would not have been made had it not been true. To say that a court learns the meaning, the mental state of the witness or the declarant in a document by the circumstantial evidence of the statement which appears or the substances which it reads, seems entirely justified. Judicial evidence presents problems not of physics, but of psychology. But the mental states of the witness or declarant are not *perceived* by the court. Consequently, they do not constitute real evidence, but personal, for they emanate from a person who alone can be properly said to perceive, i. e., to know them by a direct act of consciousness. Psychological facts are, necessarily, established by personal evidence.

*The essential fallacy in Mr. Gulson's position*, is, however, it would seem, demonstrated in another way. If its correctness were conceded, it would prove entirely too much. The result of such a step as that proposed by him would be not only to eliminate documentary evidence as a vehicle or instrument of proof, but to eliminate, in any classification, also oral or personal testimony which he still desires to retain, and reduce all media of proof or instruments of evidence to the single one of perception. Evidence by perception is a term denoting all facts — necessarily physical — which the court perceives by the use of its senses. This perception is not in the least limited to the sense of sight. It may occur on the employment of any sense, including that of hearing. When the oral testimony of a witness is delivered in court, the tribunal *hears* it as fully as the court would perceive a document submitted to it. It perceives the tone of the voice, the hesitancy, the caution or hastiness, all the complicated facts of behavior or demeanor<sup>7</sup> and may draw inferences as to relevant psychological facts regarding the witness — his knowledge, truthfulness, motive to misrepresent and the like — as readily as it can gather the mental or moral characteristics of a writer from his handwriting. The court can as easily perceive for itself that a witness is blind, deaf, hard of hearing or is a negro, as it can see that a document looks old or has a peculiar texture or, perhaps — though this is by no means so certain — that it purports to be a deed. This is clearly evidence

by perception — what Mr. Gulson, following Bentham and Best, calls real evidence. But is it also *real* evidence — proof furnished by *things*; or, is it, on the contrary, personal? Mr. Gulson, to follow his reasoning in case of a document, must claim that it is *real*. But assuming this also to be correct — as it scarcely seems to be — still, what shall be said as to the far more important element of the witness' testimony, the psychological fact in the witness' mind of which the oral testimony is an expression, as the physical demeanor and appearance is a manifestation? Is the *thought* of the witness conveyed to the consciousness of the court by the use of language *real* evidence, because the court hears the expression and perceives the manifestations? If, on the contrary, his thought, conveyed by oral testimony to the hearing of the court, be — as it certainly would seem to be — personal evidence, no reason is perceived why the thought of a writer, conveyed to the consciousness of the court by the sense of sight, through the medium of written, instead of spoken language should not be regarded as *personal* evidence also.

**§ 25 (*Subdivisions of Evidence; Oral and Documentary Evidence*); Conclusions Reached.**— To sum up the results of this examination into the proper scope of “documentary evidence,” it may be taken (1) that as a species of evidence, a classification into oral evidence and documentary evidence would be of little or no value. (2) That as a medium of proof, documents have a recognized and valuable place, sharing with the oral testimony of witnesses and with perception the class of media of proof. (3) That the oral testimony of witnesses is properly confined to the psychological facts, such as thought, and the like, which are conveyed to the tribunal by means of oral testimony, i. e., the verbal statements of witnesses. (4) That “documentary evidence” is confined to such psychological facts, including thought and the like, as are conveyed to the consciousness of the tribunal by the medium of written language carried by any material substance. (5) That the third medium of proof, perception,<sup>1</sup> may properly be used to denote all physical facts, including the expression or manifestation of psychological facts, whether the immediate source of these facts is a person or a thing, which the court perceives by the use of its own senses. It may be added that in connection with the treatment of documents as a medium of proof, it has

1. See EVIDENCE BY PERCEPTION.

seemed appropriate to treat the requirements of substantive law or various branches of procedure especially affecting the use of documents and their distinctive effect in evidence, under this heading of documentary evidence.

**§ 26. (*Subdivisions of Evidence*); Positive and Negative Evidence.**—The term “positive evidence” has been used as synonymous with “direct,”<sup>1</sup> even by so great a jurist as Chief Justice Shaw of Massachusetts.<sup>2</sup> A more accurate use of the term “positive” is that by which it is employed as opposed to “negative” — positive evidence being defined as direct evidence as to the existence of an alleged fact, negative evidence being used to indicate the case where a tribunal is asked to infer the nonexistence of the fact in question from the circumstance that the witness did not perceive it.<sup>3</sup> Certainly the distinction is of little if any practical importance. Besides being a mere restatement of the difference, on a particular set of facts, between direct and circumstantial evidence,<sup>4</sup> it is usually very much a matter of accident whether a witness states that an alleged fact did not exist, or, on the other hand, gives the reason which lies at the basis of the direct assertion, viz.: that he did not perceive its occurrence and would have done so had it occurred. Moreover, as Bentham<sup>5</sup> says: The only really existing facts are positive facts. “A negative fact is the nonexistence of a positive one, and nothing more.”

**§ 27. (*Subdivisions of Evidence*); Real and Personal Evidence; Bentham's View.**—The distinction between real and personal evidence has proved one fertile in confusion. The fundamental difficulty does not lie in the main line of cleavage—real evidence, on the one hand, being the evidence furnished by things — Latin, *res*;

1. *Kentucky*.—Davis v. Curry, 2 Bibb (Ky.) 238 (1810).

*Maryland*.—Cooper v. Holmes, 71 Md. 20, 281, 17 Atl. 711 (1889).

*Michigan*.—Niles v. Rhodes, 7 Mich. 374 (1859).

*New York*.—Pease v. Smith, 61 N. Y. 477, 484 (1875).

*Pennsylvania*.—Bash v. Bash, 9 Pa. St. 260, 262 (1848), “positive” and “clear and satisfactory.” See also Schrack v. McKnight, 84 Pa. St. 26, 30 (1877), “positive” and “satisfactory.”

2. *Com v. Webster*, 5 Cush. (Mass.) 295, 310 (1850).

3. *Falkner v. Behr*, 75 Ga. 671, 674 (1885).

**Illustration.**—The distinction between positive and negative testimony may be illustrated thus: It is positive to say that a thing did or did not happen; it is negative to say that a witness did not see or know of an event's having transpired. *McConnell v. State*, 67 Ga. 633 (1881).

4. *Supra*, § 15.

5. *Works*, VI, 217, 218.

*personal* on the other, being evidence furnished by persons, as this distinction was originally formulated by Bentham. His primary division into species of judicial evidence<sup>1</sup> is thus conveniently summarized by Mr. Gulson:<sup>2</sup> (1) Real and personal evidence; (2) voluntary and involuntary personal evidence; (3) depositional, testimonial and documentary evidence; (4) oral and scriptitious depositional testimony; (5) direct and circumstantial evidence; (6) ordinary and makeshift evidence; (7) preappointed and unpreappointed evidence; (8) original and unoriginal evidence; (9) evidence *ab intra*, and evidence *ab extra*. The distinction between real and personal evidence is thus stated by Bentham:<sup>3</sup> “*Personal* evidence, that which is afforded by some human being — by a being belonging to the class of persons: *real* evidence, that which is afforded by a being belonging, not to the class of persons, but to the class of things.” This is perfectly clear. It is a natural division — one supposed by its author to be inherent in the nature of things. It has no relation to any particular view point; nor to the operation of volition. It is announced as an absolute, unconditioned division based upon the reality or essential nature of things.<sup>4</sup> Bentham proceeds, in two subsequent divisions, to adopt classifications among species of evidence which are more closely related to jurisprudence, and in which the basis of division is respectively (1) the exercise of volition, (2) the relation of the tribunal to the original act of perception. Relative to the existence of volition, Bentham says:<sup>5</sup> “Voluntary personal evidence may be termed, all such evidence as is furnished by any person by means of language or discourse; or by signs of any other kind, designed by him to perform the function, and produce the effect of discourse. *Testimonial* is the term by which evidence of this descrip-

1. Bentham, *Rationale of Jud. Ev.*, bk. I, c. 4.

2. Gulson, *Philosophy of Proof*, § 217.

3. Bentham, *Rationale of Jud. Ev.*, bk. 1, c. 4, p. 53.

4. The distinction, it will be observed, is one of general philosophy rather than of jurisprudence. It is, moreover, of but slight practical value. For, as will be seen later, any particular bit of real evidence becomes personal to any but the original percipient witness. The classification is

also objectionable by reason of its inexactness. Persons are physical objects and so fall under the designation of things and the evidence furnished by them would therefore be properly designated as real evidence.

It is important to observe carefully this circumstance, that persons are material objects and also a source from whence proceed manifestations of mind — knowledge, reason, above all, *will*.

5. Bentham's *Rationale of Jud. Ev.*, bk. I, c. 4, p. 53.

tion will henceforward be designated. To the head of *involuntary* personal evidence may be referred all such personal evidence as, being the result, sign, and expression, of some emotion, is exhibited not only not in consequence of any act of the will directed to that end, but frequently in spite of the will and every exertion that can be made of it. To this head belong, for example, all involuntary modifications of which the deportment, and all involuntary changes of which the countenance, is susceptible." Evidence of which the person to be affected is the original percipient, i. e., verifies or ascertains to be true by the exercise of his own perceptive faculties and evidence which he learns from others, is stated by Bentham<sup>6</sup> as constituting, respectively, evidence *ab intra* and evidence *ab extra*. "The evidence by which, in any mind, persuasion is capable of being produced, is derived from one or other or both of two sources: from the operations of the perceptive or intellectual faculties of the individual himself, and from the supposed operations of the like faculties on the part of other individuals at large. For distinction's sake, to evidence of the first description, the term evidence *ab intra* may be applied; to evidence of the other description, evidence *ab extra*. The modifications of which evidence *ab intra* is susceptible, are perception, attention, judgment, memory; imagination, a faculty little less busy than any of the others, and but too frequently operating in the character of a cause of persuasion, being excluded, as not appearing capable of being with strict propriety ranked among the modifications of evidence. Evidence *ab extra* has place, in so far as the persuasion has its source or efficient cause in the agency of some person or persons other than he whose persuasion is in question. The sort of agency from which such persuasion is derived, is either *discourse* or *deportment*." These classifications seem fairly simple and intelligible — if not valuable.

**§ 28. (*Subdivisions of Evidence; Real and Personal Evidence*); Best's View.**—The difficulties lie, not in Bentham's treatment, but in that of Best. Best has adopted Bentham's division of evidence into real and personal; but, impressed possibly with its lack of inherent value and exactness, has attempted to join with it Bentham's additional classification, cited above, as to the influence of volition and the question of whether the evidence is gained by

6. Bentham's *Rationale of Jud. Ev.*, bk. I, c. 4, p. 51.

the immediate perception of the judicial tribunal or other seeker for truth or is, on the other hand, reported to the tribunal or other inquirer by another person. As Best very truly says,<sup>1</sup> his own statement of the distinction between real and personal evidence has "slightly deviated from the definition given in 1 Benth. Jud. Ev. 53, 54." "Evidence is either *real* or *personal*. By *real* evidence is meant evidence of which any object belonging to the class of *things* is the source, *persons* also being included, in respect of such properties as belong to them in common with things. This sort of evidence may be either *immediate*, where the thing comes under the cognizance of our senses; or *reported*, where its existence is related to us by others. *Personal* evidence is that which is afforded by a human agent; either in the way of discourse, or by voluntary signs. Evidence supplied by observation of *involuntary* changes of countenance and deportment comes under the head of real evidence."<sup>2</sup>

This classification of real and personal evidence obviously announces several propositions in excess of that stated by Bentham. Among these are: (1) Real evidence may be either immediate or reported. (2) The involuntary action of a witness is not personal but real evidence. These additional propositions seem entirely inconsistent with Bentham's original definition of the distinction between real and personal evidence, and much confusion has necessarily resulted from using the phraseology of Bentham's simple distinction to cover additional and subsequent classifications based on the difference between volition and its absence and between direct judicial perception and the information furnished to the tribunal by some other person testifying either as a witness or through documents concerning facts perceived by him. But Mr. Best's additional propositions are not only confusing but erroneous. It is not, in any sense which is valuable to the cause of justice, true that real evidence may be immediate or reported; nor is it true that involuntary action on the part of a human being is evidence furnished by a thing.

*Involuntary Human Action not Real Evidence.*—The idea of Best that evidence of human action not controlled by the will is real evidence, seems to proceed from a failure to distinguish between the respective meanings of the terms *testimony* and evidence. When Bentham is defining testimony he may well require that such a

1. Best, Ev., § 28, note (q).

2. Best, Ev., § 28.

term should be understood as implying the voluntary action of the witness.<sup>3</sup> But it is not questionable that evidence may be presented to the tribunal or other person by the involuntary action of any one as well as by his intended or volitional action and, indeed, Bentham concedes the truth of this by including "deportment" as among the means by which evidence may be communicated directly to the percipient person, judge, jury or witness.<sup>4</sup> A familiar illustration of this fact may suffice, if any illustration be deemed necessary. A defendant is indicted for selling intoxicating liquor to A, knowing him to be a minor. A, as a witness, testifies to the circumstances of the sale and, possibly, as to his age. This is his testimony — all into which his volition directly enters as a factor. What shall be said as to his appearance, physically, as it is presented to the judge and jury from the witness stand? Is it doubtful that any legitimate inferences which the jury reasonably may see fit to draw, either as to A's actual age or the defendant's knowledge with regard to it is *evidence* in the case? Yet these phenomena are largely beyond the control of the will of the witness.

*Volition not the True Test.*— The objection to Best's definition goes still deeper than the apparent confusing of the terms "testimony" and "evidence."<sup>5</sup> The presence or absence of volition is not a true point of differentiation between persons and things; i. e., between real and personal evidence. The true test is furnished rather by the existence or nonexistence of mental action. Things and persons are distinguished, properly, as the physical and the psychological are distinguished, as matter is opposed to mind. Our classification of facts as being either physical or psychological<sup>6</sup> seems a sound one. Under the operation of such a distinction, it would be possible to allow a due place for the physical qualities of men and other animals possessing mental powers. However

3. "Testimonial is the term by which evidence of this description will henceforward be designated." Bentham, *Rationale of Jud. Ev.*, bk. I, c. 4, p. 54.

4. "The sort of agency from which such persuasion is derived, is either discourse or deportment." Bentham, *Rationale of Jud. Ev.*,\* bk. I, c. 4, p. 52.

5. Best is not alone in this particular confusion. It is probably the reason why Mr. Justice Stephen, in defining evidence in terms of its media omits all reference to perception. Stephen, *Dig. Law of Ev.*, c. 1, art. 1.

6. *Infra*, § 43.

this may be, no propriety is perceived for selecting a single mental power, such as will, and making its existence the test between persons and things, i. e., between personal and real evidence, leaving the operation of other mental powers to be an attribute of certain physical objects classified as "things." Nor does such a test work out satisfactorily in practice, whether the evidence presented be that furnished by the physical attributes of an individual who presents himself in court or that arising out of his spontaneous, unintended acts. It would seem clear that where the source of the evidence is a person, it should be classed as personal rather than as real.

*Real Evidence and Evidence by Perception.*—Best's definition of the classification of real and personal evidence seems to be quite as seriously mistaken in adding Bentham's definition of the *ab intra* and *ab extra*<sup>7</sup> to his definition of real and personal evidence as he has been in adding Bentham's distinction between voluntary and involuntary to which reference has been made. Bentham's thought in this connection is a good one—that a marked difference in probative force exists between evidence which the court perceives for itself and evidence as to which the percipient witness informs the court concerning what he has seen; or, more properly, as to the inferences which his mind has drawn from phenomena that his senses have presented to it. There is no limitation in Bentham's view, in dealing with evidence which is directly perceived by the court, that it should be or be thereby created real evidence. It is apparently Best's conception that this classification of real evidence as a term coextensive with whatever the court perceives for itself<sup>8</sup> is in accordance with Bentham's definition of real and personal evidence.

**§ 29. (Subdivisions of Evidence; Real and Personal Evidence); Mr. Gulson's View.**—The view expressed by Best as to the proper meaning of the term "real evidence" has been en-

7. Bentham, *Rationale of Jud. Ev.*, bk. I, c. 4, p. 52.

8. "Again, evidence is either *real* or *personal*. By *real* evidence is meant evidence of which any object belonging to the class of *things* is the source, *persons* also being included, in respect of such properties as belong to them in common with things. This sort of evidence may be either *immediate*, where the thing comes under

the cognizance of our senses; or *reported*, where its existence is related to us by others. *Personal* evidence is that which is afforded by a human agent; either in the way of discourse, or by voluntary signs. Evidence supplied by observation of *involuntary* changes of countenance and deportment come under the head of *real* evidence." Best, *Ev.*, § 28.



dorsed by the opinion of Mr. Gulson.<sup>1</sup> In speaking of the court's use of real evidence in connection with the class of facts known as *events*, acts of conduct, as distinguished from more permanent facts, such as *states*, he says: "The cases in which a legal tribunal is qualified to bring its own senses to bear upon facts of this transient kind are, to say the least of it, somewhat rare. Best, as we have seen, cites<sup>2</sup> the instance of a contempt of court, or offence committed in the presence of a tribunal, in which case the act occurs, as it were, at the very time and place of trial, or, which is the same thing, is investigated at the very time and place at which it occurs; and thus the act, though in a high degree transient, does not assume towards the judicial proceeding the aspect of a terminated fact. In this case, as Mr. Best justly observes, the evidence is both real and direct. In admission, confession, or other acknowledgment made in open court is another instance of an act upon which a judicial tribunal is capable of exercising its perceptive faculties; though in this case, it should be remarked, the evidence does not assume so direct an aspect in relation to the questions at issue, as in the preceding instance.

"So, also, the *demeanour* of a witness who gives evidence in a court of justice is cited by Mr. Best as an illustration of real evidence. But it is not the *demeanour* only of the witness that is made manifest by real evidence. In the case of oral evidence, the *whole act* of the witness in making his statement is brought home to the senses of the tribunal. Not only do the jury hear the words of which the statement consists, but they see, moreover, who is the speaker, as well as his manner or *demeanour* when telling his story. This, however, can scarcely be regarded as a good instance of real evidence, because the matter established,—the statement made by the witness,—is not fact, but evidence; but it may be useful, when comparing the proving power of oral testimony with that of a written statement produced in court, to bear in mind that 'testimony' is itself addressed entirely to the senses of the jury."<sup>3</sup>

1. Gulson, *Philosophy of Proof*, §§ 322, 323.

2. "'Real evidence'—the *evidentia rei vel facti* of the civilians—means all evidence of which any object belonging to the class of *things* is the source; *persons* also being included in respect of such properties as belong

to them in common with things. Thus where an offense or contempt is committed in presence of a tribunal, it has direct real evidence of the fact." Best, *Ev.*, § 196.

3. Gulson, *Philosophy of Proof*, §§ 322, 323.

**§ 30. (*Subdivisions of Evidence; Real and Personal Evidence*); Stephen's View.**—It is one of the few fundamental errors of Mr. Justice Stephen's classification of evidence that it entirely omits perception as a medium of evidence. To repeat his statement, already frequently referred to, "‘Evidence’ means—(1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry; such statements are called oral evidence; (2) Documents produced for the inspection of the court or judge; such documents are called documentary evidence."<sup>1</sup> Clearly no place is left for evidence derived from any facts which the court perceives for itself. As is obvious in the nature of things and as will appear abundantly from the cases, there are facts which do not consist of the statements of witnesses or documents produced for inspection of the court. Under what head, then, does Mr. Justice Stephen classify facts of this nature? Possibly they have been overlooked by him, in the necessary incompleteness of a first attempt to introduce simplicity into a confused mass—a veritable *indigesta moles* of ambiguous decision. It may be conjectured that he is following Bentham's use of the term "testimony" without noticing that the term "evidence" covers a broader scope.<sup>2</sup> Or, perhaps, an insight into his view is afforded by the intimation at another place in the Digest of the Law of Evidence.<sup>3</sup> "Why, it is asked, put judicial notice under the general head of Proof? Is not this a strange heading: ‘Part II. Of Proof.—Chapter I: Facts which need not be Proved?’ There is an apparent verbal opposition, no doubt, which I have removed by a change in the title of the chapter, but the opposition is only apparent and verbal. I believe the arrangement to be logically correct, and I have accordingly maintained it. By Proof I mean the means used of making the court aware of the existence of a given fact, and surely the simplest possible way of doing so is to remind the court that it knows it already. It is like proving that it is raining by telling the judge to look out of the window. It has been said that judicial notice should come under the head of Burden of Proof, but surely this is not so. The rules as to burden of proof show which side ought to call upon the court to take judicial notice of a particular fact, but the act of taking judicial notice, of consciously recalling to the mind a fact known, but not

1. Stephen, Dig. Law of Ev., c. 1, art. 1.

2. *Supra*, § 27 n. 5.

3. Stephen, Dig. Law of Ev. (3d May ed.), Preface, p. 26.

for the moment adverted to, is an act of precisely the same kind as listening to the evidence of a witness or reading a document — that is, it belongs to the general head of proof.”<sup>4</sup> The information acquired by a judge by looking out the window that it is raining is spoken of as a matter of judicial cognizance. This is an illuminating instance of evidence by perception — knowledge acquired by the court through the use of its own faculties of sense perception; — what Mr. Gulson, following Bentham and Best, speaks of as *real* evidence. But clearly the court cannot take judicial notice of a fact not notorious in its nature,<sup>5</sup> i. e.; part of the stock of common knowledge.

§ 31. (*Subdivisions of Evidence; Real and Personal Evidence*); *Conclusions reached*.— Adopting the distinction between real and personal evidence as usable, which will be hereafter done, so far as the terms are employed at all,<sup>1</sup> it must be obvious that this distinction to have any forensic value must be taken from the standpoint of the *tribunal*, i. e., as a distinction of *judicial* evidence. That which the tribunal perceives of an evidentiary nature furnished by a thing, a physical object, is real evidence; that which it perceives of an evidentiary nature furnished by a person, is personal evidence. In other words, that evidence is personal which is furnished to the tribunal by persons, and *real* evidence, that which is furnished to the tribunal by *things*. If this mental concept of the viewpoint of the tribunal be abandoned, the distinction has no value, and only confusion results from its use.

*Thus let it be assumed that the standpoint of the tribunal be left and that of the percipient person who subsequently narrates to the tribunal what he has observed be adopted. The witness has seen a house, a tree — any physical object. To him this evidence of his sense perception<sup>2</sup> is furnished by things — it is therefore *real* evidence. But as the statement of the witness comes to the tribunal, it is *personal*. Best designates such testimony as *reported* real evidence. Yet as most personal evidence is in the same category, viz., consists of statements as to the inferences derived by the witness from physical objects, no actual distinction is furnished. The evidence, real to the witness, has become per-*

4. Stephen, *Dig. Law of Ev.* (3d May ed.), Preface, p. 26.

5. *Infra*, § 699.

1. See Thayer, *Prelim. Treat.*, 280, 281, *in notis*.

2. See EVIDENCE BY PERCEPTION.

sonal to the tribunal. The phrase "reported real evidence," will, therefore, not be adopted.

*Real Evidence and Evidence by Perception.*—It by no means follows that because real evidence is properly regarded as the evidence furnished by things only when such things are perceived by the tribunal itself, that all which the tribunal sees, hears or otherwise perceives for itself is real evidence. That which the court perceives for itself is evidence by perception; one of the three media or instruments of proof; witnesses<sup>3</sup> and documents<sup>4</sup> being the other two.

*Physical Aspect of Persons.*—Most closely approximating real evidence is that class of facts which is furnished by an inspection by the tribunal of the physical form of a human body. That a witness is black, yellow or white; that he has lost a leg; that he appears young, middle-aged or old; this and much more of the same nature clearly is open to the perception of the court and from it inferences are drawn by the tribunal. Under Mr. Stephen's definition—" 'Evidence' means—(1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry; such statements are called oral evidence. (2) Documents produced for the inspection of the court or judge; such documents are called documentary evidence"<sup>5</sup>—it is not evidence at all, being neither "Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry," nor "Documents produced for the inspection of the court or judge." No propriety is perceived for classifying persons as a separate species of physical objects in one connection and not in others. The source of the evidence is a person. It is therefore personal evidence; both under Bentham's definition<sup>6</sup> and in the nature of things. Where the effort is to show that real evidence and evidence by perception cover precisely the same class of facts<sup>7</sup> it would be necessary to treat the evidence as *real* for it is clearly evidence by perception.

*Involuntary Acts.*—The suggestion of Best that the terms real evidence and evidence by perception cover the same ground seems to grow more untenable as the element of mental manifestation, although uncontrolled by the will, grows larger in proportion to

3. See WITNESSES.

4. See DOCUMENTARY EVIDENCE.

5. Stephen, Dig. Law of Ev., art. 1.

6. Bentham, *Rationale of Jud. Ev.*, bk. I, c. 4, p. 53.

7. *Supra*, § 28.

the physical or material element. Such facts, when observed by the tribunal, may not only constitute evidence but evidence of very important character. This is especially true in judging of the credibility of witnesses. It is precisely the opportunity of acquiring this sort of involuntary evidence furnished by persons which constitutes the advantage in reaching truth possessed by a trial court as compared with an appellate tribunal. It is also the basis for the requirement that the oral testimony of a percipient witness shall be deemed primary evidence<sup>8</sup> and the production of such evidence insisted upon by the court until a sufficient justification is shown for proposing a report of it. In many cases the facts perceived by the observing tribunal are so numerous, subtle, interblended and interacting as to elude the possibility of extension on a record for the consideration of an appellate court or even formulated in the mind of the observer at all. Thus, for example, a witness hesitates and halts in giving his testimony, as if seeking for the right word, in which to clothe his idea. Whether this hesitancy be due to a desire to give the precise shade of meaning required by adherence to the exact truth or is due to an effort to recall the details of a fabricated story which he and others have memorized may be an important fact as to which it is usually much easier to draw a correct inference than to assign the reasons for having made it. According to the definition of Mr. Justice Stephen<sup>9</sup> these involuntary acts are not evidence. Assuming, as seems clear, that such manifestations of a mental state constitute evidence, is it real or personal? These statements which the witness is making — the narrative of facts to which he is testifying — are personal evidence. They are intended, volitional; affected by self-interest, bias, lack of memory, love of invention, partisanship — all subjective psychological states or conditions. Can it fairly be said that the manner of telling his story, the reaching of the mind, for example, after something false and fabricated, which first resided in imagination and lies entirely in memory, this inability to find any safe guidance in the reality of things, is not equally personal evidence? This peculiarity may shine through the testimony of the witness in spite of every effort of the will. But, as has been seen,<sup>10</sup> this lack of volition does not render the evidence real, if otherwise properly classed as personal. The

8. *Infra*, § 466.

10. *Supra*, § 28.

9. *Supra*, § 5 n. 10.

manner seems part of the oral statement, when considered in its probative effect. That which produces, or fails to produce, a sense of conviction is not simply the language of the witness but the normal effect of his language, plus or minus the inferences to be drawn from manifestations of the witness' subjective mental state or condition. It can scarcely, it would seem, properly be said that part of the probative effect of the oral testimony of a witness is derived from a person and part from things; that inferences from the mere statement is *personal* evidence and, so far as involuntary manifestations of subjective or psychological states are shown, that it is evidence furnished by things. The source of each is the person testifying; we shall, therefore, regard it as personal evidence. Yet, though personal, it is clearly evidence by perception. If, therefore, the classification of involuntary evidence furnished by persons is to be deemed personal evidence, the field of evidence by perception must be extended beyond that of real evidence. Indeed, it is this element of involuntariness which constitutes much of the distinctive force of this species of evidence by perception and fairly entitles it to separate consideration.

*Voluntary Acts.*— If it be not already apparent that evidence by perception cannot justly be limited to the scope of real evidence as suggested by Best and endorsed by Mr. Gulson,<sup>11</sup> it would seem convincing to notice the many *voluntary* acts of persons which are constantly being perceived by the court, and conduce to its final action. An entire transaction — as where the parties are guilty of contempt of court by a mutual assault in open court — may take place in presence of the presiding judge. More frequently the entire conduct of the parties and their witnesses in court is subject to direct perception by the judge and jury during the course of the trial, whether the latter is in progress or not. Probative inferences may well be drawn from this source of information — which is clearly perception. And yet under no definition has it been treated otherwise than as personal evidence.

*We may, therefore, feel justified* in concluding that “real evidence” is a term which covers such facts as are presented to the perceptive faculties of the court and jury by things; and that personal evidence is a term which denotes such facts as have their origin or source in *persons* whether viewed in a physical or mental capacity or regarded as acting in an involuntary or voluntary man-

11. *Supra*, § 29.

ner; and that such portion of personal evidence as falls within the direct observation of the judge or jury, constitutes, together with real evidence as above defined, evidence by perception.<sup>12</sup>

**§ 32. Secondary Meanings of the Term "Evidence."**—It seems appropriate that the subsidiary or secondary meaning of the term "evidence," that is evidence treated as a *science*, or regarded as an *art* should receive brief attention at this point.<sup>1</sup> This subordination must be understood as merely relative to the purposes of a particular treatise. Jurisprudence stands sorely in need of a science of evidence. Judicial administration, both in the work of trial and appellate courts would be greatly facilitated and expedited were the art of evidence more clearly formulated and better understood by the vast majority of practitioners. To accord the physical means appropriate for this creation of a particular mental state, priority over the skill of the user of these means and the basic principles upon which he may use them to best effect, might be regarded, it might be thought, somewhat analogous to deeming a treatise upon palettes, brushes and paints, their classification and adaptability to certain ends as of a higher or more important nature than a consideration of the rules taught by experience for the use of these things in the fine art of painting or of the underlying principles by the employment of which the masters of the art have produced their wonderful effects of harmony and beauty. However, except incidentally and in a subordinate capacity, little consideration can be afforded to what are, perhaps, the higher ranges of the subject of evidence.

**§ 33. (Secondary Meanings of the Term "Evidence"); Evidence as a Science.**—While the present treatise will, it is hoped, prove of practical value to practitioners and students of the subject, it will not be forgotten that the science underlies the art of evidence and that the elucidation and general acceptance of a sound scientific basis for the establishment of rules of practical administration of the art of evidence is not only entirely feasible but would be of great advantage to the administration itself. The rules and practical administration of evidence—the law of evi-

12. See EVIDENCE BY PERCEPTION.

1. It is, perhaps, fitting that the obvious fact should be stated that in speaking of any *subordination* of the

scientific aspect of evidence to its mechanical or so called practical side the phrase is used in an extremely limited and qualified sense.

dence — may fairly be defined as being that part of the doing of judicial justice which concerns itself with the ascertainment of truth. There is in reality, much justification for the language of Judge Davis in the case of *Hubbell v. United States*:<sup>1</sup> “Evidence, in its narrow and technical sense, is a machine for the discovery of truth fettered and restrained by municipal law and by local regulations, which vary greatly in different countries.” That justice should be done in any case it is first essential that the truth of the matter be ascertained. It is as to this preliminary requisite to the just action of any tribunal with which the law of evidence, whether regarded as a science or as an art, exclusively concerns itself. The object of the law of evidence is, therefore, that of all scientific inquiry — the establishment of truth by the use of the perceptive and reasoning faculties. To the same extent that psychology and logic — formulating the principles or rules which govern or underlie perception and reason — are natural sciences, the law of evidence may also constitute a natural science. In other words, the underlying, fundamental principles of mental action, which most effectively lead the mind to the discovery of truth; and what application, or practice, of these principles will most satisfactorily tend to elicit the truth as to the existence of a fact disputed in judicial proceedings, do not, when considered in and of themselves, depend on any rules of substantive law or procedure, but upon causes inherent in the reality and nature of things in physical and mental states of being.

*This is not true* either of substantive or positive law or of the rules or canons of procedure. By contrast, these are practical and utilitarian rather than controlled by principles in the natural order. The substantive law, for example, has in mind the attainment of practical rather than scientific ends. It seeks to establish and enforce such rules of conduct as, on the whole, are most productive of happiness and protection to the members of society. It prescribes that which in the average case, in view of the stage of social development attained, is most in the public interest. It may change its commands as social conditions alter. The end in view may remain constant; but the means by which substantive law seeks to attain it are always, as it were, in a state of fluctuation.

*Still more controlling* is the effect of varying views of public policy upon the field of procedure, or practical administration.

1. 15 Ct. of Cl. 546, 606 (1879).



As applied to the trial of legal controversies, procedure has indeed, as will be hereafter seen,<sup>2</sup> certain general principles or canons. It seeks to preserve the substantive legal rights of the parties to prove their respective contentions, to obtain the judgment of the jury rather than that of witnesses, to make use of correct reasoning and the like. But as in case of substantive law, and to an even greater extent, the means used to attain the ends which the judicial function proposes to itself and even the relative importance of these ends are found to vary in accordance with the view which society, as represented upon the bench, takes of its interest. This is an eminently desirable proceeding. It would probably be for the benefit of the administration of justice were the conservatism of substantive law less firmly engrafted upon the rules of administration; could its essentially utilitarian character be more fully recognized and the needs of present social conditions be given a greater relative influence than those of two or three centuries ago. The only point to which attention is at present sought to be directed is that the conditions under which both substantive law, and in a still greater measure, the law of procedure, perform their allotted tasks are such as to make it impossible to formulate them as a science. They are controlled by public policy; operating through more or less empirical rules, whereas the law of evidence, regarded in and of itself, is dominated exclusively by the object of verifying facts, i. e., the attainment of truth, and may, therefore, properly be considered as a science.

The phrase —“*considered in and of itself*” — is, however, a qualification of great importance upon the truth of the foregoing statement. Unfortunately, it is one which it is extremely difficult, and under present conditions, practically impossible, to attain. In other words, it would be hard to segregate the field of the law of evidence from the respective provinces of substantive law and procedure, announced and enforced as the three frequently are, by the same judge, in the same breath and often with but little regard for accuracy of statement or for any other than the immediate purposes of the ruling which he is making. The rules appropriate to the exercise of these three judicial functions by reason of this and other causes, to be, to some extent, hereafter, briefly stated, have become so interblended, in part through ignorance, carelessness or inadvertence, and in part, by design for the concealment

of judicial legislation of which its authors, in most cases, should rather have been proud, that any attempt to unravel so tangled a skein is a task attended with no small difficulty and with indifferent hope of success. Yet it seems plain that some such attempt must, of necessity, be made if any degree of clearness is to attach to the consideration of the subject of the law of evidence.

**§ 34. (Secondary Meanings of the Term "Evidence"; Evidence as a Science); Influence of Procedure.**—The manner in which the rules of pleading are confused with those in the law of evidence by predicating an admissibility of the *factum probans* which is, in reality, properly predicated only of the ultimate *factum probandum* is elsewhere stated.<sup>1</sup> But the administrative function of the court in administering the rules of evidence, which is obviously a matter of procedure apart from the rules themselves, has been productive of much confusion to the law of evidence in itself considered, and has also materially affected the present content of the law of evidence. This has been greatly to its detriment as a formulated set of principles for the attainment of truth. Indeed, in many instances, the influence of substantive law upon the law of evidence, to which reference will be made,<sup>2</sup> was in reality, first created through the mechanism of the court's function of administering the rules of evidence. This is particularly true in the matter of presumptions.<sup>3</sup> As will be more fully considered hereafter, it is an eminently proper exercise of the judicial function of administration that the repeated action of successive juries should have the effect of creating a rule of presumption as to what is proper and reasonable under like circumstances. This is legitimate legal growth and tends to the creation of certainty in the rules of law. In the evolution of substantive law from procedure, to which reference is elsewhere made,<sup>4</sup> it was apparently felt that this could best be done by an intimation from the court to the jury as to what they would be *justified* in doing e. g., adopting a particular inference. Should this advice prove acceptable to the jury and well adapted to the ends of justice, the rule might well grow into a matter of *requirement*, the announcement of a rule of law that, in the absence of evidence to the contrary, the law would presume or *assume* that the inference previously regarded merely as suitable for adoption by the jury, was the correct one. Should the rule be

1. *Infra*, § 36.

2. *Infra*, § 35.

3. *Infra*, § 1082.

4. *Infra*, § 1086.

one affecting rights of property, e. g., that the jury might from twenty years' undisturbed open, notorious and adverse enjoyment of an incorporeal hereditament presume the existence of a lost grant, it would be almost inevitable that the subsequent step in the process should be taken, i. e., that the presumption of law should be announced as a conclusive presumption of law — in reality, a rule of substantive law. This method of judicial legislation had the additional advantage that it not only introduced consistency into the practical results of litigations and kept right reason in the position of a guide but it effectually concealed, under the phraseology of the law of administration, the fact that it was, in effect, legislation. Carried through, quietly and as a matter of routine discharge of the judicial function, the fiction that the newly created law had always been the law from the earliest days took no apparent damage. What did suffer injury as a result of the process was the uniformity and consistency of the law of evidence — not only by the direct introduction into its field of propositions of substantive law, based on no special desire for the attainment of truth, but growing out of considerations of public policy with which the law of evidence has but little, if any, direct concern; but to still more subtle and deep reaching injury which grew, in time, as a perhaps unexpected corollary, that as the substantive rights of the parties were forced to figure in the livery of the adjective law of evidence, the rulings made in the course of administering that law were the subject of appeal or exception to an appellate court, a result extremely prejudicial to the accurate, speedy and complete attainment of justice through litigation.

*In much the same way*, and largely on account of the rights of parties on appeal regarding rulings on points in the law of evidence to which attention has just been called, the practical administration of the law of evidence has introduced a large number of so-called presumptions — apparently rules of law but, in reality, assumptions or provisional rulings in the course of administration as to the burden of evidence.<sup>5</sup> In discharge of his obvious administrative duty to expedite trials, so far as may be consistent with the substantive rights of the parties,<sup>6</sup> a presiding judge is amply justified and perhaps, in a sense, require to eliminate, so far as possible, all uncontroverted matters, and all matters not seriously contested, with a view to bringing out and trying, as speedily as

5. *Infra*, § 967.

6. *Infra*, §§ 544 *et seq.*

convenient, the real question which the parties are desirous of presenting for consideration. In so doing, he is well warranted in making certain assumptions — that acts apparently regularly done, so far as presented, are actually regular in all particulars, that officials have done their duty, that there is no fraud, illegality or the like. These are merely provisional assumptions,<sup>7</sup> designed to assist in getting at the gist of the case as rapidly as possible. They are announced by a statement that a *prima facie* case has been made out; i. e., that the burden of evidence<sup>8</sup> as to a given point has been sustained. As the usual method for shifting this burden of evidence — usually and erroneously called the “burden of proof” — is by the establishment of a presumption of law<sup>9</sup> such a ruling is apt to take the form of saying that it is a presumption of law in favor of official regularity, against fraud, in favor of legality and the like. These also are commonly treated as part of the law of evidence and still further disguise the simplicity and scientific correctness of the fundamental natural principles upon which the law of evidence, considered as a science, itself rests.

**§ 35. (*Secondary Meanings of the Term “Evidence”;* *Evidence as a Science*); Open Influence of Substantive Law—**

When compared with the intimate relations existing between the law of evidence and the rules of procedure or administration, the field of positive, or as it has seemed best to call it, *substantive* law is, in the nature of things, comparatively distinct, and the line between it and that of evidence clearly marked. The reason for this is entirely obvious and consists in the fact that rules of procedure and the law of evidence both lie in a still wider division of the *corpus juris* or entire body of law — namely, that of what Bentham called the *adjective* law, to which the substantive law is in direct contrast, both in name and proper operation. In brief, the substantive law prescribes the nature and extent of the rights and duties which persons, real or artificial, have as between each other or toward the state; while the adjective law regulates the manner in which rights are made available or these duties enforced. *A priori*, it would seem, as if so broad a line of demarcation might be difficult to pass without obvious impropriety and immediate detection. This is, indeed, in part true where the substantive law *directly* comes into the field of evidence, introducing its considera-

7. *Infra*, §§ 1184 et seq.

9. *Infra*, § 1082.

8. *Infra*, §§ 967 et seq.

tions of public policy and, as it were, engrafting them upon a set of rules adjusted upon scientific principles, for the verification of facts or the ascertainment of truth. This important subject — of the direct influence of substantive law upon the adjective law of evidence will be considered later in detail and no apparent necessity exists for anticipating to any considerable extent, what is to be more fully treated hereafter. It may, however, be conducive to clearness to notice, at this point, that the direct effect of substantive law is, in main, accomplished in one of five ways: (1) The substantive law may affix a definite probative weight to a particular inference of fact. As a true science, the law of evidence recognizes no probative force other than that prescribed by the logic of experience. But the substantive law may prescribe that, in the absence of evidence to the contrary, the judge and jury shall *assume* that a certain inference of fact is, *prima facie*, correct — as where the inference of death drawn from seven years of unexplained absence without knowledge on the part of those likely to possess it in case the person in question were alive, is *assumed* to be the correct one.<sup>1</sup> (2) The substantive law, on the contrary, may nullify the reason by prescribing that the inferences arising from the statements of a single witness shall not, in certain cases, be deemed *prima facie* sufficient;<sup>2</sup> but that other inferences, i. e., additional evidence — from which such inferences may be drawn — should be furnished in *corroboration*. Thus it may be provided on any criminal trial for perjury that the falsity of the statement made by the accused shall be proved by more than the uncorroborated evidence of a single witness.<sup>3</sup> (3) The substantive law may forbid evidence to be given upon certain subjects as state secrets, the information essential to public justice or the like;<sup>4</sup> or that persons standing in certain relations shall not be witnesses for or against each other, as in case of husband or wife.<sup>5</sup> (4) Substantive law may prescribe, on the other hand, that persons standing in certain definite relations to the propositions in issue, or to the evidence sought to be elicited, shall not be required to testify, either generally or on certain topics, but may claim a privilege of silence regarding such matters. (5) The substantive law may require that only a certain form of proof, e. g.,

1. *Infra*, §§ 1091 *et seq.*

2. *See* WITNESSES.

3. *See* WITNESSES.

4. *See* PRIVILEGE.

5. *See* PRIVILEGE.

writing, shall be received as evidence, in certain connections, as where a *will* is required to be proved by an instrument in writing.

**§ 36. (Secondary Meanings of the Term "Evidence"; Evidence as a Science); Concealed Influence of Substantive Law.—**

Much more subtle, pervasive and confusing are the cases in which substantive law is introduced *indirectly* into the field of the law of evidence. This is done by the employment of the terms, phraseology and nomenclature appropriate only to the uses of the law of evidence to cover propositions of substantive law. The instances in which this is done, are most frequently introduced by the phrase "evidence is admissible to prove" or "evidence is not admissible to prove" a given fact. The peculiarity is that in many such cases, the evidentiary fact, the *factum probans*, is well calculated to prove the fact to the proof of which it is directed, i. e., the *factum probandum*. The real cause for rejecting the former fact is that the latter fact is not provable under the rules of substantive law, or that the ultimate *factum probandum* — the constituent fact at the end of the chain of probative facts would be excluded by these rules. The real difficulty lies in a failure to distinguish accurately between the function of a probative fact and that of a constituent one. What is properly *factum probans* is a question in the law of evidence. What among possible *facta probanda* are constituent facts, i. e., are relevant to the existence of or constitute the right claimed or liability asserted, is determined by the component elements of this right or liability as these are placed in issue by the pleadings. The question of admissibility is therefore determined, by the law of pleading, back of which stands the substantive law under which the right or liability is claimed. What is *factum probandum* is a question, primarily, of pleading. That is, what propositions of fact are placed in issue in any given case is a question of pleading.<sup>1</sup> What are the component facts<sup>2</sup> or subordinate propositions involved in proof of a proposition in issue, and whether the constituent facts,<sup>3</sup> i. e., the material facts in the *res gestæ* of the case would, if proved, be sufficient to establish the right or liability claimed or asserted in a proposition in issue, are questions of substantive law. When, therefore, evidence is offered to prove a *factum probandum* which is not relevant to any issue in the case, that which blocks the path to admissibility

1. *Infra*, § 932.

3. *Infra*, § 47.

2. *Infra*, § 45.

is primarily the law of pleading, secondarily, the substantive law relating to the particular subject. It will be observed that these difficulties relate entirely to the admissibility of the ultimate *factum probandum*, nothing being suggested as to any lack of evidentiary quality or legal admissibility in the *factum probans* to establish the existence of the *factum probandum* were the latter itself provable. When, in such a case, the admissibility is predicated or denied as to the *factum probans*, instead of the ultimate *factum probandum* it is obvious that a proposition in the law of pleading or of substantive law has been unwarrantably transferred into the field of the law of evidence. It is further clear that the entire *corpus juris* of substantive law can readily be placed within the boundaries of the law of evidence by the use of these simple formularies: "Evidence is admissible to prove" or "evidence is inadmissible to prove," a certain fact. Perhaps the most conspicuous instance of this process is found in connection with the so called "parol evidence rule." The familiar rule is announced as one in the law of evidence: Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a valid written instrument.<sup>4</sup> In truth there is no objection to the evidence of the varying or contradictory facts on the ground that the evidence of them is "parol" or oral. "If verbal matter, i. e., spoken language is to be proved *at all*, no mode of proof is so legitimate or appropriate for the purpose as the oral statements of a witness who has heard the words spoken."<sup>5</sup> The obstacle to proving oral statements contradictory of or varying the terms of the valid written instrument is not that they are proved by oral testimony but that, under the substantive law relating to documents, a contradictory or varying oral statement, made prior to or at the time of the execution of a written instrument is not provable at all. The *factum probans*, the oral testimony of the percipient witness, is clearly admissible to prove the prior or contemporaneous verbal statement, did the substantive law permit proof of it. As it does not, and as it is the *factum probandum* which is not admissible, to lay the stress of the rule upon the admissibility of the *factum probans* transfers a rule of substantive law, thus indirectly into the province of the law of evidence.

§ 37. (*Secondary Meanings of the Term "Evidence"*);  
The Art of Evidence.—Except to a very limited extent and prin-

4. See PAROL EVIDENCE.

5. Gulson, Philosophy of Proof, § 447.

cipally in connection with the examination of witnesses,<sup>1</sup> the consideration of evidence as an art lies outside the scope of the present treatise. That there is such an art of presenting evidence in accordance with the fundamental natural principles underlying the science is abundantly attested by the daily usage of successful practitioners. That it is capable of being taught and consciously employed seems equally free from doubt. Probably few reforms in legal procedure would be more salutary and conducive to the speedy and successful dispatch of judicial business than the development of a class of advocates well trained in this art of evidence. The delays in judicial administration which result from a pure *ignoratio elenchi* — a misstating of the real issue in a case — constitutes no inconsiderable portion of the difficulty experienced by American courts in despatching the business before them. The law of evidence is rather a means than an end; more of a *tool* than a *product*. Consequently, it is of at least equal practical value to the barrister to know how to use his tool as to become acquainted with its configuration. Such a treatment of the subject is however, as has been said, foreign to the purpose of the present treatise.

1. *See* WITNESSES.



## CHAPTER II.

## FACTS.

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§ 38. **"Fact" Defined.**— These definitions of the term evidence as constituting the physical means for inducing belief in the truth of some matter of fact—meaning proposition or expression of fact—are devoid of definite meaning until an approximately accurate definition as to what is to be understood by the term "fact" which all such definitions of the term "evidence" uniformly employ, has been gained. Scientifically speaking—a fact is that which exists—either in the world of matter or in that

of mind. "We may define a fact as a reality of nature, existing or perceptible in the present or the past, and having its seat either in matter or in mind."<sup>1</sup> Mr. Justice Stephen abandons in his third edition the brave attempt of previous editions to define this protean term "fact"<sup>2</sup> and contents himself with saying<sup>3</sup> that "fact includes the fact that any mental condition of which any person is conscious exists." This means, we may assume, merely that a fact may be psychological, as well as physical — a classification to which reference is elsewhere made.<sup>4</sup>

**§ 39. ("Fact" Defined); Other Definitions.**—*Professor Thayer*<sup>1</sup> states more at length the thought that fact is that which exists, stated elsewhere,<sup>2</sup> "The fundamental conception is that of a thing

1. Gulson, *Philosophy of Proof*, pt. 33, § 49.

2. "'Fact' means: (1) Everything capable of being perceived by the senses. (2) Every mental condition of which any person is conscious. Every part of any fact is itself a fact." Stephen, *Dig. Law of Ev.*, ed. 1, c. 1, art. 1. The critic in the *Solicitors' Journal* may be assumed to have had no small part in determining this course. Of Mr. Stephen's definition of "fact," he writes: "But what is a fact? It is, by article 1, '(1) everything capable of being perceived by the senses; (2) every mental condition of which any person is conscious.'" *Solicit. Jour.*, vol. 20, p. 869. Again he says: "But, further, it is not true to say that the issue is always as to the existence or non-existence either of a 'thing perceived by the senses,' or of a 'mental condition.' Take the case of an action brought to recover damages for injury sustained in a street accident, or against a bailee for negligent custody. That the one party did in fact strike against and injure the other, that the goods were in fact lost out of the custody of the bailee, may be admitted, but there still remains the cardinal question, was negligence imputable to the defendant? But negligence is neither a thing

capable of being perceived by the senses, nor is it a mental condition of which a person is conscious. It is the nonconformity of the defendant's conduct with an imaginary standard of reasonable care, which the jury have to derive from their knowledge and experience of life, and to apply to the circumstances of the case." *Solicit. Jour.*, vol. 20, p. 869.

The critic himself attempts a definition: "Fact means commonly an act or an event, and *not* a thing; it may at least as well mean a quality of an act, person, or thing, as a thing perceived by the senses or a mental condition." *Solicit. Jour.*, vol. 20, p. 870. "To define 'fact' is an attempt of much the same kind as to define 'matter' or 'mind'; and the occasion is an apt one for remembering the maxim that definition is a dangerous thing in law, and, acting under this caution, we should propose that the interpretation of the word 'fact' should be left to common sense and common understanding, which have not hitherto found much difficulty in dealing with it." *Solicit. Jour.*, vol. 20, p. 870.

3. *Digest, Law of Ev.*, c. 1, art. 1.

4. *Infra*, § 43.

1. *Prelim. Treat. Ev.*, 191.

2. *Supra*, § 38.

as existing, or being true. It is not limited to what is tangible, or visible, or in any way the object of sense; things invisible, mere thoughts, intentions, fancies of the mind, when conceived of as existing or being true, are conceived of as facts. The question of whether a thing be a fact or not, is the question of whether it is, whether it exists, whether it be true. All inquiries into the truth, the reality, the actuality of things, are inquiries into the fact about them. Nothing is a question of fact which is not a question of the existence, reality, truth of something; of the *rei veritas*."

*As defined in the cases*, certain aspects of the term "fact" other than as denoting an *existence*, have attracted the attention of the courts. Among other attributes is that of *fixity* or unchangeableness.<sup>3</sup> There is also the attribute of *accomplishment* — something effected or achieved.<sup>4</sup> Still the idea of bare *existence*, which seems to underlie these various concepts, has not been overlooked in the cases.<sup>5</sup>

*The Object of Evidence*.—Fact has been defined as *that which may be proved*—though it would seem more accurate to regard the only object of evidence, as being the truth of a proposition rather than the existence of a fact.<sup>6</sup> "A fact, as the term is used in legal proceedings, is an event; a thing done or said; an act or action, which is the subject of testimony. The condition or state of mind at a given time is a fact. If any emotion is felt, as joy, grief, or anger, the feeling is a fact. If the operations of the mind produce an effect, as knowledge, skill, intention, this effect on the mind is a fact. When the mental processes lead up to and produce a desire or intention to do a certain thing, such state of mind is a fact. Willfulness is a desire or intention to produce a certain result; hence, willfulness is a fact."<sup>7</sup>

*Bentham*.—"Facts at large, whether considered as principal or as evidentiary, may be divided into classes, according to several different modes of division. . . . *Distinction the first*.—Facts physical, facts psychological. The source of the division here is,

3. Huber v. Guggenheim, (U. S.) 89 Fed. 598, 601 (1898).

4. Gates v. Haw, 150 Ind. 370, 50 N. E. 299 (1898).

5. "A 'fact' is defined to be 'a thing done, reality, not supposition, action, deed.'" (Walker's Dictionary.) Lackey v. Vanderbilt, (N. Y.) 10 How. Pr. 155, 161 (1854).

6. This, however, seems to have been directly disputed. Lawrence v. Wright, 9 N. Y. Super. Ct. (2 Duer) 673, 674 (1853).

7. Barr v. Chicago, St. L., etc., R. Co., 10 Ind. App. 433, 37 N. E. 814 815 (1894).

the sort of beings in which the fact is considered as having its seat. A physical fact is a fact considered to have its seat in some inanimate being; or, if in an animate being, by virtue, not of the qualities by which it is constituted animate, but of those which it has in common with the class of inanimate beings. A psychological fact is a fact considered to have its seat in some animate being; and that, by virtue of the qualities by which it is constituted animate. . . . *Distinction the second.*—Events, and states of things.—Source of the division in this case, the distinction between a state of motion and a state of rest. By a fact is meant the existence of a portion of matter inanimate or animate, either in a state of motion or in a state of rest. . . . *Distinction the third.*—Facts positive and negative. In this may be seen a distinction, which belongs not, as in the former case, to the nature of the facts themselves, but to that of the discourse which we are under the necessity of employing in speaking of them. In the existence of this or that state of things, designated by a certain denomination, we have a positive, or say, an affirmative fact; in the nonexistence of it, a negative fact. But the nonexistence of a negative fact is equivalent to the existence of the correspondent and opposite positive fact; and unless this sort of relation be well noted and remembered, great is the confusion that may be the consequence. The only really existing facts are positive facts. A negative fact is the nonexistence of a positive one, and nothing more; though, in many instances, according to the mode of expression commonly employed in speaking of it, the real nature of it is disguised.”<sup>8</sup>

*Best.*—The definition of Best<sup>9</sup> follows closely upon that of Bentham. “Confining ourselves henceforward to *truths of fact* — the proper object of the present treatise — we shall first direct attention to some divisions of them, which, as connected with jurisprudence especially, it will be convenient to bear in mind. In the first place, then, facts are either physical or psychological. By ‘physical facts’ are meant, such as either have their seat in some inanimate being, or if in one that is animate, then not by virtue of the qualities which constitute it such; while ‘psychological facts’ are those which have their seat in an animate being, by virtue of the qualities by which it is constituted animate. Thus, the existence of visible objects, the outward acts of intelligent agents, the *res gestæ* of a lawsuit, etc., range themselves under the

8. Bentham, *Jud. Ev.*, bk. I, c. 3.      9. Best, *Ev.*, §§ 12, 13.

former class; while to the latter belong such as only exist in the mind of an individual; as for instance, the sensations or recollections of which he is conscious, his intellectual assent to any proposition, the desires or passions by which he is agitated, his animus or intention in doing particular acts, etc. Psychological facts are obviously incapable of direct proof by the testimony of witnesses; their existence can only be ascertained either by confession of the party whose mind is their seat — *index animi sermo* — or by presumptive inference from physical facts.”<sup>10</sup> “There are two other divisions of facts which deserve to be noted. One is, that they are either *events* or *states of things*. By an ‘event’ is meant some motion or change, considered as having come about either in the course of nature, or through the agency of human will; in which latter case it is called ‘an act,’ or ‘an action.’ The fall of a tree is ‘an event,’ the existence of the tree is ‘a state of things;’ but both are alike ‘facts.’ The remaining division of facts is into *positive* or *affirmative*, and *negative*; a distinction which, unlike both the former, does not belong to the nature of facts themselves, but to that of the discourse which we employ in speaking of them. The existence of a certain state of things is a positive or affirmative fact, the nonexistence of it is a negative fact. But the only really existing facts are positive ones — for a negative fact is nothing more than the nonexistence of a positive fact; and the nonexistence of a negative fact is equivalent to the existence of the correspondent and opposite positive fact.”

*Holland.*—Holland’s definition of fact is best understood by receiving it in the way in which he has given it.<sup>11</sup> “‘Facts’ (Thatsachen, Faits), which have been inadequately defined as ‘transient causes of sensation,’ are either ‘events’ or ‘acts.’ (1) ‘Events’ (Ereignisse, zufällige Umstände, Zufall, Casus, Evenements) may be either movements of external nature, such as a landslip, the increase of a flock of sheep, the death of a relative, or an accidental fire; or may be acts of a human being other than the human being whose rights or duties are under consideration. Lapse of time and change of place are among the events which are most productive of legal consequences.<sup>12</sup> (2) ‘Acts’ (Handlungen,

10. Mascard de Prob. Concl., 94; 1 Benth., Jud. Ev., 82, 145; 3 Benth., Jud. Ev., 6.

11. Holland, Juris. (10th ed.), c. 8, p. 101.

12. Savigny, System, III, p. 297;

Windscheid, Pand. 1, 291. Stat. 43 and 44 Vict. c. 9, was passed “to remove doubts as to the meaning of expressions relative to Time in Acts of Parliament and other legal instruments.”

Actes), in the widest sense of the term, are movements of the will. Mere determination of the will are 'inward acts.' Determinations of the will which produce an effect upon the world of sense are 'outward acts.' 'The inner stage of an act,' says a recent writer, 'ends with the determination (Entschluss), to which it is guided by a final cause (Zweck). The outer stage (die That) is the realization of the former in the external world by the help of natural laws, such as gravity.'<sup>13</sup> Jurisprudence is concerned only with outward acts.<sup>14</sup> An 'Act' may therefore be defined, for the purposes of the science, as 'a determination of will, producing an effect in the sensible world.'<sup>15</sup> The effect may be negative, in which case the act is properly described as a 'forbearance.'"

*Sir George Cornwall Lewis* thus defines "fact": "By a matter of fact I understand anything of which we obtain a conviction from our internal consciousness, or any individual event or phenomenon which is the object of sensation. It is true that even the simplest sensations involve some judgment, when a witness reports that he saw an object of a certain shape and size, or at a certain distance, he describes something more than a mere impression on his sense of sight, and his statement implies a theory and explanation of the bare phenomenon. When, however, this judgment is of so simple a kind as to become wholly unconscious, and the interpretation of the appearances is a matter of general agreement, the object of sensation may, for our present purpose, be considered a *fact*. A fact, as so defined, must be limited to individual sensible objects, and not extended to general expressions or formulas, descriptive of classes of facts, or sequences of phenomena, such as that the blood circulates, the sun attracts the planets, and the like. Propositions of this sort, though descriptive of realities, and therefore, in one sense, of matters of fact, relate to large classes of phenomena, which cannot be grasped by a single sensation, which can only be determined by a long

13. Ihering, *Der Zweck im Recht*, I, p. 32.

14. "Nec consilium habuisse noceat, nisi et factum secutum fuerit." Dig. I. 16, 53.

15. The "Entschluss des Willens" plus the "Aeusserung des Willens" is "That," which may be of omission or of commission. "Die That ist uber-

haupt die hervorgebrachte Veränderung und Bestimmung des Daseyns. Zur Handlung aber gehört nur dasjenige was von der That im Entschlusse liegt, oder im Bewusstsein war, was somit der Wille als das seinige anerkennt." Hegel, *Propädeutik*, Einl., § 9.

series of observations, and are established by a process of intricate reasoning.”<sup>16</sup>

§ 40. “**Matter of Fact.**”—It will be noticed that in Prof. Greenleaf’s definition of the term “evidence” as given above<sup>1</sup> which states the accepted nomenclature on the subject—“The word evidence, in legal acceptance, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved”<sup>2</sup>—it is not the truth of a “fact” which is submitted to judicial investigation and to proof of the truth of which evidence is directed; it is said to be some “matter of fact” concerning which these statements are made. What, then, is “matter of fact” and how is it related to the term “fact?” As that of a species to a genus. For judicial purposes, “fact” as a genus, is divided into three species (1) matter of law, (2) matter of opinion, and (3) matter of fact. No very clear differentiae indicate these several species. It may, indeed, be said that any facts not clearly falling within the first or second species are deemed to be comprised in the third. In other words, whatever falls within the genus “fact” which is not clearly “matter of law” or “matter of opinion” is properly classed as “matter of fact.”

It will be necessary to consider in detail the relation of matter of law and matter of fact in the next chapter, especially, as these subjects are partitioned, in English practice, between the judge and the jury.<sup>3</sup>

§ 41. **Matter of Law.**—Obviously, within the definition of the term “fact” given *supra*,<sup>1</sup> the existence of a rule of law is a fact. This is at once perceived and conceded when the rule of law is other than one embraced within the field of domestic jurisprudence—the law of the forum. The existence of a rule of foreign law is, by the great weight of authority,<sup>2</sup> a question of fact. But it is otherwise as to rules of municipal or domestic law—the commands of the sovereign power of the jurisdiction under which the court is itself constituted. Knowledge and enforcement of these laws is, so far as the judge is concerned, part

16. Lewis, Authority in Matters of Opinion, c. 1, § 1.

1. *Supra*, § 5 n. 8.

2. Greenleaf, Ev. (15th ed.), c. 1, § 1.

3. *Infra*, §§ 67 *et seq.*

1. *Infra*, § 38.

2. *Infra*, §§ 154 *et seq.*

of the judicial office. It is a function of government — part of the machinery by which the sovereign controls its subjects and makes its will effective. It has seemed wise, partly as conducive to the proper demarkation of the respective provinces of the court and jury,<sup>3</sup> to segregate such matters of fact from facts of a different relation to the administration of justice under the general term “matter of law.” As the Supreme Court of West Virginia say:<sup>4</sup> “As distinguished from the law, a fact may be taken as that out of which the point of law arises, that which is asserted to be or not to be, and is to be presumed or proved to be or not to be, for the purpose of applying or refusing to apply a rule of law.”

**§ 42. Matter of Opinion.**— Viewed apart from jurisprudence, the fact that a witness has drawn a particular inference, reached a given conclusion or performed a particular act of judgment, is merely a fact. But there are strong administrative reasons for separating such facts from facts in general. It has been deemed desirable not only that the function of the judge should be preserved from the intrusion of the jury, and his special field reserved to him under the term “matter of law” but also that the special field of the jury’s action—that of applying their judgment to the verification of facts constituent of the issue in any case—should be preserved from the intrusion of the witnesses. The witnesses are to state facts observed by or known to them—not to reason about them. The jury will draw the inferences, employ the determining or reasoning faculties, “judge of their evidence.”<sup>1</sup> In a general way, it may be added, that so large an element of inference as may be involved in the statement of a fact or is required by the limitation upon ordinary powers of expression,<sup>2</sup> on the part of the witness, or lack of coördinating power in the jury,<sup>3</sup> will be permitted.

Other inferences constitute matter of opinion as to which a witness is not permitted to testify; but all such inferences—especially in case of conclusions or acts of judgment, where the element of reasoning predominates—or where the inference relates to a subject not material to the issue in the case, are rejected. “Matter of opinion” thus defined in the law of evidence—the involution of the element of inference or reasoning to an extent in

3. *Infra*, §§ 67 *et seq.*

4. *Hulings v. Hulings Lumber Co.*,  
38 W. Va. 351, 18 S. E. 620 (1893).

1. *Infra*, §§ 1796 *et seq.*

2. *Infra*, §§ 1801, 1812, 1814.

3. *Infra*, § 1814.



excess of that required for a simple statement of fact — is thus referred to by Lewis: "Doubts, indeed, frequently arise as to the existence of a matter of fact, in consequence of the diversity of the reports made by the original witnesses, or the suspiciousness of their testimony. A matter of fact may again be doubtful, in consequence of the different constructions which may be put upon admitted facts and appearances, in a case of proof by (what is termed) circumstantial evidence. Whenever such doubts exist they cannot be settled by a direct appeal to testimony, and can only be resolved by reasoning; instances of which are afforded by the pleadings of lawyers and the disquisitions of historians upon contested facts. When an individual fact is doubted upon reasonable grounds, its existence becomes a matter of opinion. The existence of such a fact, however, is not a general or scientific truth, but a question to be decided by a consideration of the testimony of witnesses."<sup>4</sup> This meaning of the term will be distinguished from one with which the law of evidence has no concern, viz.: Those propositions which from their nature do not admit of determination of verification as matters of fact, but are necessarily like matters of theological or political belief, matters held by the judgment but incapable of external proof.

"Matters of opinion, not being disputed questions of fact, are general propositions or theorems relating to laws of nature or mind, principles and rules of human conduct, future probabilities, deductions from hypotheses and the like, about which a doubt may reasonably exist. All doubtful questions, whether of speculation or practice, are matters of opinion. With regard to these, the ultimate source of our belief is always a process of reasoning."<sup>5</sup>

**§ 43. Classification of Facts; Physical or Psychological.**—Classifying facts in general, according to whether they are within or without the body of the observer, they may be divided into (1) physical, of which the knowledge of the observer comes through the *perception* of the senses; and (2) psychological, comprising feelings, emotions and other phases of the mind of which the latter is intuitively aware. It may well be that the mind is aware only of changes in its states of consciousness.<sup>1</sup> Still, it is entirely possible

4. Lewis, *Authority on Matters of Opinion*, c. 1, § 1.

5. Lewis, *Authority on Matters of Opinion*, c. 1, § 1.

1. "All that we actually know, in-

dependently of inference, is, in every case, the same, namely, our own intuitive feelings." Gulson, *Phil. of Proof*, § 30.

to distinguish between a change in consciousness due to the influence of external sense perception taking its origin or reacting from contact with a physical object on the one hand, and, on the other, a change of consciousness caused, so to speak, by the reaction of consciousness directly upon itself. The first is the mind's perception of a physical fact. The second is its recognition of a psychological one. In the former process, as is more fully considered elsewhere,<sup>2</sup> is presented, in all cases, even the simplest, a necessary element of inference, the exercise of the faculty of reason, which lies, as it were, between the physical object and the mind's awareness of its nature and qualities. In the latter there is a mere apprehension by the mind without the aid of sense perception and "unassisted by any effort of the reasoning powers beyond that amount of judgment which is involved in the progress from the feeling of which we are conscious to a belief in the existence of the thing that we feel."<sup>3</sup> It may, however, well be as pointed out by Mr. J. S. Mill<sup>4</sup> that what the mind assumes to be intuition is merely an inference too rapid for conscious appreciation of its several steps.

*Physiological Facts.*— There is, indeed, a third class of facts, of limited range, intermediate between the physical and the psychological fact, partaking, to a certain extent, of the attributes of each. These are they which are perceived by the mind not as influencing or affecting it from some physical object without the observer but from a physical object *within* or upon the observer. This is objectively rather than subjectively perceived by the mind. The observer is conscious of a certain physical or bodily condition. Thus, an injured person may be aware of certain sensations in his bodily frame. He knows where to locate them. The feeling of pain arising in his mind is a purely psychological fact, which is elsewhere denominated a mental state.<sup>5</sup> But as a mental state — a thought, emotion, feeling, phase of the mind — consciousness, while aware of its existence, is unable to assign it *location*. Regarding the cut, bruise or other physical sensation, consciousness can identify not only the feeling but the source from which it comes, its nature and location, as would be the case of an ordinary

2. *Infra*, § 1801.

3. Gulson, *Phil. of Proof*, § 32.

4. "We may fancy that we see or feel what we in reality infer. A truth, or supposed truth, which is

really the result of a very rapid inference, may seem to be apprehended intuitively." Mill, *System of Logic* (8th ed.), *Introd.*, 20.

5. *Infra*, §§ 2643 *et seq.*

physical object external to the observer. The difference, however, is that so far as relates to the nature, source and location of the bodily condition the mind's knowledge is gained rather by *intuition* than by perception. One is conscious of his bodily condition in the same way that he is conscious of his own existence.<sup>6</sup> The facts of which the mind is thus conscious may well be termed bodily facts. We should then have three classes of facts corresponding to the three methods by which they are cognized by the mind. (1) Psychological facts, which have their seat in the mind only and are known to the observer by intuition or pure consciousness; (2) Physiological facts which have their seat in the corporal frame of the observer and are known to him by that form of consciousness called *sensation*, and (3) Physical facts, which have their seat in the material world and are known to the observer by that form of sensation called *perception*.<sup>7</sup>

*It will be possible*, however, to eliminate from a practical consideration of the subject the second class of facts, viz., physiological facts, leaving for consideration only those which are psychological or physical — as we shall, in general, prefer to call them, physical facts and mental states<sup>8</sup> or conditions.<sup>9</sup> For the state of our bodily organs is, in essence, a physical fact. All that is necessary to make any bodily injury, for example, an object of direct perception is to look at it, touch it or otherwise bring it under the observation of a perceptive faculty of sight, touch or the like. It is true that we may also cognize it by a mere act of consciousness — by intuition or instinctively. But so considered, it in no substantial way differs from psychological facts, as above defined. It has seemed best to classify physiological with physical facts, and to divide all facts into psychological and physical.

**§ 44. (*Classification of Facts*); Simple and Compound.**—As will be seen later regarding inferences,<sup>1</sup> facts of a comparatively simple nature may unite to form compound facts of a greater degree of complexity, these in turn joining with others to form a fact still more involved, and so on to an indefinite extent. An

6. "Examples of truths known to us by immediate consciousness, are our own bodily sensations and mental feelings." Mill's *Logic* (8th ed.), *Intro.*, §§ 4, 19.

7. "We are said to be conscious

of our feelings; to feel our sensations; and to perceive material objects." Gulson, *Phil. of Proof*, § 39.

8. *Infra*, §§ 2643 *et seq.*

9. *Infra*, §§ 2638 *et seq.*

1. *Infra*, §§ 1797 *et seq.*

absolutely simple, uncompounded, indivisible fact apparently does not exist in nature as commonly presented to perception. Even the simplest act to which a single name is attached in language as of a unit is in reality upon closer inspection found to be a series or collection of simpler acts. "I cannot," says Gulson,<sup>2</sup> "even take a step, or ring the bell, without performing a series or combination of movements, though they be all comprised in a single expression of fact. And we *must* accept the complex expression of fact as the fact. It is as impossible to dissect a fact, whether of this or of any other kind, into its ultimate elements, as it is to discover the indivisible particles of which a material object is composed. In theory we can conceive a fact absolutely simple, for example, the existence of an atom in a state of rest, an instantaneous perception in the mind, etc. In practice, there is nothing of this kind; a fact, though it may be spoken of as a single fact, is still in reality an aggregate of facts."<sup>3</sup> Where a fact formed any constituent part of a principal fact, it would not be itself an evidentiary fact, nor would the proof of it offer an instance of circumstantial evidence."<sup>4</sup>

**§ 45. (*Classification of Facts*); Component Facts.**—In any investigation, judicial or other, in which the existence of a right is claimed or a liability asserted, the truth of certain special facts which, when united, make up or compose such right or liability, is necessarily involved. It seems proper to designate these facts as *component*.<sup>1</sup> Proof of these facts is absolutely essential to proof of the proposition submitted to investigation. They, or more prop-

2. Gulson, *Philosophy of Proof*, pt. 94, § 116.

3. Dumont, *Ev.*, 11.

4. Gulson, *Philosophy of Proof*, 171, § 200.

1. These are the "facts in issue" as the term is used by Mr. Justice Stephen: "The expression 'facts in issue' means—(1) All facts which, by the form of the pleadings in any action, are affirmed on one side and denied on the other. (2) In actions in which there are no pleadings, or in which the form of the pleadings is such that distinct issues are not joined between the parties, all facts from the establishment of which the

existence, non-existence, nature, or extent of any right, liability, or disability asserted or denied in any such case would by law follow." Stephen, *Dig. Law of Ev.* (3d ed.), c. I, art. I. Although, in strictness, material facts brought out in an investigation where there are no pleadings, cannot properly be either said to be "in issue" or component facts but are rather of the class of facts to which the term *constituent*, has been assigned. A fact in issue is a fact which was necessarily and immediately found under the pleadings in the cause. *Potter v. Baker*, 19 N. H. 166, 167 (1848).

erly, their existence is essential to the truth of the proposition in issue. To put the same idea in a slightly different form, every proposition of fact submitted to investigation may be regarded as subdivided into a number of subordinate or secondary propositions of fact, each of which must be true if the main or primary proposition itself be true. If each of these subordinate propositions of fact be true, the main proposition is of necessity established. If any of these subordinate propositions fails to be established as true, the effort to establish the main proposition has failed. In a sense, this may be regarded as the splitting up of a compound or complex fact — which as has been seen,<sup>2</sup> may be of any degree of complexity — into the necessary minor facts which are its component parts and all of which are necessary to its existence.

*It is, for example, asserted that A killed B.* This proposition is submitted to investigation. But its truth involves and is dependent upon that of several subordinate or minor propositions. As these make up the main proposition, they may here be called component. It must be shown (1) A was present at a given time and place. (2) B was present at the same identical time and place. (3) A set in operation a force which acted upon the body of B. (4) The result of this action was a certain wound or injury to the body of B. (5) Of this wound or injury B subsequently died. Taken collectively these minor or subordinate facts or propositions of fact establish the more comprehensive fact or proposition of fact that A killed B and may properly be said to be component parts of this proposition. If it be conceded that, as in case of poison sent from a distance and taken by B in a physical absence of A, that A is constructively present wherever the force set in motion by him continues to operate, it may also be affirmed that if any of these subordinate propositions of fact is untrue, the more comprehensive proposition cannot be true. All complex facts may thus be resolved into these which are more simple. "In theory," says Mr. Dumont,<sup>3</sup> "we can conceive a fact absolutely simple; for example, the existence of an atom in a state of rest, an instantaneous perception in the mind, etc. In practice, there is nothing of this kind; a fact, though it may be spoken of as a single fact, is still in reality an aggregate of facts."<sup>4</sup>

2. *Supra*, § 44.

4. *Supra*, § 44.

3. Dumont, *Ev.*, 11.

*While this is essentially true*, it has been deemed practically expedient to treat as a simple fact any existing state of matter or mind which may be ascertained or verified by a single act of perception or intuitive consciousness.

*In a judicial proceeding* where there are pleadings it may be more convenient to regard these component facts as the splitting up of the main proposition or expression of fact into certain minor propositions or expressions of fact, which compose and are essential to the truth of the main proposition of fact. It would thus appear that legal investigations stand in no different position from other inquiries so far as relates to the matter of component facts or propositions of fact. The essential difference between natural and judicial inquiries attaches to another matter — the relation which the component facts or propositions hold to the compound fact or proposition. This difference may be considered under two substantially similar aspects of the same fact: (1) That which prescribes the number and nature of the subordinate propositions which must be shown to be true in order that the main proposition shall be deemed to be established as alleged. (2) That which determines whether proof of the existence of certain component facts does or does not establish the truth of the main proposition submitted to investigation.

*In an investigation in pais* the elements of a complex proposition of fact are prescribed by the nature or reality of things. In case of a judicial inquiry, these elements of a proposition in issue are determined, in an artificial or in a sense, arbitrary, manner, by the rules of substantive law. Such elements, component facts or subordinate propositions of fact, make up the definition, *in matter of law*<sup>5</sup> of the right or liability asserted in the action. Thus, assume the proposition submitted to judicial investigation to be — A committed larceny from B. The subsidiary propositions of fact may be thus stated: (1) A took into his possession certain personal property. (2) This personal property was owned by B. (3) A took and carried away these articles. (4) A did so intending to use this personal property as his own and to deprive B of his use of the same. Each of these subsidiary propositions of fact, taken singly, forms an integral part of the main proposition and taken collectively, they are identical with it. Still, it is obvious that the subsidiary propositions are the elements of the criminal

5. *Infra*, §§ 65 et seq.

offence of larceny and are prescribed, not by a necessity inherent in the nature of things, but by the view of public policy entertained by the law-making power of the forum and formulated into the substantive law regulating that particular offense.

*It merely reverses the statement* to say that while the sufficiency of the component facts, or subsidiary proposition of fact to make, by their union or combination the compound fact or main proposition, presents, in the case of an investigation *in pais* a question of fact determined by reasoning based on experience, the same question in a judicial inquiry is one of law.

*It is important to observe* that in neither case, i. e., neither in an investigation *in pais* nor in a judicial inquiry, is the component fact or proposition *evidentiary* or probative of the existence of the compound fact or proposition. It is equally true that no probative or evidentiary fact can be either a compound or a component fact.

*It is further to be observed*, as a corollary from the above statements, that the component facts as formulated by the pleadings in a judicial proceeding have no proper connection with the immediate field of *evidence*. Evidence deals with that which exists in nature — mental or physical. Component facts are merely propositions of the intellect, formulated by a process of reasoning, empirical or legal, as guides to what the rules of law require should be established by the evidence in any particular case. Such facts, being purely intellectual concepts, have no necessary connection with the world of nature.<sup>6</sup>

#### § 46. (*Classification of Facts*); Component and Probative.—

The relation between a compound fact and its component facts is essentially different from that between an evidentiary and a principal one, between a *factum probans* and a *factum probandum* whatever be the degree of approximation to the *res gestæ* and through these and the component facts to the proposition in issue. First, a component fact is comprised in, and part of, its compound fact. The latter, at least in its present form, does not exist unless the component fact also exists. If the compound

6. A fact in pleading is a circumstance, act, event, or incident, and widely different from a truth, which is the legal principle which declares or governs the facts and their opera-

tion and effect, though in common parlance the terms "fact" and "truth" are often used as synonymous. *Drake v. Cockroft*, (N. Y.) 1 Abb. Pr. 203, 205 (1855).

fact exists, its component facts, of necessity, also exist. The cause of this inseparable relation is obviously that the component facts are rather postulates of the reasoning faculty than actual existences in the realm of nature. They therefore occupy a mathematical or geometrical relation to the main fact which they compose, for much the same reason that it may be axiomatically announced that the whole is equal to the sum of its parts.

On the contrary, a probative or evidentiary fact (*factum probans*) is something extrinsic to and entirely outside of the principal fact (*factum probandum*), it is externalized as part of objective nature. The evidentiary or probative fact may exist and the principal fact not exist; or, on the contrary, the probative fact may not be true and the *factum probandum* still exist. Thus, in the case of a larceny by A of the goods of B<sup>1</sup> the compound fact of the larceny cannot be true, in the form stated, unless the component facts be all true, e. g., that A took and carried away certain personal property; and, on the other hand, if the compound fact or proposition of fact that A committed a larceny of the goods of B be established, the subsidiary or component fact or proposition of fact that A took and carried away the personal property in question is also established. But should it be necessary to establish the fact of the taking and carrying away by evidence, taking is to be regarded as *factum probandum*. In proof of it, the fact is offered that shortly after the alleged larceny, A spent money more freely than before that time. Evidently this fact is entirely extrinsic to the fact of taking and carrying away. The free spending of money may exist and yet A be entirely innocent of the larceny; or it may be true that he may not have spent the money as claimed and yet have taken and carried away the goods in question. The underlying reason for this is that the step from the *factum probans* to the *factum probandum* is one of logical inference. As will be more fully considered in another place,<sup>2</sup> this inference of the unknown from proof of the known, the deductive logic from experience depending, as it does, for its major premise upon a general proposition which can never be more than highly probable, can seldom do more than furnish the mind with a probability of a more or less convincing sort. But the relation between a component fact and the compound legal

1. *Supra*, § 45.

2. *Infra*, §§ 1728 et seq.



fact of right or liability is one of definite certainty under a fixed requirement of law.

*With the legal relevancy* which exists between the compound fact or proposition and its component fact or proposition of fact the law of evidence has no concern. The establishment of the component facts or propositions, establishes, *ipso facto*, as a matter of law, the compound or more comprehensive proposition. *Per contra*, it is the natural effort of a litigant against whom redress or punishment is asked from the court, to seek to disprove or render to a sufficient degree doubtful by proof of suitable probative or deliberative facts the existence of a component fact or proposition of fact; being well aware that every component fact must be shown to exist if the compound proposition is to be proved and made the basis of judicial action.

**§ 47. (Classification of Facts); Res Gestæ and Constituent.—**

The *res gestæ* of a judicial inquiry are that portion of the natural occurrences, a portion, as it were, of the world's aggregate of happenings or existences, out of which the right claimed or liability asserted comes into being.

*To employ a much used and, indeed, greatly abused phrase* like *res gestæ* in the distinctive sense in which it is employed in this treatise may seem to call for explanation. The thought of action or doing something has, in large measure, ceased to be associated with *res gestæ*. The growing and fairly convenient use of the term — one which cannot but continue — carries with it the idea of proximity to the ultimate proposition submitted to investigation. The phrase is too well established, too seductively ambiguous, presents too great an appearance of learned exactness to be replaced. It is, perhaps, too late to hope to confine it to any one of its several meanings. The use above selected seems to harmonize the conflicting meanings as well as any. *Constituent* facts are those among the *res gestæ* facts which are *material* to the existence of this right or liability.<sup>1</sup> The *res gestæ* are usually

1. The simple question to be tried on the general issue is whether the material facts alleged in the declaration are true. By "material," in this connection, is not meant "of legal sufficiency," but whether they constitute a part of the plaintiff's case as he

presents it. *Adams v. Way*, 32 Conn. 160, 168 (1864).

*Res gestæ and constituent facts distinguished.*—While constituent facts are found in or inferred from the *res gestæ* the relation between the two is rather in the nature of the exhibition

placed before the tribunal by witnesses, because it is they and they alone which are the ultimate objects of direct proof or through probative facts which stand to them in a relation of objective<sup>2</sup> relevancy. It is true that use of witnesses may be largely diminished or entirely dispensed with and the *res gestæ* nevertheless be before the tribunal for its action. A libelous letter, with an admission by the defendant in open court of its authorship and publication, may, for example, furnish the *res gestæ* in an action of libel. The judge himself may even become the original percipient witness as when a contempt of court is committed in his presence. But such simplicity is not characteristic. Facts are not, as a rule, presented to the tribunal in the shape of component or even of constituent facts but rather as a mass of circumstances beginning frequently in order to secure clearness at a point logically removed from these component or constituent facts.

**§ 48. (Classification of Facts; *Res Gestæ* and Constituent); An Illustrative Instance.**—Thus take the oral testimony of an eye witness and recur to proof of the proposition previously cited,<sup>1</sup>

of a mechanical mixture than classification into genus and species. The differentiation of each of these two sets or classes of facts from other facts is a different one for each. The *res gestæ* are an artificially segregated part of the world happenings; they are differentiated from other facts by physical conditions and limitations, cohering, among themselves, by relations of time, space or causation. They are thus separated from other facts by the circumstance that these others possess different natural conditions, occurred at a different time, in another place, were the effects of a separate chain of causes. Constituent facts are segregated from other facts in the *res gestæ* by possessing a relation of relevancy, constituent in its nature, to an objective external to the *res gestæ*;—the truth of a proposition in issue. While the *res gestæ* are subject to observation and to be resolved into their simplest elements for judicial use; in the form of constituent facts, they may well be

evolved by the reasoning faculty from more simple *res gestæ* or even from other less complicated constituent facts. Toward any given objective, the entire relevancy of a given *res gestæ* lies in such of its number as are constituent. The balance of the *res gestæ* are facts of a secondary degree of relevant force;—constituent, corroborative, deliberate or the like. Many of the *res gestæ* may be absolutely inert and inactive, in a constituent sense; yet these inert facts may perhaps need only a change in the objective to become at once constituent of another right or liability; while facts formerly constituent, may thus become inert *quoad* the new objective. In other words, any collection of *res gestæ* is a combination of actual natural states or events, certain of whose individual elements may have constituting *relations* as to the existence of various rights or liabilities.

2. *Infra*, § 55.

1. *Supra*, § 45.

that A killed B. It is not usually proved, in so many words, that the component propositions there mentioned are true. On the contrary, the witness is, after being asked as to his name, age, residence, business and the like, much more apt to make a statement in reply to questions of counsel, which placed in narrative form would run more nearly as follows: "On a certain day (naming it) about six o'clock in the afternoon, I was at the liquor saloon called the White Hen at the corner of Fourteenth street and Eighth avenue. I had a glass of ale; had only one and had drunk nothing intoxicating before on that day. I left the saloon at five minutes past six by the clock. I noticed the clock as I left the building. I walked rapidly up Eighth avenue, going north on the west side of the avenue, walking rapidly, until I came to another saloon called the Old Lion, on the southwest corner of Eighth avenue and Twentieth street. According to my best recollection and judgment, I should say that it had taken me about fifteen minutes to walk up. As I entered I saw A standing at the bar drinking. I had known him for several years, had first met him about a dozen years before, and repeatedly since that time. A had apparently been drinking heavily, was much under the influence of liquor and greatly excited. He asked me to drink with him. I told him that he had had enough and advised him to 'let up.' I sat down at a table and began reading a paper. I might have been reading for about five or ten minutes when my attention was attracted by the opening of the front door and I saw B enter. I had known B but slightly, though for some years I had nodded to him in passing. I saw A immediately upon seeing B draw a pistol and point it at him, shouting 'Damn you, you have broken up my home; I said I'd shoot you at sight and, by God, I will!' I saw a flash from the pistol in A's hand, heard a report, saw B fall with the words, 'Boys, A has shot me like a dog, and all for nothing.' B, so far as I could see, was entirely unarmed. A immediately left the room. On running to B, I found that he was apparently unconscious, breathing heavily and with a wound on his left side from which blood was flowing freely. A messenger was sent for a doctor, but before he arrived B's heavy breathing ceased. Shortly after the physician arrived and after a short examination, pronounced that B was dead."

*A physician very probably is subsequently called as a witness, and after giving his name, age, residence, profession and, perhaps,*

some statement as to place of graduation and length and range of professional practice, testifies in answer to questions substantially as follows: "About 6.30 p. m. of the day in question I was called on in my office by some one who did not give me his name and requested to come to a drinking place on the corner of Eighth avenue and Twentieth street, on the southwest corner, to a man who had been dangerously injured. I immediately went; the man was pointed out to me as B; I felt for the pulse but could find none. There was no respiration which I could detect; the body was cold. I was satisfied that the man was dead. Upon removing a portion of the clothing for the purpose, I found a wound about an inch and a half above the left nipple, such as might have been caused by a bullet. I probed to a certain extent and found that the course of the wound was toward the right at a definite angle and slightly upward. I subsequently made an autopsy upon the body, traced the course of the bullet more accurately as striking certain bones, severing certain arteries or ligaments, piercing certain organs and finally landing in the fleshy portion of the back from which I removed the bullet I now produce and identify. Such a bullet wound is almost invariably fatal, was well calculated to produce death, and, in my judgment, in this case, did produce it."

*Thus, it will be noted,* that the *res gestæ* facts are of various degrees of legal relevancy<sup>5</sup> to the right or liability involved in the inquiry. It will be seen that certain of the *res gestæ* facts mentioned in the above illustration are what might be called preliminary facts designed to give coherence, smoothness and plausibility to the narrative. The entire set of occurrences during a certain time and in a particular locality are all placed before the jury in their objective setting — in the natural correlation in which they happened. It is the province of legal reasoning<sup>6</sup> as exercised by the jury, to determine which are the material constituent facts, those which *constitute* the elements of the liability charged against A, the selective principle in this discrimination being the existence of the component facts<sup>7</sup> in which the liability of A is expressed by the substantive law of homicide. The same legal reasoning will decide as to how far the constituent facts establish the component ones, and as to how far the rule of law is correctly stated in the component facts.

5. *Infra*, § 61.

6. *Infra*, § 63.

7. *Supra*, § 45.

*In respect to the relation* which the facts testified to by these two witnesses — the ordinary and the skilled observer<sup>8</sup> — stand to the compound proposition that A killed B or to the five component or subordinate propositions of fact into which the compound proposition seems separable,<sup>9</sup> it is at once obvious that they present great and essential differences which must be steadily held in view by those who seek definite conceptions of the differentiations of fact, and more especially what is meant by the familiar but extremely versatile and elusive phrase the *res gestæ*. It is apparent that even in this short space of less than an hour, from the time when the first witness left for the *locus* of the principal transaction until the time of B's death, there are, so far as is related to proof, by logical reasoning based on logical relevancy between facts of the main proposition that A killed B, at least three distinct stages or periods. (1) That prior to B's entering the door; (2) that between B's entering the door and A's leaving the room; (3) that following A's leaving the room. It is equally clear that the important of these periods is the second. All before B enters the door derives its relation to the proposition A killed B merely because it leads up to and throws light upon what happened while A and B were together, or as to the credit to be given the witness' account of it, while the third derives its total constituent value from the consideration that it gives definiteness to or throws light upon the occurrences of the middle. In this case, those of the third throw light on the facts of the second by giving the effect of causes set in operation during that period. In the second lie all the facts which in their immediate or more remote effects create or constitute the truth of the proposition that A killed B.

*What then are the constituent facts*, as that term is used in connection with a judicial inquiry? To bring the subject more closely within the domain of the law of evidence, let it be assumed that it is formally charged by the sovereign, through the prosecuting officers, by indictment that A has *murdered* B. In what respect, so far as the constituent use of the facts detailed by the friend and the physician — is the situation affected by the change? In at least two particulars. (a) A new component element is added — a new subordinate proposition must be proved — viz.,

8. *Infra*, §§ 1836 et seq., 1947 et seq.

9. *Supra*, § 45.

a certain subjective attitude — a mental state — on the part of A. This act must, at common law at least, have been done with deliberate malicious intent, with *malice aforethought*. (b) The number and nature of the component facts which make up or compose the compound proposition — A murdered B — and the sufficiency of any particular set of facts to compose or constitute the truth of this main proposition, are no longer questions to be decided by logical relevancy, i. e., by logical reasoning based upon human experience of the nature of things, but *matters of law* to be determined by the will of the sovereign in the form of substantive law — thereby creating to the facts proved a relation not of logical but of legal relevancy<sup>10</sup> and calling for the exercise of legal rather than logical reasoning.<sup>11</sup>

*Reverting to the detail of facts* stated by the two witnesses,<sup>12</sup> let it be applied to the new proposition — A murdered B. In some very important particulars, the situation does not appear to be in the least changed. The relation of the three periods to each other and to the compound or main proposition remains unchanged. The facts prior to B's entering the door which may well be called preliminary facts<sup>13</sup> continue to affect the truth of the main or compound proposition, which, for the sake of brevity may well be called the *issue*<sup>14</sup> — simply as they throw light *forward* on the second. The facts of the third continue to be probative only as they throw light *backward* upon the second. Such facts may properly be designated as *subsequent facts*.<sup>15</sup> In the second period with the addition of the fact of actual death projected from it into the third, lie the constituting or constituent facts. Were the second period blotted out, neither the preliminary facts of the first or the subsequent facts of the third would have any tendency to establish the truth of the issue. If, for example, the first witness had left the saloon before B entered it, the evidence in the case would then amount merely to a walk between two drinking

10. *Infra*, § 61.

11. *Infra*, § 59.

12. *Supra*, § 48.

13. *Infra*, § 1760.

14. "The 'issue' then, was literally the *exitus*, exit or emergence of the contending parties, from the field of preparatory altercation, and entrance upon the stage of *trial*. The formation of an issue was the end of all

common-law pleading. The word, 'issue' (referring, now, to issues of *fact* as distinguished from those of *law*) came to denote *the fact*, in regard to which the parties, through the sifting process of the pleadings, at length reached the respective attitudes of affirmation and denial." Demarest, Hints for Forensic Practice, p. 11.

15. *Infra*, § 1751.

saloons, a recognition of A in a certain mental and physical state, the partial perusal of a newspaper, the summoning of a physician for B; the latter's discovery that B was dead and a statement as to the probable cause of his death. Absolutely nothing would remain in the way of evidence which fastens any responsibility on A. For it is the peculiar and essential characteristic of the facts of the second period that out of them arises, if at all, the right or liability asserted. In fact, if the right or liability is found to exist, these facts constitute it. They have therefore been designated *constituent* facts. To the entire mass of objective happenings detailed by the direct observers of these constituent facts has been applied somewhat arbitrarily but, it is hoped, not without justification,<sup>16</sup> the term *res gestæ*.

*Probative Effect of Constituent Facts.*—While, as has been said<sup>17</sup> a constituent fact is not evidentiary of the existence of a component fact — this relation in a judicial inquiry being a matter of law — it well may happen that one constituent fact may be evidentiary as to the existence of another. Thus, in case of the larceny by A of the goods of B. Here A's felonious intent is obviously a constituent as well as a component fact or an element of the offense. Its existence may, however, be inferred from the existence of the other constituent facts — that is they are evidentiary facts as to its existence. In other words, it frequently happens that the same facts which establish the other component facts, establish the intent also.

§ 49. (*Classification of Facts*); Compound, Component and Constituent.—What, then, is the relation between compound, component and constituent facts as presented in a judicial investigation? Is the relation one of *inference*? Do the constituent facts furnish an inference as to the existence of the component facts or as to the truth of the facts in issue<sup>1</sup> — or even as to the existence of the main or compound proposition, the issue itself? Undoubtedly, in the proposition of fact A killed B, there is reason for regarding the facts of the second period of the supposed story of the witnesses as *evidentiary* of the truth of the main proposition, in so far as they fulfil the conditions imposed by the existence of its component parts. In other words, it may well be

16. *Supra*, § 47.

1. *Supra*, § 45, 45 n. 1.

17. *Supra*, § 44 n. 4.

considered that these facts unite to make up a complex minor premise of which the conclusion is the proposition that A killed B.<sup>2</sup> But in the judicial inquiry as to the truth of the proposition A *murdered* B there enters an element which creates an essential difference — the element of substantive law — the mandate of the sovereign. The relation of the component facts to the compound proposition — of the facts in issue to the issue itself — is, as has been said,<sup>3</sup> a matter of law. The component facts are those whose propositions constitute the allegations of a properly framed pleading charging the existence of the right or liability claimed or asserted in any action, civil or criminal. The sufficiency of the component facts — the allegation of whose existence thus constitutes a pleading may be raised by a demurrer to such a pleading — and is clearly a matter of law. The existence of these component facts is part of the definition, in point of law, of the main proposition, i. e., of the issue. These component facts are the requirements of substantive law expressed in terms of fact, they establish the legal standard up to which the facts proved in the case are to come in order to establish the truth of the main proposition asserted. The main proposition is not one of fact. Therefore it lies outside the domain of logic. No new syllogism can, as in case of the proposition A killed B establish the truth of the proposition A *murdered* B. Therefore the constituent facts of the second period of our evidence in the case assumed, are not *evidentiary* in any proper sense, of the truth of the proposition in issue. A fact, or set of facts cannot prove the existence of a matter of law. It can, at best, but show that certain conditions, under which the law becomes operative have been fulfilled.

*Nor for the same reason*, can it truly be said that the constituent facts are involved into and form part of a more complex fact<sup>4</sup> as may well happen in cases where only the verification of fact is concerned — and so constitute the component or compound fact, or proposition of fact. Facts can no more constitute a rule of law than they can prove the existence of one.

*Relation Between Component and Constituent Facts.*— If then the constituent facts neither prove the main proposition in issue nor the component facts or minor propositions of fact into which the issue may be resolved, what do they actually constitute? They

2. *Infra*, §§ 1729 et seq.

4. *Supra*, § 45.

3. *Supra*, § 45, 45 n. 5.



constitute the final or primary facts, to which, when established to their satisfaction, the court or jury, as the case may be, will apply the rule of law involved in the main proposition — the issue. When this rule is applied and stretched over the *res gestæ* facts to ascertain what they mean, in terms of law, it will be found long enough to require proof of all the component propositions which make up the main proposition. In other words, component facts are part of the rule, furnished by the court, and applied by it or by the jury. The constituent facts are those to which the rule is applied. If the main proposition is established it is because the facts do not fall short when the rule is placed over them. The *res gestæ* constitute the mass of fact out of which the right or liability asserted arises if it arise at all. Constituent facts cannot be said to prove the existence of a right or liability except in the secondary sense in which a board may be said to prove to be ten feet long when measured by a rule. That which really “proves” or tests is the rule itself. The court or jury, as the case may be, apply the rule of law to the *res gestæ* — including, of course, the constituent facts. This rule of law, an essential element of the main proposition of fact, has upon it certain markings which divide and define its length. These, when expressed in terms of fact, make up the component facts. In other words, component facts are the nodules, markings, articulations, or whatsoever term may be preferred, expressed in terms of fact, which together constitute the rule of law when applied to determining whether the *res gestæ* have constituted the right claimed or liability asserted. The necessity for and advantage in the use of these nodules, notches or articulations is an incident of the law of pleading and, therefore, in judicial investigations where there are no pleadings, the rule of law is applied, without them, directly to the constituent facts.

**§ 50. (Classification of Facts); Positive and Negative.**— It has been said by high authority<sup>1</sup> that all facts may be classified as positive or negative. This statement is true rather of propositions than of facts. In the nature of things, all facts must be positive. For, as Bentham more accurately says,<sup>2</sup> “the only really existing facts are positive facts. A negative fact is the nonexistence of a positive one, and nothing more. But it is otherwise of propositions of fact. We may, and frequently do, predicate, both in judicial

1. Best, Ev., § 13.

2. Rationale of Jud. Ev., bk. I, s. 50.

or other inquiries, the nonexistence of a fact." As Mr. Dumont says:<sup>3</sup> "At first sight it appears singular to speak of a negative fact; but everything is a fact which is susceptible of being announced in a proposition. It is a fact that I have been in such and such a place; that I have not been there is likewise a fact. To speak otherwise would be to speak unintelligibly." Owing in part to the ambiguity and uncertainty of language, and partly to the lack of precision in those who handle it, much difficulty frequently arises as to whether a negative fact or a positive one is asserted. Negative predications may be made of positive facts; and positive predications of negative facts. For, as treated by logic, the positive or negative quality of a proposition is determined by whether the *copula*—that which connects the subject with the predicate is positive or negative in form, as where, for example, it is said that A *is* or *is not*,<sup>4</sup> a good man. In ordinary discourse, the accepted test of whether a statement is positive or negative is, in a similar way, as to whether the negative particles *not*, *never*, *nowhere* are or are not employed in connection with the verb. But this seems superficial and, on the whole, unsatisfactory. A proposition, negative in form, may well be positive in substance; a statement in form positive, may in reality be negative. Indeed, the same proposition may be made positive or negative at will—it being obvious that it is not material to the meaning whether the existence of a fact be affirmed or its nonexistence be denied; or whether its nonexistence be affirmed or its existence be denied. The proposition, in either form, is positive in the first case and negative in the second. This becomes perhaps clearer if the *copula* be left positive in all cases, and the negative quality if it exist, be stated in the predicate. For it is evident that the real difference between a positive and a negative proposition is not as to whether the statement is negative or positive in form, but as to whether it is a negative or a positive state or condition which is predicated of the subject. A statement which affirms a positive or denies a

3. Dumont, Ev., p. 10, note.

4. Whately, Logic, 38. "A proposition being a portion of discourse in which something is affirmed or denied of something, the first division of the propositions is into affirmative and negative. An affirmative proposition is that in which the predicate is *affirmed* of the

subject; as 'Caesar is dead.' A negative proposition is that in which the predicate is *denied* of the subject: as, 'Caesar is not dead.' The copula in this last species of proposition consists of the words, *is not*, which are the sign of negation; *is* being the sign of affirmation." Mill, Logic, bk. I, 106, p. 51-a.

negative fact is positive; one which affirms a negative fact or denies the existence of the corresponding positive one, is negative. This substitution of the form of the predicate for the form of the *copula*, as a test between negative and positive propositions, is rendered the more easy by the fact that for every positive name or term, there exists, or may readily be framed, a corresponding negative name or term.<sup>5</sup> It amounts to the same thing whether it is affirmed that A was licensed, or denial is made that he is unlicensed; or, on the other hand, it is asserted that A was absent from the scene of a crime or it is denied that he was present. The first statement is positive, however framed; the latter is negative though the word "not" does not appear in the statement of it.

*The ambiguities and varied meanings of words* are such that it is, at times, difficult to decide whether a term, in reality, denotes a negative state as of a mere nonexistence or something more positive. "Many negative terms, which are such *in sense only*, have led to confusion of thought from their real character being imperfectly perceived: e. g., 'Liberty,' which is a purely *negative* term, denoting merely 'absence of restraint,' is sometimes confounded with 'Power.' It is to be observed that the same term may be regarded either as positive, or as privative or negative according to the quality or character which we are referring to in our minds; thus of 'happy' and 'miserable,' we must regard the former as positive and the latter (unhappy) as privative, or *vice versa*, according as we are thinking of enjoyment or of suffering."<sup>6</sup> On the other hand, words apparently positive in form, may, in reality, be negative in substance, i. e., predicate nonexistence. "By *health*, is meant nothing more than the absence, the nonexistence of disease; by *minority*, the individual's nonarrival at a certain age; by *darkness*, the absence of light; and so on."<sup>7</sup> Bentham's rule is still workable. "For satisfying himself whether in the case of a certain fact, it is the existence or the nonexistence,

5. "Another principal division of names is into positive and negative. Positive, as *man, tree, good*; negative, as *not man, not tree, not good*. To every positive concrete name, a corresponding negative one might be framed. After giving a name to any one thing, or to any plurality of things, we might create a second name which should be a name of all things what-

ever except that particular thing or things. These negative names are employed whenever we have occasion to speak collectively of all things other than some thing or class of things." Mill, *Logic*, bk. I, 51, 52, p. 26a.

6. Whately, *Logic*, 82.

7. Bentham, *Rationale, Jud. Ev.*, bk. 1, 50.

the presence or the absence of it, that is in question, the course a man may take is to figure to himself the corresponding image; he will then perceive whether, by the expression in question, it is the presence or the absence of that same image that is indicated and brought to view.”<sup>8</sup> But enough has been said to indicate the general nature of the difficulty which makes the distinction between negative and positive facts of importance regarding the law of evidence.

*The important consideration* in connection with negative facts is the greatly increased difficulty of establishing by evidence the truth of a negative proposition, i. e., of proving the *nonexistence* of a fact. A positive fact — an existence — is capable of being verified. If physical, it may be verified, its existence ascertained, by perception, the employment of the sense faculties of the observer.<sup>9</sup> If the fact be a psychological one, it may be recognized by a direct act of consciousness. As Bentham puts it,<sup>10</sup> “In most cases, we cannot perceive nonexistence or absence. We can only infer it from something existing and present which we do perceive.” This is, of course, not universally true. Certain negative facts, mere absences or nonexistences of their positive correlative terms seem capable of direct perception. Thus, cold is merely the nonexistence of heat, yet we may be fairly said to perceive it. In a certain sense, we may be said to perceive *darkness*, though simply the nonexistence or withdrawal of light. It is not an improper use of language to say that we are conscious of the absence or nonexistence of sound, i. e., of silence. In all such cases — as of the cessation of a customary or pleasurable state — we may be said to be conscious of a *lack*, to an extent which, coming to the consciousness through the sense, differs but slightly, if at all, from perception. But, in general, a negative fact cannot be perceived but must be inferred. Proof, therefore, of a positive fact is much easier, in the usual case, than disproof of such a fact, i. e., the proof of a negative fact. This is in part because an absence is not apt to attract attention unless the thing absent be, as in the case of heat, light or sound, something with which we are familiar or so striking a fact that it could scarcely fail to attract attention.

8. Bentham, *Rationale Jud. Ev.*, bk. 1, p. 50.

Gulson, *Philosophy of Proof*, p. 446, § 512.

9. “For it is undeniable that *proof* is intrinsically more simple, more certain, and more direct than *disproof*.”

10. *Rationale, Jud. Ev.*, bk. I, p. 50.

It is for this reason that one who testifies to a positive fact, e. g., that he noticed a certain detail of an accident, is deemed, as a rule, more credible than he who affirms the negative fact that it did not occur. But the more fundamental difficulty in the establishment of a negative fact, or the truth of a negative proposition, lies on the surface. All evidence rests, at some degree of remoteness from a particular fact, upon perception. With the comparatively few exceptions mentioned *supra*, a negative fact — as being a mere absence or nonexistence of a correlative positive — is not perceptible, therefore is not susceptible of direct proof. The most that can be done in the way of proof of the negative fact — or, if the expression be preferred, the disproof of the correlative positive — is the proof of some positive fact, the existence of which is inconsistent with the existence of the correlative positive fact, and then *infer* the nonexistence of the latter from the existence of the former. Take, for example, the case above suggested of one who has observed an accident and testifies that a certain detail — observed by others — did *not* occur. Apparently, this is testifying to a negative fact — that a certain detail did not occur. But in reality he cannot, of his own knowledge, testify to such a fact. He did not perceive that a certain thing did not happen. He could not observe that it did not happen. In most cases there would be nothing to call his attention to the fact that this detail did not happen. What the witness can properly testify to are certain positive facts, e. g., that he was present during the time of the alleged occurrence, that he was watching the transaction carefully, that there was nothing to impede his observation or to divert his attention; that he observed that certain things happened — not including the detail in dispute and that he did not perceive it. He may, or may not, be permitted to state that, in his opinion, he would have seen it if it had happened. The court may decline to permit this to be done for it is this precise inference which it is proposed, on his behalf, to ask the jury to draw, viz.: That he would have seen or otherwise observed it had it happened, and, as he did not observe it, it did not happen. This is the negative *factum probandum*. In other words, while a negative fact presents peculiar difficulties in the way of direct proof, it may be established inferentially or, by the more customary phrase, circumstantially.

But this proof of a negative fact by proving an inconsistent positive one is possible only where a single witness is thus able to cover with his perceptive faculties the entire time and place involved in the transaction. The difficulties of establishing a negative fact are immensely increased when the time and place of the alleged occurrence are extended beyond this range. Thus, a crime is committed in the absence of percipient witnesses. A is accused of having committed it. He relies on the fact that he was not in the neighborhood of the *locus* at that time. To establish that negative fact directly would be one of great difficulty, if not impossibility. A will usually be reduced, almost of necessity, to an attempt to establish a positive inconsistent fact, i. e., that at the time when the crime must have been committed, he was at another place, sufficiently distant from the *locus* to prevent his reaching there in time to commit the crime as charged. This may involve the use of several witnesses covering an extended time and, possibly, a number of localities at considerable distances from each other. The difficulties of proof will be found to increase as the time to be covered as to when the offense might have been committed is extended. This difficulty becomes insuperable in cases where a longer period than can be covered by any single act of perception or the connected use of any set of witnesses is involved in the inquiry, where a number of years, amounting to a considerable portion of a lifetime or even a longer time. Such a situation arises where the proposition to be established is that A has not been intoxicated for the last ten years, that he was never married, that he never told a lie, at no time made a will, or the like. Direct proof of such a negative proposition is manifestly impossible; while the only inconsistent positive fact or series of facts would seem to be proof of a different employment for the person in question at all times when the fact to be disproved could have happened. This is quite as impossible of proof as the negative fact itself. It is chiefly in connection with such cases that the court, in determining the *quantum* of evidence required for a *prima facie* case will regard the respective ability of the parties to produce evidence on the point.<sup>11</sup> It is clear that the *disproof* of these negative propositions — amounting to the affirmance of a positive proposition — is, by comparison with proof of the negative, extremely simple. All that is needed for disproof of the negative, is proof of a single positive

11. *Infra*, § 970.

act of intoxication or falsehood within the period named, the production of a will or the like to maintain the affirmative proposition.

**§ 51. (*Classification of Facts*); Principal and Probative.—**

According to the classification adopted by Bentham the distinction between a principal and an evidentiary fact is that between a *factum probandum* and a *factum probans*. The relation is not as to the proposition in issue but as to the two facts — the fact to be proved and the fact offered as proving or assisting to prove it. In other words the principal fact is not a principal fact as related to the issue but as related to the evidentiary or probative fact. "In every case, therefore, of *circumstantial evidence*, there are always at least two facts to be considered — 1. The *factum probandum*, or say, the principal fact — the fact, the existence of which is supposed or proposed to be proved — the fact evidenced to, the fact which is the subject of proof. 2. The *factum probans* — the evidentiary fact — the fact from the existence of which that of the *factum probandum* is inferred."<sup>1</sup> Bentham it may be observed, apparently limits the terms *factum probans* and *factum probandum* to facts other than the oral testimony of witnesses, or statements contained in documents. Whether there is, in point of principle, any valid distinction between oral testimony or documents — in this particular — or, in other words, how far direct evidence is itself circumstantial — will be a subject for consideration elsewhere.<sup>2</sup> But, at this point, the important consideration to be observed is that the relation between the principal and the evidentiary fact as conceived by Bentham was one purely of logic and was without necessary relation to the proposition in issue, except that the *factum probandum* in any case stands a step nearer in point of logical sequence to the proposition in issue than does the fact which is evidentiary to its existence. It is, however, necessary for reasons to be immediately stated, to distinguish the principal facts from two other classes of fact with which it is constantly in danger of being confused: (1) Facts standing within the inner circle, as it were, around the proposition

1. Rationale of Jud. Ev., bk. V, c. 1.  
"In any inquiry the identical facts proposed for investigation are called principal facts; while any fact that is sought, not for its own sake, but because it has a tendency to establish by

inference the truth of a principal fact, may be denominated an evidentiary one." Gulson, *Philosophy of Proof*, 99, § 122.

2. See WITNESSES.

in issue or where there are common law pleadings around the component facts. These are the facts out of which the right or liability claimed or asserted in that proposition arises, if at all. To these it has been deemed proper to apply the designation of *constituent facts*<sup>3</sup> or, as it is somewhat less accurately said, the *res gestæ*.<sup>4</sup>

(2) It is further necessary to distinguish these probative or evidentiary facts from the *component* facts so-called; i. e., from those subordinate facts or expressions or propositions of fact which, when asserted, state in any judicial inquiry where there are common law pleadings, in terms of fact, the rule of substantive law which announces or formulates the right or liability involved in that inquiry. The constituent or *res gestæ* facts must, indeed, be established by evidence and each, therefore, is a *factum probandum* to be proved by some *factum probans*—including, in case of direct evidence, so-called, the oral statements of witnesses. But while the *factum probandum* may be a constituent or *res gestæ* fact, it is not necessary that it should stand in this rank, but may stand in any relation of logical order to such facts. Whatever be the logical relation of the *factum probandum* in any particular instance to the constituent or *res gestæ* facts, the use of the designation *factum probandum* connotes and implies that there is another fact, still further removed than itself in logical connection, from the constituent or *res gestæ* facts, and to which it stands in the relation of the subject of proof, and which is evidentiary of its existence; to wit, a *factum probans*.

An anomaly of code pleading may make such a statement inaccurate. As contrasted with common law pleading and statutory pleading which adopts common law pleading as its basis, code pleading, distinctively so called, states the *constituent* rather than the component facts. This circumstance must be kept constantly in mind while dealing with the rulings of certain courts.<sup>5</sup> The ultimate *facta probanda* are these constituent facts. Here the line of proof—the proper subject of evidence—ceases.<sup>6</sup> The

3. *Supra*, § 47.

4. *Supra*, § 47.

5. An "ultimate or issuable fact" is one essential to the claim or defense, and which cannot be stricken from the pleading without leaving it insufficient. *Meyer v. School Dist.* No. 31, 4 S. D. 420, 57 N. W. 68, 69 (1893).

6. *Caywood v. Farrell*, 175 Ill. 480, 51 N. E. 775, 776 (1898); *Read v. State Ins. Co.*, 103 Iowa 307, 72 N. W. 665, 668, 64 Am. St. Rep. 180 (1897); *Kahn v. Central Smelting Co.*, 2 Utah 371, 375, 376 (1878). Where, in legal proceedings, from the facts in evidence, the result can be reached by an exact process of rational



sequel — the relation between the constituent or *res gestæ* facts, on the one hand, and the component facts on the other, is one of legal reasoning,<sup>7</sup> with which the law of evidence has no immediate concern, except to supply the *res gestæ* or constituent facts on which it is to operate.

The *nexus* or connection between the *factum probans* and the *factum probandum* is therefore one of logic. Beginning at the outermost range of relevancy which the court will admit, the fact — the first *factum probandum* is established by the aid of a *factum probans* — including the statements of witnesses — or number of them. The *factum probandum*, so established now becomes in turn a *factum probans* for the verification, establishment or proof of a new *factum probandum* one step nearer in point of logical connection to a constituent or *res gestæ* fact. This last *factum probandum* becomes *factum probans* and the process continues until the *factum probandum* becomes a constituent or *res gestæ* fact. Each step up to this point is based on a logical inference. With the proof of a constituent or *res gestæ* fact the logical sequence stops; for the next steps, the inference from the constituent or *res gestæ* facts to the component facts, through these to the truth of the proposition in issue, or as to the existence of the right or liability asserted or claimed, are not matters of fact or of logical reasoning. Reason at once enters an entirely different field, the legal field, and the deduction from either set of these facts — constituent or component — is a *matter of law*.

**§ 52. (Classification of Facts; Principal and Probative); Deliberative Facts.**—Deliberative facts, in the original significance

reasoning adopted in the investigation of proof, it becomes an ultimate fact, to be found as such. *Levins v. Rovigno*, 71 Cal. 273, 12 Pac. 161, 162, 164 (1886).

It is these “inferential” facts as contrasted with the evidentiary facts, which the jury reach by a process of reasoning which the court will require should be stated by the jury in any special finding. *Woodfill v. Patton*, 76 Ind. 575, 579, 40 Am. Rep. 269 (1881); *Locke et al. v. The Merchants National Bank*, 66 Ind. 353 (1879). See also *Witham v. Earl of Derby*, 2 Wils. 48 (1744). Probative or evidentiary facts are not included.

*Post v. Williams*, 33 Conn. 147 (1865).

“Adjudicated Facts.”—The inferences produced in whole or in part by weighing evidence and the credit to be given witnesses are called facts, as denoting adjudicated facts, which can only be retried by an appellate court having jurisdiction in the trials of such facts. *Nolan v. New York, etc. R. Co.*, 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305 (1898). See also *Credit Co. v. Howe Sewing Mach. Co.*, 54 Conn. 357, 8 Atl. 472, 476, 1 Am. St. Rep. 123 (1886).

7. *Infra*, §§ 59, 63.

of the term, comprise that species of judicial evidence which assists the tribunal in weighing the truth of a party's contention or the credibility of the witnesses or other proof by which it is established. Deliberative facts enable the court or jury to exercise adequately and accurately the function of judging. They explain, elucidate or qualify the probative or *res gestæ* facts in such a way as to determine the evidentiary weight that shall be accorded them. They are placed, as it were, in the mental scales, together with the probative or *res gestæ* facts to assist in striking the proper balance. Such facts are probative; but possess that slight degree of probative relevancy which may properly be spoken of as deliberative.<sup>1</sup> Such circumstances have no strong logical tendency to establish a fact in the *res gestæ*; at most, they tend to render in greater or less degree the existence of such a fact probable or improbable. Most frequently, perhaps, they are used by the *reus* or nonactor, i. e., the party not having the burden of proof; and are infirmative in their operation upon the contention to which they are directed. Much of the scope of the cross-examination as to credit consists in bringing out facts of this nature. For example, the fact that a witness is related to one of the parties and has had a violent quarrel with the other in itself, tends to prove no fact in the *res gestæ*. But a party may well offer evidence of such circumstances to be weighed by the jury with the probative or *res gestæ* facts.

*The use of the evidence, however, is by no means confined to the nonactor* nor is its operation necessarily infirmative. The actor may corroborate his evidence-in-chief or reinforce it upon rebuttal by the use of facts of but slight individual probative force which have the sole office of rendering the facts already established in some degree more probable. The actor may, in like manner, offset the deliberate facts established by the opponent by using others of the same species.

*Into the same class* may properly fall the facts of circumstantial evidence which, though separately of but slight probative force, unite by their nice adjustment or other mutual corroboration to establish the existence of the *res gestæ* in a manner which is properly to be regarded as strongly probative.

**§ 53. (Classification of Facts); States and Events.**—Bentham distinguishes as a classification of facts between events and states of things.<sup>1</sup> Best adopts the same distinction and assigns Ben-

1. *Infra*, § 60.

1. *Rationale, Jud. Ev.*, bk I, 47.

tham's reasons for making it.<sup>2</sup> "By an event," says Best, "is meant some motion or change considered as having come about either in the course of nature or through the agency of the human will, in which latter case it is called an act or action. The fall of a tree," he goes on, "is an event, the existence of a tree is a state of things, but both are alike facts." The essential point of difference here indicated is that between motion and rest. Whatever embodies motion is an event; that which is attended by a condition of rest is a state of things. Such a distinction one may venture to observe, with deference to these two eminent authorities who have placed the students of the law of evidence under such heavy obligations, is, in reality, superficial and inaccurate. It is true that motion usually attends an event and that its absence generally characterizes a state of things. It is equally true that a state of things is usually of a more permanent and enduring nature than an event, which frequently, by comparison, appears to be essentially transient. But in truth, duration in time or the presence or absence of motion are equally fallacious when treated as *differentiæ* between events and states. A brief shower of rain, for example, while it continues, is evidently a state of things. Yet it is attended with *motion* and is soon over. When it is over, it ceases to be a state of things and is merely a passed *event*. In other words, a state of motion is, while it continues, as much a state of things as would be the existence of a tree. The real test between an event and a state of things is seen to be the element of *continuance*. A state of things is viewed by the speaker as continuing; an event is looked upon as something which is over and passed.

*So of that species of events spoken of as acts or actions.* It is undoubtedly a general experience that such events are transitory, i. e., that they soon become events. For during the time of their continuance they are apparently states of things. This is most plainly seen where the act extends, as it well may do—for as has been seen<sup>3</sup> a series of acts, however long continued, is merely an act of greater complexity—over a considerable period of time. Thus, the existence of a war, which consists of a series of acts, however long continued, is properly spoken of as a *state* of war. A man's life, though covering a series of acts done over many years, is only an event after it is over. While it continues, it is clearly

2. Best, Ev., § 13.

3. *Supra*, § 44.

a state of things. The conclusion that continuance rather than either duration or lack of motion characterizes a state of things, seems confirmed by the circumstance that where the limitation of our mental faculties prevents our receiving either from a physical or psychological fact the impression of continuance, we do not speak of it as a state of things. Thus the flash of a gun, the instantaneous mental perception of it, would scarcely be spoken of as a state.

*But there is grave doubt* as to whether the distinction itself exists in the reality of things. Only the continuous renewal of the operation of a cause or combination of causes — which operation, of minute duration, properly constitutes an *event* — enables a given state of things to exist. A book, for example, is held at arm's length. While this continues it is, according to common acceptance, a state of things. When the book is placed upon the table the state of things is over, and the holding at arm's length has become an event. Its happening when regarded as fully completed, might even have been properly spoken of as a future event. Even, however, while the state of things continues and the book is held at arm's length, there is at the end of each conceivable division of time a completed event — having successfully held a book at arm's length under the influence of volition exerted through muscular energy. It is merely this constant renewal of such muscular energy, this succession of *events* which, in fact, constitutes a state of things. "The truth of the matter appears to be that all facts, whether they be properly called states or events, are transient or permanent in an infinitely varying degree, from the transit of a flash of lightning or the passage of a thought, to the continuance of the motions of the heavenly bodies or the duration of the existence of the universe itself, and that it is impossible to draw any exact line between facts of the more transient and those of the more permanent order."<sup>4</sup>

*From the standpoint of the law of evidence*, however, the distinction will continue to be of importance. It need not be pointed out that only facts, however numerous or complicated, which constitute to the observer, whether a witness or the tribunal itself, present existences or states of things, can be the subject of perception and, consequently, of personal knowledge. Completed events can be learned only by information derived from others — results of

4. Gulson, *Phil. of Proof*, § 119.

their past perception of what were to them, at that time, continuing states of things. Such information usually contains also inferences of fact deduced by the informants from the data thus furnished them by their sense perception. Only such events, as were at the time of their observation cognized by perception of the witnesses as states of things then continuing, can be presented to the court or jury by oral testimony. It follows also that evidence which the court or jury gain by perception<sup>5</sup> is confined to states of things and does not extend to events which have not been previously observed as states of things.

§ 54. *Relevancy.*— The *relation* between a *factum probans* and a *factum probandum* by virtue of which the former tends to establish the existence of the latter is logical relevancy. The relation, in natural order, as detected by experience, or evolved by reason, or out of which is evolved the evidentiary quality of a probative fact, is direct relevancy in its logical sense. It is essential that the distinction between the probative force which establishes the existence of the *factum probandum* from proof of the *factum probans* and the *relation* between the two by virtue of which this probative quality exists should be constantly observed. These are merely different ways of viewing the same two facts. But the treatment of these different aspects by the law of evidence is sharply variant. The first—the probative force or effect—is considered under the heading of presumption<sup>1</sup> and inference.<sup>2</sup> The latter—the logical *relation*—between the two is discussed under the heading of probative relevancy.<sup>3</sup> Logical relevancy is conveniently treated as of two kinds—corresponding in general to extra-judicial<sup>4</sup> and judicial<sup>5</sup> evidence, viz. (1) objective relevancy and (2) subjective relevancy—viewing the matter from the standpoint of the witness in case of oral testimony or of the declarant in connection with documentary evidence. Considered in its relation to the constituent fact, logical relevancy may be direct or indirect.

*It may further be convenient* to consider briefly the relations subsisting between logical and legal relevancy,<sup>6</sup> especially in connection with the nexus between constituent (or *res gestæ*) and *component* facts and between these component facts and the main proposition in issue or under investigation.

5. See EVIDENCE BY PERCEPTION.

1. *Infra*, §§ 1082 et seq.

2. *Infra*, §§ 1026 et seq.

3. *Infra*, §§ 1709 et seq.

4. *Infra*, § 6.

5. *Supra*, § 7.

6. *Infra*, §§ 61, 62.

§ 55. (*Relevancy*); *Objective*.— *Objective relevancy* is a *relation* arising in the world of matter, as distinguished from the realm of mind. The *res gestæ* — the artificially segregated part of the world's happenings involved in the judicial inquiry, and every fact in it, can only be separated artificially, for logical purposes, practical convenience and the like. In the order of nature, each fact is coördinated, dove-tailed into the universe of matter. It is the result of many causes and will itself be the cause of many effects. As Professor Greenleaf says:<sup>1</sup> "The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character and essential to be known in order to a right understanding of its nature."

*Every individual fact* not only thus comes under the law of causation; it must occur under certain fixed conditions of time and space. By virtue of this immutable, universally imposed condition, every event must necessarily stand in certain fixed relations of time to all prior or subsequent events. It must also be coördinated, in space, locality, environment with what are rather infelicitously called the "surrounding circumstances."

*This order of nature* furnishes valuable guaranties for truth and is particularly important in testing, upon cross-examination,<sup>2</sup> the objective probability or improbability of the story which a witness has told the court. It may suffice for present purposes to say that objective relevancy is the relation which exists in the order of nature, between a fact and those coördinated with it. Stephen's definition of "relevancy" — as a term is an excellent statement of what, for purposes of differentiation, we have preferred to call objective relevancy. "The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or nonexistence of the other."<sup>3</sup>

1. I. Greenl. on Ev., 15th ed., § 108.

2. See WITNESSES.

3. Stephen, Dig. Law of Ev., May's Ed., art. I. "A fact relevant to the issue, or relevant

§ 56. (*Relevancy*); *Subjective*.—Subjective relevancy deals with the realm of mind. It is chiefly confined, in its operation, to judicial evidence,<sup>1</sup> i. e., to the oral statements, the testimony of witnesses, given in court, or the written declarations of the author of a document. It will be observed that the distinction between objective and subjective in this connection is taken from the standpoint of the *witness* and not, as in case of many other classifications of fact, e. g., into real and personal or judicial and extrajudicial, from that of the tribunal. The question is one of credibility, of weight, of power for producing belief in the minds of a tribunal. The question is one of the most difficult, intricate and puzzling to which the intellect of man can be devoted. The workings of the mind, as manifested in oral or written declarations, are frequently utterly inscrutable to human insight. Even in the best regulated minds there appears to be a certain element of unmotivated purposeless conduct. To other minds, the intellectual pleasure of fabrication, even without personal advantage, seems irresistible. When contrasted with the orderly processes of objective relevancy, those of subjective relevancy seem chaotic, bewildering, untraceable. For practical purposes, an assumption, fairly sustained by experience, may reasonably be made, viz., that one who knows the truth about a matter will state it correctly, unless he has some controlling motive to misrepresent it. The question of subjective relevancy—the credibility, cogency, belief-enforcing quality, of the witness' statement—resolves itself into a double query: (1) How much did the witness know, what opportunities had he for observing or acquiring knowledge, how great was his ability to coördinate correctly, to infer and state truly? (2) Was the wit-

fact, is one which, though not in itself forming any constituent part of the actual subject of inquiry, is yet connected by a legitimate inference (or by a series of such inferences) with a fact in issue; in other words, a relevant fact is one that raises a fair presumption of some principal fact." Gulson, *Philosophy of Proof*, 435, § 499.

"On the other hand, a fact may be said to be irrelevant to the issue when it is neither itself a fact in issue, nor is connected by a legitimate inference with any principal or evi-

dentiary facts." Gulson, *Philosophy of Proof*, 435, § 499.

"A fact in issue, though it may perhaps be correctly described as 'material,' cannot with strict propriety be called a relevant fact." Gulson, *Philosophy of Proof*, 435, § 500. "In short, what is called irrelevant evidence almost invariably presents itself in the shape of the proof of irrelevant facts by legitimate means." Gulson, *Philosophy of Proof*, 437, § 501.

1. *Supra*, § 7.

ness under any motive to misrepresent which, in view of the other facts known to the tribunal, will reasonably lead to the inference that it exerted a controlling influence on the mind of the declarant?<sup>2</sup> In other words, the elements of subjective relevancy are, (1) adequate knowledge, (2) absence of controlling motive to misrepresent.<sup>3</sup>

**§ 57. (Relevancy); Direct.**— Relevancy is a state of relation. Unless and until conditioned, it may well be regarded as a link connecting any given fact in point of time, with varying degrees of remoteness, with all other facts, prior or subsequent, and in all directions of space. In a state of nature, the existence of any given fact, according to general experience, renders probable, in a greater or less degree, the existence of a large number of other facts. Under the law of causation, the given fact is related, running backward, from effect to cause, to a large number of antecedent facts. Tracing forward into time, from cause to effect, it is relevant to a large number of subsequent ones. All time, prior or subsequent, is connected with the time of its occurrence. All space stands in definite relation to the location of its occurrence. Subjective relevancy, unconditioned, is in a similar position. The entire realm of mind is coördinated and related in much the same way as is the realm of matter. Any given act, in its mental or moral aspect, is the resultant of a very large number of previous states of consciousness, the ramifications of which it is impossible to trace. In turn, it gives rise to consequences in the subjective mental conditions which cannot well be counted. To all of these psychological facts, prior or subsequent to itself, any artificially segregated act of consciousness stands in some degree of relevancy. Until its relations are conditioned by something which can direct thought along some given line of causation, or establish some fixed

2. The presence of a motive to misrepresentation which might fairly be assumed to be controlling was in the earlier judicial administration deemed to furnish reason for excluding the evidence of the declaration from the jury. Thus the Supreme Court of South Carolina says: "Belief cannot be given to one who has been hired by the plaintiff to appear as a witness in the case, and who is to be paid a certain sum if plain-

tiff wins the suit; and hence the testimony of such a witness should not be received, and such 'evidence' ought not to be given." *Holland v. Ingram*, (S. C. 1851) 6 Rich. Law 50, 52. The rule persists down to the present time in connection with the exceptions to *hearsay*, where, as a general rule, the existence of *lis mota* is regarded as reason for excluding the unsworn statement of the declarant.

3. *Infra*, §§ 2698 *et seq.*



point as a goal toward which proof may verge, relevancy cannot be said to be either direct or indirect.

*That which conditions* relevancy into direct and indirect in any judicial inquiry are the material facts in the *res gestæ* of the case, the facts which constitute the right or liability asserted. The entire mass of intercorrelated, mutually relevant, facts, at once assumes a definite arrangement dependent upon the assertion of a constituent fact of which proof must be offered. The proponent may start his proof of a material *res gestæ* fact as far back over the links of the chain of causation as the court, under all the circumstances of the case, shall deem not too remote to be helpful to him or the jury. He may then prove the existence of the several links in the chain until the ultimate *factum probandum*, the *res gestæ* fact is reached. This is the direct line of proof, the direct lineal relevancy. Any *res gestæ* fact may be proved in this way.

§ 58. (*Relevancy*); Indirect.—Establishing the direct line of proof, in and of itself, makes other potentially direct relevancy indirect or collateral. It is as natural and inevitable as that laying out and constructing a road should create sides for it. Other relevant relations persist but in a subordinate, collateral<sup>1</sup> and incidental capacity. As Frederick Pollock says: "Facts may be relevant to one another not only when they are links in the same chain, but when they are links in two chains having a common link in some other part of their length; that is, when they are effects of the same cause or causes of the same effect. It is not the case, however, that facts are always relevant when they answer this description, for there are many facts of a general kind, such as the known uniformities of nature, whose occurrence in a sequence of events can afford no ground for inference as to whether any other particular fact does or does not occur as another link in the same sequence, or as a link in another sequence branching from it."<sup>2</sup> These collateral relevancies, the indirectly relevant facts placed in a position relatively inferior as to probative force by the establishment of direct lines through the natural correlations of things, are nevertheless not without many valuable uses. While the direct lines of proof — the probative facts — establish the existence of the constituent facts, in an objective sense, the mission of the collateral, indirectly relevant facts is to *test*, by corroborat-

1. *Summerour v. Felker*, 102 Ga. 254, 29 S. E. 448, 450 (1897).      2. 26 Fort. Rev. (N. S. 20) 385.

ing or disproving, confirming or discrediting, the evidentiary force which the proof of these probative and consistent facts would otherwise exert on the mind. Of this nature are the so-called *deliberative facts*.<sup>3</sup> A perfectly plausible story may be proved as constituent facts, complete in itself, apparently harmonious in its details. But if true it must have had a large number of collateral relevancies. No portion, as has been said, of the world's happenings, as given in the *res gestæ*, can take place without these direct and collateral relations of time, space or causation. The tribunal will insist — and it is an important mission of cross-examination<sup>4</sup> to carry this desire into effect — that the alleged *res gestæ* be mentally put back, so far as possible, in its original place among these interrelevant natural occurrences with a view to noticing how they stand the test. If the alleged *res gestæ* fit and dovetail into the surrounding relevancies, the result is corroborative, in proportion to the nicety and unforeseen nature of the adjustment. If the test fail, the *prima facie* case established by proof of the constituent facts is correspondingly discredited. If it shall appear, upon the making of the test, that the *res gestæ* are entirely inconsistent with the collateral or indirect relevancies — as where a prisoner said to have committed an offense satisfactorily establishes an *alibi* — the *prima facie* case is disproved. The method by which this test is objectively or subjectively applied is by proof of the deliberative facts, from which are formed, as it were, the *facies* of the irregular causal, temporal and spatial surface into which the corresponding angles of the *res gestæ* facts will be found to fit if the truth has been correctly stated and rightly understood.

§ 59. (*Relevancy*); *Logical*. — “The law furnishes no test of relevancy. For this it tacitly refers to logic and general experience — assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known to them.”<sup>1</sup> As is more fully stated elsewhere,<sup>2</sup> relevancy, so far as relates to the matter of proof — the connection between a *factum probans* and a *factum probandum* is concerned — or, as Bentham prefers to call it, be-

3. *Supra*, § 47.

4. *See* WITNESSES.

The test of whether a fact inquired of in cross-examination is collateral is this: Would the cross examining party be entitled to prove it as a part

of his case, tending to establish his plea? *Garner v. State*, 76 Miss. 515, 25 So. 363, 364 (1898).

1. Thayer, *Prelim. Treat.*, 265.

2. *Infra*, §§ 1721 *et seq.*

tween the evidentiary and the principal fact—is a question of logic, with which law, either in its substantive or adjective form has nothing to do. The only test is that of experience; and to follow it, presents in practice, little, if any, difficulty except the question of what degree of probative force may be deemed by a presiding judge helpful to himself and to the jury. In other words,<sup>3</sup> the question of remoteness presents the principal difficulty of administration in connection with logical relevancy. This is one of administration. The determination of this question in any particular case is conditioned by the existence of so many variables, in the stage of the case, the state of the evidence, the probability of procuring more satisfactory evidence and the like, as scarcely to permit the application of a more general rule.

*No Particular Theory of Relevancy Imposed on the Law of Evidence.*—While no practical difficulty is anticipated in determining as to the existence of logical relevancy in any given case, the attempt to impose upon the administration of justice the limitations of any particular system of logic as to the precise manner in which this logical relevancy acts or in what it consists, as was essayed by Stephen in his first edition,<sup>4</sup> and by certain of his

3. "Whether it be out of regard to the general want of time and convenient opportunity; or to the nature of the questions discussed, and the ordinary methods of mankind in judging of the practical problems of life and business, and the practical impossibility of running an inquiry out into fine details; or to the nature of our popular tribunal, the jury, or for whatever reason; we have principles of exclusion which limit the inquiry, and so the evidence, to matters that have a clear and obvious bearing and a plainly appreciable weight, as contrasted with what is slight, conjectural, and remote; and to matters which do not unnecessarily tend to complicate and confuse the determination of the issue." Thayer, *Prelim. Treat.* 272.

4. "Facts, whether in issue or not, are relevant to each other when one is, or probably may be, or probably may have been—the cause of the other; the effect of the other; an

effect of the same cause; a cause of the same effect: or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not, or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other." Stephen, *Dig. Law Ev.* (1st ed.), c. 2, art. 9.

Stephen's original conception of relevancy is found in the Indian Evidence Act of 1872, which was the fruit of his work as legal member of council. *Indian Ev., Act I of 1872, Acts of the Gov. Gen. of India*, p. 1. Under Chapter 2 at sections 7 and 11 of the act it is provided:

"Facts which are the occasion, cause, or effect, immediate or otherwise, or relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

critics,<sup>5</sup> seems injudicious and was very properly abandoned by Stephen with characteristic fairness and openness to correction. However convincing seem the merits of Mill's system of inductive reasoning, it is scarcely safe to assume that it is

"Facts not otherwise relevant are relevant:— (1) If they are inconsistent with any fact in issue or relevant fact; (2) If by themselves or in connection with other facts they make the existence or nonexistence of any fact in issue or relevant fact highly probable or improbable."

Mr. Stephen somewhat amplified this statement in the introduction to his English edition of the Act; and the general principle is stated to be, in effect, that all facts are relevant to one another which appear to be links in the same chain of consequence: "Facts may be regarded as relevant which can be shown to stand either in the relation of cause or in the relation of effect to the fact to which they are said to be relevant."

5. Among the more valuable of these was Mr. George Clifford Whitworth, of the Bombay Civil Service, who comments entertainingly upon the theory of relevancy advanced by Stephen in the Indian Evidence Act by pointing out the relative value omitted by Mr. Stephen, of what we had called indirect relevancy, but which Pollock, 26 Fort. Rev. (Sept. 1876), prefers to call collateral relevancy and truly deems to be as important at times as the direct or lineal relevancy to which alone Mr. Stephen directs his definition.

And Mr. Whitworth, in his pamphlet on the subject, quoted by Mr. Pollock in the Fortnightly Review, for September, 1876, at page 385, after commenting on the general subject, thus proceeds: "There are four classes of facts which aid in determining a fact in issue:— (1.) Any part of the fact alleged or any fact implied by the fact alleged. (2.) Any cause of the fact. (3.) Any effect of the fact. (4.) Any fact hav-

ing a common cause with the fact in issue. And it is not the whole of these facts that are of use. Some facts connected with the fact in issue in one of the four ways mentioned may be of a general nature, existing whether or not the fact in issue happened, and therefore indicating nothing as to whether it happened or not. For example: A is charged with the murder of B by pushing him over a precipice. Here the fall of B to the ground after he was pushed over is as much a cause of his death as the pushing over, and as much an effect of the push as his death is. But gravitation is a general fact and exists all the same whether B went over the precipice or not, and proof of it is therefore needless."

A further criticism is made that Stephen enters on no adequate attempt in this connection to prescribe a limit of probative force beyond which no inference can reasonably be drawn. Mr. Whitworth therefore, places as a limitation upon his definition of relevancy the qualification that "No fact is relevant to another unless it makes the existence of that other more likely." As a test for ascertaining this limit of rational belief-generating probative force he proposes the following rules:

"Rule 1. No fact is relevant which does not make the existence of a fact in issue more likely or unlikely, and that to such a degree as the judge considers will aid him in deciding the issue.

"Rule 2. Subject to Rule 1, the following facts are relevant: (1.) Facts which are part of, or which are implied by, a fact in issue; or which show the absence of what might be expected as a part of, or would seem to be implied by, a fact in issue. (2.)

a perfect or a final word on the subject. Early systems as that of Aristotle and the schoolmen have claims for judicial adoption in greater simplicity and practical comprehensibility. Among systems since those of Hamilton and

Facts which are a cause, or which show the absence of what might be expected as a cause, of a fact in issue.

(3.) Facts which are an effect, or which show the absence of what might be expected as an effect, of a fact in issue. (4.) Facts which are an effect of a cause, or which show the absence of what might be expected as an effect of a cause, of a fact in issue.

"Rule 3. Facts which affirm or deny the relevancy of facts alleged to be relevant under Rule 2 are relevant.

"Rule 4. Facts relevant to relevant facts are relevant."

Mr. Frederick Pollock, while appreciative of the merits of Stephen's work, deems the combination of several attempted scientific definitions with a loosely phrased sweeping popular sequel to be itself unscientific. To take but a single extract from his very suggestive discussion of this subject (26 Fort. Rev. p. 387): "Mr. Stephen himself says in his note that the general principle 'might no doubt be expressed very shortly by saying that every fact is relevant to every other, if it affects in any definite way the probability of its occurrence. This, however, would throw no light on the question how facts affect the probability of the occurrence of other facts.' But now what says the text? Stephen, Dig. Ev. (1st ed.), chap. 2, art. 9, quoted *supra*, § 59 n. 4. It tells us that there are four defined ways in which 'facts affect the probability of the occurrence of other facts,' and also an undefined number of undefined ways, coinciding to an undefined extent with those already named. In truth, instead of choosing between a scientific analysis and a popular general statement, it gives us both at once; and we are left to guess as best we can how much more, if

anything, is meant to be included in the popular form of the proposition than in the exact one."

Of Mr. Whitworth's rules Mr. Pollock says that while the strictures made by him on Stephen's definition of relevancy are sound, that they are no less applicable to Mr. Whitworth's own rules. He further observes regarding Mr. Whitworth's rules that "his first rule, which limits the definition by showing what is *not* relevant, is a practical abandonment of the scientific form of the others; and in dealing with the illustrations of the Evidence Act he seems to assume once or twice the converse of this rule, namely that a fact is relevant which (to the intuitive judgment of common sense, and to an appreciable extent) makes the existence of a fact in issue more likely or unlikely. The grounds on which the judgment of common sense proceeds may perhaps be capable in every case of being exhibited in terms of the more definite rules; but then it should be made clear, even to superfluity, that the definite rules are of themselves sufficient." Mr. Pollock proceeds to inquire into the basis upon which Mr. Stephen and Mr. Whitworth felt it necessary to add a popular definition, of wide scope, following an attempted scientific classification of the grounds of relevancy. "Is it felt" he says, "that after all it may not be quite safe to trust the logical rule to cover everything without the help of more largely and loosely framed additions? Notwithstanding all that has been done by Mill and others to elucidate the nature of inductive proof, it is still quite possible to doubt whether the process of inference can be completely and accurately expressed in any formal canons; and it may be wise to

Mill are various groups, each in its way helpful, which assert the value of what may be called respectively the metaphysical, the psychological or the empirical point of view in treating the matter, following, in so doing, previous schools of thought.<sup>6</sup> The generally accepted substratum upon which these various philosophical modes of viewing the field of logic have all been constructed, is itself amply sufficient for practical purposes. Instinct and judicial intuition as to the existence of a logical relevancy between two given facts, will, as a matter of reasonable certainty, continue to be the test actually employed by the courts. It seems hardly necessary to cumber the consideration of the subject of logical relevancy with insistence upon any special logical system, even one so valuable as that of Mr. Mill. It is safer to wait until some more general consensus shall have been reached upon a point now in the very arena of debate. It will be better to adopt the philosophy of Bentham: "Hitherto," he says, "the operation of judging of the degree of connection, of the closeness of the connection, between a principal fact and an alleged evidentiary fact, has been

leave room for this doubt in an exposition of the logical rules which is intended for men's practical guidance. If such is the intention, however, it would be more clearly shown by some such rearrangement of Mr. Stephen's ninth article as follows: "Facts, whether in issue or not, are relevant to each other—when the one shows that the other must or cannot have occurred, or probably does or did exist, or not; or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other; and in particular when one is, or probably may be, or probably may have been—the cause of the other; the effect of the other; an effect of the same cause; a cause of the same effect." 26 Fort. Rev. p. 386.

6. "The science of logic, having been created by the inventive and penetrating genius of Aristotle and afterwards systematized by the schoolmen, was enlarged by the sagacious divinations of Bacon, who indicated its applications to natural philosophy,

and freed it from much of the needless subtlety of the schools. Since the publication of the *Novum Organon*, the fundamental processes of thought connected with reasoning have been explored by Locke, Leibnitz, and the metaphysicians who have followed in their steps: and of late years, logical science has, in this country, received much illustration and improvement from the writings of Archbishop Whately, Dr. Whewell, and Mr. John Mill; of whom, the first has improved the form of the scholastic logic, and adapted it to the wants of modern students; the second has expounded the philosophy of induction, and of its subsidiary processes as applied to the whole field of the physical sciences; while the latter has determined the province of logic with precision, has established its first principles on a sound basis, and has systematized the methods of observation and deduction for all the subjects of scientific research." Lewis, *Authority in Matters of Opinion*, c. I, § 1.

an operation of the instinctive class; an operation which has never been attempted to be subjected to rule, or at least to any other rules than what have been completely arbitrary and irrational. To take the business out of the hands of instinct, to subject it to rules, is a task which, if it lies within the reach of human faculties, must at any rate be reserved, I think, for the improved powers of some maturer age.”<sup>7</sup> Nor is it quite possible to exclude from the mind a doubt as to whether a logical or scientific definition of relevancy is a legitimate topic in the law of evidence. This feeling is happily expressed by Mr. Frederick Pollock.<sup>8</sup> “But I find myself compelled to go beyond any suggestion of verbal and logical amendments. I think it extremely doubtful whether the logical theory of proof, which is common to all knowledge, should appear as part of the law of evidence at all, though I fully agree with Mr. Stephen that one cannot understand the law of evidence without some previous understanding of the nature of proof in general. Legislation affecting the tenure of land is very likely to do more harm than good, unless it is guided by sound economic knowledge, nor can its objects and effect be appreciated without such knowledge; but who would think of incorporating the economic definition of rent in an agricultural holdings act? Again, there can be no inheritance without death, and the fact of death must be proved; but the physiological definition of death is certainly no part of the law of succession. It appears to me that a legal text-writer, and still more a legislator, should confine himself as much as possible to the questions proper to his own science, and avoid mixing up the substance of the law with propositions which belong to other branches of knowledge, or are common to all alike. If the law of evidence is to embody the canons of inductive logic to the extent of Mr. Whitworth’s rules or Mr. Stephen’s ninth article, I do not see why it should stop short of giving a complete exposition of them, and landing us, perhaps, in the thick of a purely metaphysical controversy on the true meaning of cause.”

§ 60. (*Relevancy; Logical*); *Deliberative*.—The probative relation of a deliberative fact<sup>1</sup> to the existence of one in the *res gestæ* may well be spoken of as deliberative relevancy. It is a relation of logical relevancy where the connection between the evi-

7. *Rationale of Jud. Ev.*, bk. I, c. III, 44.

1. *Supra*, § 47.

8. 26 *Fortnightly Rev.* (n. s. 20), 388.

dentiary and principal fact is a slight one. This may arise from one of several causes. The uniformity which is invoked as the basis of probative force may be one which is merely empirical, i. e., based upon no recognized principle. Such a uniformity may be in dispute; as where it is plain that A did a particular act because he had a motive for doing so. Experience may even show that the causal relation relied upon if it exist at all is but an unreliable one. In these and similar cases the deliberative fact would, standing alone, possess little or no probative relevancy. A number of such facts may, however, by corroborating each other or reinforcing other circumstances which are individually more probative contribute to the whole no small portion of an evidentiary power upon which a jury may reasonably be permitted to act.

§ 61. (*Relevancy*); *Legal*.— All relevancy is not, however, that of logic. Only of relevancy in its aspect of *proof*, the relation which makes one fact probative or evidentiary as to the existence of another, is logic the supreme arbiter and guide. Logical or probative relevancy is concerned, in judicial acceptation, with the relation between facts which gives rise to an inference with regard to *existence*. One fact, it is familiar, is logically relevant to another when proof of the one rationally grounds an inference as to the existence of that other. In all *proof*, there is this element of inference of the existence of the unknown from proof of the known. But with the establishment of the *res gestæ* the use of proof, the operation of experience, and, on principle, the function of the jury, at once and finally cease and determine. Relevancy, however, may well exist as is hereafter more fully indicated, between a given fact and the proposition in issue where the operation of the fact said to be relevant is entirely apart from any attempt to establish the *existence* of a fact nearer in causal relation to the proposition under investigation. But relevancy between two facts exists whenever proof of one fact gives rise to belief, i. e., suggests a reasonable inference not as to the existence of that other fact but its possession of some other intrinsic quality, property, attribute, or of some external relation to another fact. The link, in other words, between the two facts said to be relevant may not be that of proof as to existence, but of an adjustment, similarity in any particular respect or other mutual relation. For example, one fact may fairly be said to be relevant to another if, under a certain established



standard, it corresponds with, creates or constitutes it. But such a relevancy is not that of logic; but is adjusted and determined by the nature of the standard employed, the nature of the result which the facts are to constitute.

*It has been said*, for example, that the direct, the lineal, course of logical relevancy is determined by the legal nature and bearing of the constituent facts, and that the line of probative, evidentiary facts ends there. In other words, that the line of *evidence*, proper scope of the law of evidence, properly so-called, ends with the establishment of the *res gestæ*.<sup>1</sup> That is to say, in a judicial inquiry the constituent facts are not themselves selected arbitrarily but are, on the contrary, determined by their relevancy, appropriateness, constituency, relation and sustaining quality to certain other facts, i. e., the component facts, or subsidiary propositions or expressions of fact, in terms of which the right or liability involved in the inquiry has been formulated, affirmed or denied in the pleadings. The adjustment between the component facts or expressions of fact and the constituent facts has been reached by the work of counsel or prosecuting officials at a stage anterior to trial and represents an attempt to state the *res gestæ* in the terms of the right or liability, civil or criminal, to which, in the view of the pleader they give rise. In any fairly scientific system of pleading the allegations perform a double office. They state the constituent elements or component propositions of fact which constitute the right or liability asserted; and, in the second place, they assert that these constituent elements exist or that the component propositions or expressions of fact are true, with regard to the *res gestæ* of the particular case under investigation. The sufficiency of the allegations of the first class raises a question of law which may be presented to the court in the form of a demurrer. They are, as it were, the constituent allegations of the right or liability. This is a question as to the relevancy—constituent relevancy we have preferred to call it—as the term is used in the Scots law,<sup>2</sup> of the allegations to sustain the right or

1. *Supra*, § 47.

2. **Relevancy.**—As a quality of evidence, “relevancy” means applicability to the issue joined. Relevancy is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being one which, if sustained, would logically influence the

issue. Whart. Ev., § 20. In Scotch law, the relevancy is the justice or sufficiency in law of the allegations of a party. A plea to the relevancy is therefore analogous to the demurrer of the English courts. Black, Law Dict., *in verbo*.

liability involved in the inquiry. The second element in the allegations serves to adjust the pleadings more closely to the *res gestæ* facts as the latter are found by the jury.

*Two inquiries at once arise:* (1) What is the nature of the relevancy existing between the constituent and the component facts? (2) What is the nature of the relevancy which exists between the component facts or expressions of fact and the right or liability asserted or denied? In answering them, it will at once occur to the mind; that an entirely distinct element has been added to the logical relevancy, based on experience, which has been hitherto dominant in establishing the *res gestæ*—from which the constituent facts have been selected or inferred; and that this new element furnishes the selective principle in determining which of the *res gestæ* facts are *material* to the component facts and so are constituent of the right or liability. It so becomes clear that this new element is the substantive or positive law of the subject which confers the right or imposes the liability. Such a rule is entirely outside the logic of experience, is arbitrary, of legal rather than mental allegiance and relations. The selection of certain *res gestæ* facts as material to the existence of this right or liability is, therefore, an attempt to formulate the facts of a particular transaction, when observed by the tribunal or proved to its satisfaction by testimony or documents, into the terms of this proposition of substantive law which formulate or condition the right or liability.<sup>3</sup> In other words, were the tribunal to perceive for itself the entire *res gestæ*, as in the case of a contempt in open court referred to by Best,<sup>4</sup> no matter of logical or probative relevancy would be involved. The only question would be one of law. So, were the *res gestæ* facts agreed upon by the parties or stated, as an opening, by counsel having the burden of proof, the province of evidence would have been passed and the only question remaining would be a legal one.

§ 62. (*Relevancy; Legal*); “*Facts in Issue.*”—The foregoing considerations lead us to inquire whether failure to distinguish between the relevancy of logic and that in which substantive law

3. Whatever the evidential facts may be, the question whether they make out a case or not is a question of law, so whether the evidence tends to show fraud is a question of law. There being such evidence, fraud is

generally said to be a mixed question of law and fact. *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620, 627 (1893).

4. *Supra*, § 29 n. 2.

furnishes a portion of the test has introduced an element of ambiguity and confusion into Mr. Justice Stephen's "Digest." "Evidence," says Mr. Stephen, with certain exceptions and additions not important in this connection, "may be given in any proceeding of any fact in issue, and of any fact relevant to any fact in issue."<sup>1</sup> These terms are more fully defined later: "The expression 'facts in issue' means: (1) All facts which, by the form of the pleadings in any action, are affirmed on one side and denied on the other. (2) In actions in which there are no pleadings, or in which the form of the pleadings is such that distinct issues are not joined between the parties, all facts from the establishment of which the existence, nonexistence, nature or extent of any right, liability or disability asserted or denied in any such case would by law follow. The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or nonexistence of the other."<sup>2</sup> It would seem that in this definition logical and legal relevancy are used, under the general term, relevancy, without distinction. "Facts in issue" are evidently facts which we have preferred to call component facts.<sup>3</sup> No constituent or *res gestæ* fact is placed in issue by the pleadings. Such a fact never becomes a fact in issue; at most, it can only become a fact in *dispute*,<sup>4</sup> or contro-

1. Stephen, Dig. Law of Ev., c. II, art. 2.

2. Stephen, Dig. Law Ev., 3d ed., c. I, art. 1.

3. Subordinate or component propositions of fact may well have been adopted as a more accurate expression. The issues are not facts but propositions or expressions of fact.

This habit of speaking of the subordinate propositions of fact as "facts" component, as we have called them, while inaccurate, seldom leads to much confusion. Thus, in a criminal prosecution, the court instructed that the defendant pleaded not guilty, which plea put in issue every material fact involved in the crime charged, but, before he could be convicted, the state must establish beyond a reasonable doubt the guilt

of the defendant. The court held that the use of the word "fact," as equivalent to allegation, while not accurate, could not have prejudiced the defendant, for the meaning which was intended to be conveyed was reasonably certain. *State v. Harris*, 97 Iowa 407, 66 N. W. 728, 729 (1896).

4. The expression "fact in issue," as used in the general statement of the rule that a judgment is *res judicata* only as to those facts which were in issue, means that matter on which the plaintiff proceeds by his action and which the defendant controverts by his pleadings; but the facts offered in evidence to establish the matter in fact are not themselves "facts in issue," although they may be controverted. So, when a deed is merely offered as evidence to show a

versy.<sup>5</sup> Between these facts in issue and the right or liability which they assist to formulate the relation is one of legal relevancy. So facts directly relevant to facts in issue, to wit, constituent facts sustain to the component facts a relation of legal relevancy, one in which the rule of law is a controlling factor and test. On the other hand, probative facts, those which establish the existence of *res gestæ* or constituent facts, the *facta probantes* stand to their respective *facta probanda* in a relation of logical relevancy. In a lesser degree of probative force and in a more collateral manner deliberative facts, in relation to the facts tested by them, stand also in a relation of logical relevancy. Thus, Mr. Stephen appears to have used relevancy as a term embracing indifferently and without warning, both logical and legal relevancy. His only definition of the term relevancy is that of logical relevancy which he treats as all-embracing. As the constituent facts are an attempt to formulate the *res gestæ* facts into terms of law, the component facts are an attempt to state the law in terms of fact. The component facts are the analysis of a rule of law of which the constituent facts are an attempted synthesis, both in terms of fact. By this double process the component facts are, as it were, superimposed upon the constituent facts and a test thereby established as to whether the constituent facts have really established or made out the right or liability asserted, or that portion of it placed in issue by the pleadings. The relation between these two sets of facts, constituent and component, may be one of relevancy, but not of logical relevancy. The establishment of the proposition in issue by the correspondences between the constituent and the component facts is determined, in part at least, by legal reasoning, with which logic has no exclusive function. This is, so far as possible,<sup>6</sup> within the inviolable province of the jury—the judging of their

title, whether in a real or personal action, the title is the fact which is in issue. The deed is a fact in controversy; but, so far as the suit is concerned, it is incidental and collateral, not a matter necessary of itself to the finding of the issue. *King v. Chase*, 15 N. H. 9, 15, 17, 41 Am. Dec. 675 (1844).

5. *Applegate v. Dowell*, 15 Or. 513, 16 Pac. 651 (1887). A fact in issue is a fact on which the determination

of the court is conclusive, while a fact in controversy is only collaterally adjudicated. It must be a fact immediately found according to the pleadings, not that on which the verdict was merely based. *Caperton v. Schmidt*, 26 Cal. 479, 494, 85 Am. Dec. 187 (cited in *Glenn v. Savage*, 14 Or. 567, 573, 13 Pac. 442, 446) (1864).

6. *Infra*, §§ 1801 *et seq.*

evidence. To this form of relevancy, no designation seems more appropriate than that of legal or constituent relevancy.<sup>7</sup>

**§ 63. (Relevancy; Legal); Legal Reasoning.**—As has been repeatedly observed, one fact is legally relevant to another when an inference can legally be drawn from the one as to the existence of the other. In other words, legal relevancy imports the possibility of legal reasoning. The relation between the constituent and the component facts and the further step from the component facts to the truth of the *main* proposition in issue is determined by this legal reasoning. Reasoning from probative to constituent facts is thus seen to be a conclusion of fact, while any reasoned result from the constituent or *res gestæ* facts is a matter of legal reasoning.<sup>1</sup> This class of reasoning is merely reasoning in general motivated and conditioned by a rule of substantive law.<sup>2</sup> This, it must be remembered, is entirely outside of and in general occurs at a subsequent stage of the proceedings to that of evidence. As Professor Thayer puts it, "The function of scrutinizing the material which it has once got, of observing its implications and the effect of one part on another, of comparing and inferring, does not belong to the region of the law of evidence. To the hungry furnace of the reasoning faculty the law of evidence is but a stoker."<sup>3</sup>

**§ 64. General Order and Scope of Treatise.**—While an exact and complete classification of topics in the law of evidence upon any

7. It is to be regretted that it has seemed necessary to use a term to which Professor Thayer has already affixed a different meaning: the more strongly probative quality of logically relevant facts on which alone the court will permit the jury to act. Thayer, *Prelim. Treat.*, 517. This question of *remoteness*, however, seems more closely connected with an administrative principle rather than with a rule of evidence.

1. The word "fact," as employed in the statement of the rule that errors of law can be reviewed, while errors of fact cannot, denotes those conclusions reached by the trier from sifting testimony, weighing evidence, and passing on the credit of the witnesses (conclusions which are not within the jurisdiction of the appel-

late court, and cannot be reviewed at retrial on appeal), and it does not denote those inferences drawn by the trial court from the facts ascertained and settled by it. *Nolan v. New York, N. H., etc., R. Co.*, 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305 (1898).

2. "Let it be distinctly set down, then, that the whole process of legal argumentation, and the rules for it, essential as these are, and forever pressing upon the attention, are mainly an affair of logic and general experience, not of legal precept." "I say mainly, because the reasoning process, in its application to particular subjects, gets always a tincture from the subject-matter." Thayer, *Prelim. Treat.*, 271.

3 Thayer, *Prelim. Treat.*, 271.

definite principle is probably rendered impossible by the interblending nature of the subject matter, it has seemed most natural to classify these various topics according as they involve a greater or less proportion of the element of administration as compared to that of procedure. The subject has accordingly been arranged in an order corresponding to the degree in which the flexible administrative power of the judge, conditioned by the use of reason, may fairly be said to be exercised; — the influence of rigid rules of substantive law relating to procedure, which differ in no material way, in scope and operation, from other rules of substantive law, being, as it were, to a corresponding extent displaced.

*The first volume* deals with the subject of judicial administration itself. After certain preliminary definitions, it considers the general nature and powers of the judicial office and the canons or principles upon which sound administration of its functions proceeds. It deals briefly with the development of the institution of the jury and its office, present and potential, in the administration of justice; — including some consideration of the relative duties of the two branches of the tribunal, as all this has been established by the substantive law. The first volume concludes with some statement as to the general atmosphere of previously acquired *Knowledge*, Judicial, Common and Special, in which the vital functions of judicial administration can alone be satisfactorily discharged; — knowledge being an essential requisite to the use of *reason* by which all the processes of judicial administration are carried on, tested and conditioned.

*The second volume* discusses topics in the law of evidence in which the element of administration is least operative and the power of precedent and procedure reaches its highest point. Although some admixture of administrative action is essential, it yields readily to the dominating influence of procedure. Topics so affected are those, such as Burden of Proof, Presumptions, Admissions, Confessions, and Evidence at a Former Trial, which are direct survivals of the formal period of legal evolution and have come into the rational stage of legal growth bearing strong marks of their origin.

*The third volume* is concerned with the exclusionary rule in respect to "opinion evidence." It deals mainly with the matter of reasoning by witnesses, with or without the element of observation. In treating this subject the psychological acts have been divided into three classes. To the first, the term Inference has been applied. Observation is supreme in this field and reasoning is at its lowest point of efficiency. In the second species, Conclusion, a larger element of reasoning is found, while in Judgments, by which the third class is designated, reasoning, to which observation is no longer yoked, is given unimpeded force. It is here that we have what is properly the field of the expert.

*The fourth volume* discusses branches of the law of evidence which reveals an increasing influence of the element of judicial administration. While its treatment covers primarily questions relating to logical or probative Relevancy and considers the operation of the rule of substantive law under which the litigants are entitled to the use of reason, the underlying administrative basis upon which the practical application of these procedural rules rests becomes more obvious. The great exclusionary rules of procedure, rejecting Hearsay, *Res inter Alios actae* or Character Evidence are considered, not only in and of themselves, but as actually employed and modified, extended or depressed, in scope and operation, by the courts under their social mandate of administering justice. Some consideration is also given, in this connection, to the two great rational rules relating to the admissibility of unsworn statements used in their assertive capacity, which have been designated, for convenience, the Relevancy of Spontaneity and the Relevancy of Regularity, respectively, by which the modern law of evidence seeks to relieve the administration of justice from certain of the more injurious effects of the anomalous Hearsay Rule by means of the reasonable expedient of admitting the extrajudicial statement where the danger of self-serving invention on the part of the declarant is eliminated by the semi-automatism of reflex, uncerebrated action.

## CHAPTER III.

### LAW AND FACT.

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§ 65. **Law and Fact; A Third Conception.**— But it is obvious that these conceptions of evidence and fact are incomplete and inadequate for the present purpose until supplemented and unified by a third fundamental conception, that of *law*. Law supplies to the rules of evidence much of their form and all their objective. Not only do the substantive law<sup>1</sup> and that regulating judicial procedure<sup>2</sup> deeply affect the rules of evidence and the canons of its administration, but evidence on the trial of any issue is conditioned by its relevancy to the proof of constituent facts and of these facts to the existence of a right or liability, which, in turn, is determined by law. It is, therefore, essential to consider in what way law is to be regarded in this connection.

§ 66. **Law Defined.**— Law may, for municipal or domestic judicial purposes, be defined as a rule of conduct prescribed by the sovereign

1. *Supra*, § 35.

2. *Supra*, § 34.

of the forum upon its subjects and enforced by a sanction.<sup>1</sup> Naturally, unconfined by relation, the word is one of wide significance. As Salmond says,<sup>2</sup> "In its widest and vaguest sense the term law includes any rule of action; that is to say, any standard or pattern to which actions (whether the acts of rational agents or the operations of nature) are or ought to be conformed."<sup>3</sup> The body of municipal law is of necessity a growing and changing system. These characteristics of growth and changing are essential to its usefulness. "The law, if it is to be an efficient and workable system, must needs be blind to many things, and the legal theory of things must be simpler than the reality. Partly by deliberate design, therefore, and partly by the errors and accidents of historical development, law and fact, legal theory and the truth of things, are far from complete coincidence. We have ever to distinguish that which exists in deed and in truth, from that which exists in law."<sup>4</sup> "Laws are in theory," as Hooker says, "'the voices of right reason'; they are in theory the utterances of justice speaking to men by the mouth of the state; but too often in reality they fall far short of this ideal. Too often they 'turn judgment to wormwood,' and make the administration of justice a reproach."<sup>5</sup>

§ 67. A Divided Tribunal.—The form of the English law of evidence, at any period of its not very extended existence, is unintelligible without constant mental reference to what is perhaps the most salient and fundamental feature of English jurisprudence—the separation of the judicial tribunal for the trial of causes into two component parts of judge and jury. Only where such a division of function exists is it necessary to segregate "matter of law" from "matter of fact" with the care and precision with

1. "Law is a rule set by a political superior to political inferiors and enforced by a sanction." Austin, *Province of Jurisprudence*. "The law is the wisdom and justice of the organized commonwealth, formulated for the authoritative direction of those to whom the commonwealth has delegated its judicial functions." Salmond, *Jurisp.* (2d ed.), 13.

2. *Jurisp.* (2d ed.), p. 39.

3. Other definitions.—"Law, in its most general and comprehensive sense,

signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics or mechanics, as well as the laws of nature and of nations." Blackstone, *Comm.*, I, 38. "We term any kind of rule or canon whereby actions are framed a law." Hooker, *Ecc. Pol.*, I, 3, 1.

4. Salmond, *Jurisp.* (2d ed.), 18.

5. Salmond, *Jurisp.* (2d ed.), 19.

which the English law finds it necessary to insist upon so artificial a distinction. In order to obtain approximately clear conceptions of what is meant by these terms "matter of law" and "matter of fact" to which some consideration has been given in the last two chapters, it will be necessary before proceeding to the more full consideration of the various functions and relations of the judge and jury, as will shortly be hereafter done,<sup>1</sup> to consider in this preliminary chapter the relation between the respective provinces of judge and jury, at common law, in an English or American court, in respect to this distinction between "matter of law" and "matter of fact." In general it may be said that it is error to instruct the jury that they are to judge of the law<sup>2</sup> or of its constitutionality.<sup>3</sup> Political considerations of the rights of the citizen as related to the prerogative of the crown, presented in a highly controversial form to the people of England in the seventeenth and eighteenth centuries, have made this topic one upon which there is a wealth of feeling.<sup>4</sup> The zeal of counsel defending desperate

1. *Infra*, §§ 163 *et seq.*, 269 *et seq.*

2. *Alabama*.—*Washington v. State*, 63 Ala. 135, 35 Am. Rep. 8 (1879); *Batre v. State*, 18 Ala. 119, 122 (1850) (gaming); *Pierson v. State*, 12 Ala. 149 (1847).

*Arkansas*.—*Sweeney v. State*, 35 Ark. 586, 601 (1880) (murder).

*Indiana*.—*Townsend v. State*, 2 Blackf. 151 (1828).

*Michigan*.—*Hamilton v. People*, 29 Mich. 173, 189-193 (1874).

*New Hampshire*.—*Pierce v. State*, 13 N. H. 536 (1843).

*Ohio*.—*Montgomery v. State*, 11 Ohio 424 (1842); *Robbins v. State*, 8 Ohio St. 131, 148, 149, 166 (1857).

*South Carolina*.—*State v. Drawdy*, 14 Rich. Law 87 (1866).

*United States*.—*United States v. Battiste*, 2 Sumn. 240, Fed. Cas. No. 14,545 (1835).

*England*.—*Levi v. Milne*, 4 Bing. 195 (1827).

3. *Com. v. Anthes*, 5 Gray 186 (1855); *Pierce v. State*, 13 N. H. 537 (1843) (intoxicating liquor).

*Connecticut* permits this. *State v. Thomas*, 47 Conn. 546, 552, 36 Am.

Rep. 98 (1880). But the rule, rationally reckless and anti-social, is in deserved disfavor with the judges. Thus where the trial judge erroneously stated to the jury that the supreme court had held a section of the law against the sale of intoxicating liquor to be constitutional—which the court would have done had the question come before them. Park, C. J., said: "The most that can be said is that the jury were misled into taking the only view of the law that they could correctly have taken. The defendant lost a possible chance of the jury's erroneously deciding the law in his favor. This ground for a new trial does not commend itself to our sense of justice. But we need not decide whether, if that were the precise state of the case, it would be a sufficient ground for granting a new trial. This court had in fact decided the question as to the validity of the statute." *State v. Thomas*, 47 Conn. 546, 552, 36 Am. Rep. 98 (1880).

4. *Kentucky*.—*Montee v. Com.*, 3 J. J. Marsh. 132, 149 (1830).

*Massachusetts*.—*Com. v. Porter*, 10

criminal cases has, moreover, been quick to take advantage of some so-called "right" of the jury to return a verdict of acquittal in disregard of the rules of law which the judge has directed them to apply to the constituent facts. Notwithstanding these contentions, while the contrary has been at times held,<sup>5</sup> the view that even in criminal cases the jury are to receive and apply the rule of law as announced by the court is supported by the great weight of authority.<sup>6</sup>

*With the policy of the law* it seems to be conceded that the jury are not concerned.<sup>7</sup>

§ 68. **Who Should Apply Rule of Law.**—Legal reasoning, as has just been seen,<sup>1</sup> so far as applies to matter of fact, with which alone evidence is concerned, consists in the application of facts to a legal standard of rights and liabilities prescribed by substantive law. In the ordinary judicial action this legal reasoning upon facts is the application of a rule of substantive law to the con-

*Metc.* 263, 283 (1845); *Com. v. Knapp*, 10 Pick. 477, 496 (1830); *Coffin v. Coffin*, 4 Mass. 2, 25 (1808).

*Michigan.*—*Hamilton v. People*, 29 Mich. 173, 189 (1874).

*New York.*—*People v. Crosswell*, 3 Johns. Cas. 337 (1804).

*Ohio.*—*Montgomery v. State*, 11 Ohio 424, 427 (1842).

*Pennsylvania.*—*Pennsylvania v. Bell*, Add. 156, 160 (1793).

*United States.*—*United States v. Battiste*, 2 Sumn. 240, 243, Fed. Cas. No. 14,545 (1835).

*England.*—*Devizes v. Clark*, 3 A. & E. 506 (1835); *Macclesfield v. Pedley*, 4 B. & Ad. 403 (1833); *Mosley v. Walker*, 7 B. & C. 53, 56 (1827); *Bushell's Case*, Vaugh. 135, 143 (1670); *Rex v. Withers*, 3 T. R. 428 (1789); *Rex v. Woodfall*, 5 Burr. 2661 (1770); *Rex v. Wilkes*, 4 Burr. 2527 (1770); *Rex v. Owens*, 18 How. St. Tr. 1203 [case 525] (1752); *Francklin's Case*, 17 How. St. Tr. 625 [case 489] (1731); *Fuller's Case*, 14 How. St. Tr. 517 [case 422] (1702); *Hargrave's Notes*, 1 Inst. 155b; 1 Chase Tr. 34.

5. *Infra*, §§ 71, 86.

6. *Alabama.*—*Washington v. State*, 63 Ala. 135, 35 Am. Rep. 8 (1879); *Batre v. State*, 18 Ala. 119 (1850).

*Arkansas.*—*Sweeney v. State*, 35 Ark. 586 (1880); *Pleasant v. State*, 13 Ark. 360 (1853).

*Massachusetts.*—*Com. v. Rock*, 10 Gray 4 (1857); *Com. v. Anthes*, 5 Gray 185 (1855).

*Michigan.*—*Hamilton v. People*, 29 Mich. 173, 189 (1874).

*New Hampshire.*—*Pierce v. State*, 13 N. H. 536 (1843).

*New York.*—*Duffy v. People*, 26 N. Y. 588 (1863).

*Ohio.*—*Montgomery v. State*, 11 Ohio 424, 427 (1842); *Robbins v. State*, 8 Ohio St. 131 (1857).

*Pennsylvania.*—*Pennsylvania v. Bell*, Add. 156, 160 (1793).

*South Carolina.*—*State v. Drawdy*, 14 Rich. Law 87 (1866).

*United States.*—*United States v. Morris*, 1 Curt. 23, Fed. Cas. No. 15,815 (1851); *Georgia v. Brailsford*, 3 Dall. 1, 4 (1794).

7. *State v. Buckley*, 40 Conn. 247 (1873); *State v. Miller*, 53 Iowa 154, 156, 157, 4 N. W. 900 (1880).

1. *Supra*, §§ 59, 63.

stituent facts, as defined above.<sup>2</sup> In other words, before it can be ascertained by the tribunal as to whether the right or liability asserted or denied in the proceeding can be regarded as established or shown not to exist, three steps, one of law, one of logic and one partly of law and partly of logic, i. e., of legal reasoning must be taken by the tribunal, or one of its component parts. That is to say, (1) a rule of law must be formulated and announced; (2) the ultimate facts must be ascertained; (3) the rule of law must be applied to these ultimate constituent facts and determine in this way whether the right or liability has been established. These several steps will briefly be considered in this order. Only as to who is entitled to take the third step—that of applying the rule of law to the constituent facts—is there confusion among the authorities and lack of symmetrical and scientific development in the law of evidence.

**§ 69. (*Who Should Apply Rule of Law*); (1) Judge Authoritatively Announces Rule of Law.**—The first step is taken by the judge. He is to formulate and announce the rule of law governing the existence, in matter of law, of the right or liability asserted. This is part of the judge's function of administration in point of law with which the jury have no concern. It is the universally recognized duty of the jury,<sup>1</sup> even in criminal cases,<sup>2</sup> to follow the rulings of the judge as to matter of law.<sup>3</sup> These instructions as to rules of law the judge will give so far as required by the state of the evidence, either *sua sponte*, of his own motion,<sup>4</sup> or at the request of the parties,<sup>5</sup> even in criminal cases.<sup>6</sup> This, for the purposes of the trial, is authoritative; revision or correction, so far as needed, is the work of other judges, nothing of the kind being allotted to the jury.<sup>7</sup>

2. *Supra*, § 47.

1. *Higginbotham v. Campbell*, 85 Ga. 638, 11 S. E. 1027 (1890).

2. *Infra*, § 71.

3. *Council v. Teal*, 122 Ga. 61, 49 S. E. 806 (1905); *Com. v. Rock*, 10 Gray 4 (1857).

4. *State v. Stonum*, 62 Mo. 596 (1876); *State v. Matthews*, 20 Mo. 55 (1854).

5. *Montee v. Com.*, 3 J. J. Marsh.

132, 149 (1830); *Com. v. Porter*, 10 Metc. 263 (1845); *Coffin v. Coffin*, 4 Mass. 2, 25 (1808); *Montgomery v. State*, 11 Ohio St. 424, 427 (1842); *Nels v. State*, 2 Tex. 280 (1847).

6. *Montee v. Com.*, 3 J. J. Marsh. 132 (1830).

7. *Hamilton v. People*, 29 Mich. 173, 193 (1874). No independent examination into the law is permissible in the jury-room. *Newkirk v. State*, 27

§ 70. (*Who Should Apply Rule of Law; [1] Judge Authoritatively Announces Rule of Law*); Civil Cases.—In civil causes the jury have encroached upon the province of the court to declare the law and require the jury to observe it only to a very limited extent; and have gradually been dislodged from such advantages in this respect as they may be said to have gained for any other than political reasons. It has been plausibly suggested that the reason why juries were ever permitted to determine the law in civil cases, was, in part, at least, the fact that early jury trials were usually held at the bar of the full court, whose judges, giving varying rules of law, were practically forced to leave all the component parts of the issue, law as well as fact, to the general verdict of the jury.<sup>1</sup>

*Local Laws.*—As *quasi* matter of fact, the jury, for example, have been considered, in a few cases, as entitled to find the law to be different from that announced to them by the court, should the law be one of a *local* nature.<sup>2</sup> This may be regarded as untenable.<sup>3</sup>

Ind. 1 (1866); *Merrill v. Nary*, 10 Allen 416 (1865); *Harrison v. Hance*, 37 Mo. 185 (1866); *State v. Smith*, 6 R. I. 33 (1859).

*Law books in jury-room.*—Books of the law—even the statute book should be excluded from the jury while deliberating on their verdict. *State v. Kimball*, 50 Me. 409, 418 (1861); *Merrill v. Nary*, 10 Allen 416 (1865); *Harrison v. Hance*, 37 Mo. 185 (1866); [overruling, in part, *Hardy v. State*, 7 Mo. 607 (1842)]; *Burrows v. Unurn*, 3 C. P. 310 (1828).

*New trial.*—The improper conduct in using law books in the jury-room is not, necessarily, so prejudicial as to require that the judge presiding at the trial should set aside the verdict. *State v. Hopper*, 71 Mo. 425 (1880); *People v. Gaffney*, 14 Abb. Prac. (N. S.) 37 (1872). See also *Wilson v. People*, 4 Parker Cr. R. 619, 632 (1859); *Grandolfo v. State*, 11 Ohio St. 114, 118 (1860).

Under circumstances of aggravation

the judge may, however, properly exert his administrative powers to the end of granting a new trial. Among such circumstances are wilful and conscious violation of law,—as where the volume is removed from the courtroom *secretly*. *Newkirk v. State*, 27 Ind. 1 (1866); *People v. Hartung*, 4 Parker Cr. R. 256 (1859); *State v. Smith*, 6 R. I. 33 (1859).

1. Thayer, Prelim. Treat., 253.

2. *Sparf v. U. S.*, 156 U. S. 51, 110, 15 Sup. 273 (1895).

3. *Connecticut.*—*State v. Gannon*, 75 Conn. 206, 52 Atl. 727 (1902).

*Massachusetts.*—*Com. v. Porter*, 10 Metc. 263 (1845).

*New Hampshire.*—*State v. Hodge*, 50 N. H. 510, 522 (1869).

*United States.*—*U. S. v. Battiste*, 2 Sumn. 240, 243, Fed. Cas. No. 14,545 (1835).

*England.*—*Levi v. Milne*, 4 Bing. 195 (1827).

Co. Litt. 155b, Hargrave's note 276.

§ 71. (*Who Should Apply Rule of Law; [1] Judge Authoritatively Announces Rule of Law*); Criminal Cases.—Juries are not judges of the law in criminal cases.<sup>1</sup>

§ 72. (*Who Should Apply Rule of Law; [1] Judge Authoritatively Announces Rule of Law; Criminal Cases*); Double Jeopardy.—In criminal cases, the court may direct a verdict for the defendant but not against him.<sup>1</sup> The entire power of the jury to deal with the rules of law in any case is incidental to their right to render a general verdict.<sup>2</sup> The peculiarity in criminal cases

1. *Alabama*.—*Batre v. State*, 18 Ala. 119 (1850).

*Indiana*.—*Townsend v. State*, 2 Black, 151 (1828).

*Massachusetts*.—*Com. v. Anthes*, 5 Gray 185 (1855).

*Missouri*.—*Hardy v. State*, 7 Mo. 607 (1842).

*New Hampshire*.—*State v. Hodge*, 50 N. H. 510 (1869); *Pierce v. State*, 13 N. H. 536 (1843).

*New York*.—*Duffy v. People*, 26 N. Y. 588 (1863).

*Ohio*.—*Robbins v. State*, 8 Ohio St. 131 (1857).

*Pennsylvania*.—*Com. v. McManus*, 143 Pa. St. 64, 86, 21 Atl. 1018, 22 Atl. 761 (1891).

*United States*.—*Sparf v. U. S.* 156 U. S. 51, 15 Sup. Ct. 273 (1894). The rule is not affected by the circumstance that it is the legal right of a jury to return a general verdict and that this draws after it, as a necessary consequence, that they incidentally pass on the law. In so doing, they are not at liberty to exercise their own reason and judgment against the statement of law by the judge, to adjudicate on the law—as, unquestionably, they may do as to the fact. *Com. v. Anthes*, 5 Gray (Mass.) 185, 209 (1855).

A contrary view as to the right of a jury to deal with questions of law in criminal cases is held in several jurisdictions.

*Kentucky*.—*Montee v. Com.* 3 J. J. Marsh, 132, 151 (1830).

*Louisiana*.—*State v. Jurche*, 17 La. Ann. 71 (1865).

*Maine*.—*State v. Snow*, 18 Me. 346 (1841).

*New Jersey*.—*Drake v. State*, 30 N. J. Law, 422 (1863) (criminal libel).

*Tennessee*.—*Nelson v. State*, 2 Swan, 482 (1852).

*Vermont*.—*State v. Crotean*, 23 Vt. 14 (1849).

*United States*.—*State of Ga. v. Brailsford*, 3 Dall. 1 (1894).

There is, however, an obvious distinction between a right and an excessive exercise of power which can neither be prevented or corrected.

Parties or their counsel are permitted, in criminal cases, to address the jury, under the general superintendence of the Court, upon all the material questions involved in the issue including such questions of law as come within it. *Com. v. Porter*, 10 Metc. (Mass.) 263, 287 (1845). "The jury are the exclusive judges of the fact in every criminal case, but not of the law in any case. They are bound to receive the law from the court and to be governed thereby."

*Texas Code Crim. Pro.*, art. 676.

1. *Infra*, n. 3.

2. *Devizes v. Clark*, 3 A. & E. 506 (1835); *Bushell's Case*, Vaugh. 135 (1670); *Macclesfield v. Pedley*, 4 B. & Ad. 397, 403 (1833). See also *Morley v. Walker*, 7 B. & C. 40, 53, 56 (1827); 1 Chase Tr. 34. "Upon the whole, the result is that the immediate and direct right



consists merely in this; that where such a general verdict is one of acquittal, the judge cannot set it aside.<sup>3</sup> Under an almost universal constitutional provision, one accused of crime cannot twice be placed in jeopardy for the same offense. Changed social conditions seem greatly to have impaired the basis of public policy upon which the rule originally rested.<sup>4</sup> Be this as it may, the fact of the provision against double jeopardy has given rise to the conception that as the work of the jury in acquitting contrary to the rule of law formulated by the court could neither be prevented, revised, nor punished,<sup>5</sup> therefore, they had a *right* to disregard the instructions of the court. "This power, instead of being called a power to judge of the law, should rather be regarded as a power to *set aside the law* in a given instance; and it is believed that

of deciding upon questions of law is entrusted to the judges; that in a jury, it is only incidental; that, in the exercise of this incidental right, the latter are not only placed under the superintendence of the former, but are in some degree controllable by them and therefore that in all points of law arising on a trial juries ought to show the most respectful deference to the advice and recommendations of judges; nor is it any small merit in this arrangement that, in consequence of it, every person accused of a crime is enabled, by the general plea of not guilty to have the benefit of a trial in which the judge and jury are a check upon each other." Hargrave's Notes, 1 Inst. 155b.

3. "It was never yet known, that a verdict was set aside by which the defendant was acquitted in any case whatsoever, upon a criminal prosecution." *King v. Jones*, 8 Mod. 201, p. 208 (1724). Per Pratt, C. J.

4. The rule is manifestly based upon the fondness of the English law for safeguarding its criminal from the (now vanished) severity of its own operation, which, whether an element of strength or weakness, in judicial administration, is at least one of its salient features. The prohibition against double jeopardy gives no support to the claim that the jury may

disregard the law laid down by the Court in criminal cases. *Duffy v. People*, 26 N. Y. 588, 591 (1863).

5. *Attaint*.—The earlier practice provided a punishment of the jury for false verdicts by way of *attaint*. This led to a disinclination to finding general verdicts which alone involved this risk;—a special verdict throwing on the court the duty of applying the law to the facts. In mishap or misconduct in legal reasoning lay the chance for punishment. It was openly advised that: in view of the *attaint*, special verdicts be returned. Thus in Coke on Littleton, the text of the author is as follows:—"Also in such case where the inquest may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge," etc. Coke, in commenting offers this shrewd suggestion:—"Although the jurie, if they will take upon them (as Littleton here saith) the knowledge of the law, may give a general verdict, yet it is dangerous for them so to doe for if they doe mistake the law, *they runne into danger of an attaint*; therefore to find the speciall matter is the safest way, where the case is doubtfull." Co. Litt., 228a. See also, Co. Litt., 155b.

the popular affection for the system of trial by jury lies largely in the fact that this system involves a popular prohibition upon the execution of the law in hard cases.”<sup>6</sup> Such is the general view of American courts who very properly distinguish sharply between a *right* and an uncorrectible abuse of *power*.<sup>7</sup>

§ 73. (*Who Should Apply Rule of Law; [1] Judge Authoritatively Announces Rule of Law; Criminal Cases*); Public Policy.—No zeal for a client could well be more anti-social than that which leads an attorney (in the American sense) to urge the jury to award his client a verdict of acquittal under a rule of law invented or devised by themselves.<sup>1</sup> While it cannot be doubted that a principal claim of the jury to popular favor is, as has just been said, its traditional ability to defy, in a general verdict, the law of the land as announced by the judge, grave public dangers necessarily grow out of notorious lawbreaking similar to those which would arise from any other open and successful infraction of the rules of law. The natural result is that persons legally guilty are permitted to escape punishment. To this extent, the evil is part of an emotional indulgence to those accused of crime, accounted for in its inception, if not justified, by the rigor of early English criminal codes; but now unmitigatedly evil in an enlightened age and under humane laws. Not even, however, does the personal interest of one accused of crime lie in the direction of having

6. 2 Thomp. on Tr. 2133.

7. *State v. Ford*, 37 La. Ann. 443, 465 (1885); *State v. Tally*, 23 La. Ann. 677, 678 (1871); *United States v. Greathouse*, 4 Sawy. 457, 464, 2 Abb. 364, Fed. Cas. No. 15,254 (1863). See also *State v. Scott*, 12 La. Ann. 386 (1857); *State v. Ballerio*, 11 La. Ann. 81 (1856); *State v. Scott*, 11 La. Ann. 429 (1856). *Pennsylvania* maintains a *contrary view*:—taking a position which seems entirely anomalous: “It has been strongly contended that, though the jury have the power, they have not the right, to give a verdict contrary to the instruction of the court upon the law; in other words, that to do so would be a breach of their duty and a violation of their oath. The distinction between power and right, whatever may be its value

in ethics, in law is very shadowy and unsubstantial. He who has the legal power to do anything has the legal right. No court should give a binding instruction to a jury which they are powerless to enforce by granting a new trial if it should be disregarded. They may present to them the obvious considerations which should induce them to receive and follow their instructions, but beyond this they have no right to go. The argument in favor of their taking the law from the court is addressed very properly *ad verecundiam*. The court is appointed to instruct them, and their opinion is the very best evidence of what the law is.” *Kane v. Com.*, 89 Pa. 522, 525 (1879). Per Sharswood, C. J.

1. *Pennsylvania v. Bell*, Add. 156, 160 (1793).

the jury violate their oaths by applying to the facts a different rule of law from that formulated for them by the courts. In time of popular clamor, more eager for the sacrifice of a victim than a search for the true offender, the rule of law laid down by the court may be the sole protection of innocence. A lawless jury may be as dangerous to him as a lawless mob.<sup>2</sup> "If the court had no right to decide the law, error, confusion, uncertainty and licentiousness would characterize the criminal trials, and the safety of the accused might be as much endangered as the stability of public justice certainly would be."<sup>3</sup>

**§ 74. (*Who Should Apply Rule of Law; [1] Judge Authoritatively Announces Rule of Law; Criminal Cases*); Confusion of Law.**—An evil still greater than lack of protection to any individual accused of crime, lies in the consideration that, unless the jury take the rule of law as announced by the court, all certainty in the law itself is at an end. Each application of a rule of law to a known state of facts amounts to a construction of the rule of law in terms of fact. To permit casual bodies of twelve untrained men, selected by lot from the community, to construe the law, would introduce such an element of confusion as to what that law is as would amount to an intolerable abuse and degradation of the administration of justice.<sup>1</sup> More than this, under such circumstances, "Jurors would become not only judges but legislators as

2. *Pennsylvania v. Bell*, Add. 156, 160 (1793); *United States v. Battiste*, 2 Sumn. 240, 243 (1835). "Parties charged with crime need the protection of the laws against unjust convictions quite as often as the public needs it against groundless acquittals. Neither can be safe without having the rules of law defined and preserved, and beyond the mere discretion of any one." *Hamilton v. People*, 29 Mich. 173, 191 (1874).

3. *Montee v. Com.*, 3 J. J. Marsh. 132, 151 (1830).

1. *Hamilton v. People*, 29 Mich. 173, 191 (1874); *Duffy v. People*, 26 N. Y. 588, 591 (1863). "If the court is to have no voice in laying down these rules, it is obvious that there can be

no security whatever, either that the innocent may not be condemned or that society will have any defense against the guilty." *Hamilton v. People*, 29 Mich. 173, 191 (1874). "For miserable would be our situation if our lives depended not on fixed rules, but on the feelings which might happen to be excited in the jurors who were to try us. If in the case of one man, compassion pervert the construction of the law to acquit, in the case of another resentment may pervert it to condemn; and whenever guilt may thus escape from punishment, innocence may be no longer a shield." *Pennsylvania v. Bell*, Add. 156, 160 (1793).

well.”<sup>2</sup> Nor is this all. “If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which juries might take of it, but, in case of error, there would be no remedy or redress of the injured party; for the court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was.”<sup>3</sup>

**§ 75. (*Who Should Apply Rule of Law; [1] Judge Authoritatively Announces Rule of Law; Criminal Cases*); Differing Views.**—The great authority of Blackstone, especially in his emphatic statement that a jury is the *palladium* of English liberty, has been a powerful force in impeding the symmetrical growth of judicial administration. In several jurisdictions more powers in dealing with the rule of law than are generally judged to be in the public interest have, by statute or constitution, been conferred upon the jury.<sup>1</sup> The same results authorizing the jury to invent or improvise a rule of law for themselves, in criminal cases, has been occasionally effected by judicial

2. *Duffy v. People*, 26 N. Y. 588, 591 (1863);

3. *State v. Hannibal*, 37 La. Ann. 619, 620 (1885); *State v. Ford*, 37 La. Ann. 443, 465 (1885); *Nicholson v. Com.*, 96 Pa. 503, 505 (1880); *United States v. Battiste*, 2 Sumn. 240, 243, Fed. Cas. No. 14,545 (1835). See also *State v. Drawdy*, 14 Rich. Law 87 (186).

1. *Hudelson v. State*, 94 Ind. 426, 429 (1883); *Powers v. State*, 87 Ind. 145, 156 (1882); *State v. Ford*, 37 La. Ann. 443, 465 (1885); *State v. Miller*, 75 N. C. 74 (1876); *R. S. Ind.* 1881, §§ 64, 1823.

In Georgia a code provision is as follows:—“The jury in all criminal cases shall be the judges of the law and the facts.” Const. Ga., art I, § 2, par. I (1877); Georgia Code 1882 § 5019. Under this provision the earlier cases held that the jury might determine that the law was different

from the rule given them by the judge. *Dickens v. State*, 30 Ga. 383 (1860); *Keener v. State*, 18 Ga. 194 (1855); *Berry v. State*, 10 Ga. 511 (1851); *Holder v. State*, 5 Ga. 441 (1848). In later cases this ruling has been reversed. For example, the following charge was sustained: “That they were the judges of the law and the facts, so as to enable them to apply the law to the facts, and bring in a general verdict; but that they had no right to make law; the law was laid down in the Code; it was the province of the court to construe the law and give it in charge, and of the jury to take the law as given, apply it to the facts as found by them, and bring in a general verdict.” *Anderson v. State*, 42 Ga. 9, 32, 34 (1871). This has continued to be the law. *Ridenhauer v. State*, 75 Ga. 382 (1885); *Danforth v. State*, 75 Ga. 614 (1885); *Hill v. State*, 64 Ga. 454 (1880).

decision.<sup>2</sup> Among these jurisdictions are Illinois,<sup>3</sup> Indiana,<sup>4</sup> Louisiana,<sup>5</sup> Maine,<sup>6</sup> Massachusetts,<sup>7</sup> Pennsylvania,<sup>8</sup> Tennessee<sup>9</sup> and Vermont.<sup>10</sup>

2. An erroneous instruction by the court will, even in states where the jury are judges of the law, be ground for a new trial. *Clem v. State*, 42 Ind. 422, 447 (1873); *State v. Rice*, 56 Iowa 431, 9 N. W. 343 (1881).

3. *Adams v. People*, 47 Ill. 376, Hor. & Th. Cas. Self Def. 208 (1868); *Fisher v. People*, 23 Ill. 283 (1860); *Schnier v. People*, 23 Ill. 17, Hor. & Th. Cas. Self Def. 285 (1859). But see *Mullinix v. People*, 76 Ill. 211 (1875). "It is the duty of the jury to accept and act upon the law, as laid down to you by the court, unless you can say, upon your oaths, that you are better judges of the law than the court." *Mullinix v. People*, 76 Ill. 211 (1875); *Accord*:—*Fisher v. People*, 23 Ill. 283 (1860).

4. *Stout v. State*, 96 Ind. 407 (1834); *Heagy v. State ex rel.*, 85 Ind. 260 (1882); *Fowler v. State*, 85 Ind. 538 (1882); *Keiser v. State*, 83 Ind. 234 (1882); *Harvey v. State*, 40 Ind. 516 (1872); *Williams v. State*, 10 Ind. 503 (1858); *Daily v. State*, 10 Ind. 536 (1858); *Lynch v. State*, 9 Ind. 541 (1857); *Murphy v. State*, 6 Ind. 490 (1855); *Carter v. State*, 2 Ind. 617 (1851); *Warren v. State*, 4 Blackf. 150 (1836); *Townsend v. State*, 2 Blackf. 151 (1828).

5. *State v. Vinson*, 37 La. Ann. 792 (1885); *State v. Saliba*, 18 La. Ann. 35 (1866); *State v. Jurche*, 17 La. Ann. 71 (1865); *Tresca v. Maddox*, 11 La. Ann. 206, 209 (1856). But see *State v. Ford*, 37 La. Ann. 443, 465 (1885); *State v. Vinson*, 37 La. Ann. 792 (1885); *State v. Hannibal*, 37 La. Ann. 619 (1885); *State v. Johnson*, 30 La. Ann. Pt. II, 904 (1878); *State v. Jurche*, 17 La. Ann. 71 (1865). "If you believe that you know more law than the judge does, you can believe so." *State v. Johnson*, 30 La. Ann. (Pt. II.) 904 (1878).

Rather inconsistently the Court

spoke approvingly of a charge informing the jury of "their clear duty to accept and apply the law as laid down for them by the judge." *State v. Vinson*, 37 La. Ann. 792 (1885). Per Fenner J.

6. *State v. Snow*, 18 Me. 346 (1841).

7. *Com. v. Porter*, 10 Mete. 263, 283 (1845); *Coffin v. Coffin*, 4 Mass. 2, 25 (1803).

8. "Judges may still be partial and oppressive, as well from political as personal prejudice, and when a jury are satisfied of such prejudice, it is not only their right, but their duty, to interpose the shield of their protection to the accused." *Kane v. Com.*, 89 Pa. 522, 527 (1879) *per* Sharswood, C. J. "One of the most valuable securities guaranteed by our Bill of Rights." *Kane v. Com.*, 89 Pa. 522, 527 (1879) *per* Sharswood, C. J. "It is in perfect accordance with the spirit of our legal institutions that courts should decide questions of law, and the juries of facts; the nature of the tribunals naturally leads to this division of duties, and it is better, for the sake of public justice, that it should be so: when the law is settled by a court, there is more certainty than when done by a jury; it will be better known and more respected in public opinion. But if you are prepared to say that the laws is different from what you have heard from us, you are, in the exercise of a constitutional right, to do so." *United States v. Wilson*, Baldw. 78, 99 (1830). This instruction of Mr. Justice Baldwin has been endorsed by Chief Justice Sharswood as representing his personal preference. *Kane v. Com.*, 89 Pa. 522, 33 Am. Rep. 787 (1879).

9. *Hannah v. State*, 75 Tenn. (11 Lea) 201 (1883).

10. *State v. Croteau*, 23 Vt. 15 (1849).

A *growing tendency* is observable among courts conceding the power of the jury to judge the law in criminal cases, to modify or explain away the peculiarity of their administrative position — bringing their rulings more nearly into correspondence with the general weight of authority.<sup>11</sup>

**§ 76. (*Who Should Apply Rule of Law*); (2) Jury Ascertain Constituent Facts.**— Speaking generally, the second step — that of ascertaining the constituent facts — is admittedly for the jury.<sup>1</sup> This is the rule even in states like Louisiana,<sup>2</sup> which by constitutional provision makes the jury judges of both law and fact in criminal causes.

**§ 77. (*Who Should Apply Rule of Law*); (3) Application of Law to Constituent Facts.**— The application of the law to the facts is partly one of logical and partly of legal reasoning. On fundamental administrative principles, little doubt would seem to exist as to which branch of the mixed tribunal should apply the rule of law to the constituent facts as being best calculated to do so with advantage to the cause of justice. To a certain extent, applying a rule of any kind to a set of facts, amounts to a construction of the rule. Such a process is an attempt to define an intellectual proposition in terms of fact. When it is asked as to whether in case of legal commands their construction in this form or any other, is best intrusted to one branch or the other of the mixed tribunal, reason would seem to point to that portion of the court which is familiar with these rules and is charged with the duty of announcing them, rather than to that branch which knows nothing on the subject. It is of recognized social importance that the rule of law should be as uniform and applied as accurately as possible. For the attainment of this uniformity and accuracy, two subjective qualities are highly beneficial, if not absolutely necessary, to any one who would apply or construe a rule of law. These are knowledge and a lively sense of responsibility for the social consequences of the course adopted. Either mental quality, without the other, is of but slight administrative value. Both are united in the well-balanced judge. Both are absent from the average jury.

11. *State v. Ford*, 37 La. Ann. 443 (1885).

1. *Fowler v. State*, 85 Ind. 538, 541 (1882); *State v. Hannibal*, 37 La. Ann. 619, 620 (1885); *Robbins v. State*, 8 Ohio St. 131, 148, 149, 166

(1857); *United States v. Greathouse*, 4 Sawy. 457, 464, 2 Abb. 364, Fed. Cas. No. 15,254 (1863).

2. *State v. Tisdale*, 41 La. Ann. 338, 6 So. 579 (1889).

*Knowledge of the rules of law is ex hypothesi*, with the judge. Habits of legal reasoning, trains of legal thinking, the philosophizing quality, the correct estimate of legal values in terms of fact, are part of the judicial training. Even where, as by no means always happens, the presiding judge is able to communicate to the jury the precise meaning of the rule of law which they are to apply to a particular set of constituent facts, the rule comes to them entirely apart from their ordinary experience, far from their usual modes of thinking, and divorced from the appropriate setting among other rules of law which it occupied in the judge's mind and generally unaccompanied by the capacity for sound legal reasoning which has come and can only come from years of exercise and other training.

*A sense of social obligation*, a feeling of responsibility for the wider effects of litigation, grows in the mind of a conscientious judge as a sort of instinct. It is the crowning privilege of the judicial office. But of necessity, it is developed by experience and requires imagination dealing with a special line of considerations. It implies power to disregard the appeal of the sympathies and other emotions as applied to individuals subject to immediate perception and contact for the sake of a moral obligation to a large number of indeterminate persons whose claims to supreme consideration are discerned only by a process of reasoning. Adequately to discharge this function of administration involves a high sense of duty and strong powers of inhibition against emotionalism. It would scarcely be anticipated, *a priori*, that a casual tribunal to whose daily thinking such considerations are alien, which is taken at short notice from the midst of a community perhaps strongly excited on the subject and which well knows that, without fear of punishment, it is soon to dissolve back into the general mass of the community, now shaken by adverse or friendly feelings carefully fanned by the enthusiasm of counsel, would display much of the influence of a desire to advance the interest of society beyond what society demands should be awarded, in favor of punishment, or its absence, on a particular occasion.

*Upon a natural scientific division of matter of law and matter of fact*, the jury should find simply the constituent facts. To the judge should fall the duty of announcing the rule of law and applying it to the constituent facts found by the jury. In other

words, both the rules of law and their application — judicial knowledge<sup>1</sup> and legal reasoning<sup>2</sup> — are “matter of law.”

*It is unfortunate*, from the standpoint of administrative symmetry and precision, that under the Tudors and Stuarts, political considerations should have led the growing forces of Democracy to assert the right of the jury to apply the rule of law to the facts found by them; while the contention of the Royalist party sought to impose its will upon the nation by the scientifically reasonable claims of the judges to perform this essential act in the administration of justice. The success of Democracy was therefore accompanied and, to a certain extent, signalized by the formulating of the unsound administrative canon that legal reasoning, the application of the law to the facts, is a matter of fact for the jury.

§ 78. *Coke's Maxim considered.*—It may be accepted as settled that whatever be the proper relation between law and fact on a jury trial, no such simple division exists as that all matters of law are for the judge; all matters of fact are for the jury, which has had a wide vogue in England<sup>1</sup> and America.<sup>2</sup> The so-called maxim — *ad quaestionem facti non respondent iudices, ad quaestionem juris non respondent juratores* — was a favorite with Lord Coke and was by him<sup>3</sup> attributed to Bracton. It was, however, never more than partially true.

1. *Infra*, §§ 570 *et seq.*

2. *Supra*, §§ 59, 63.

1. *Welstead v. Levy*, 1 Mood. & Rob. 138 (1831); *King v. Dean of St. Asaph*, 3 T. R. 428 note (1789).

2. *Arkansas*.—*Sibley v. Ratliffe*, 50 Ark. 477, 30 S. W. 686 (1888).

*Illinois*.—*Scott v. People*, 141 Ill. 195, 30 N. E. 329 (1892).

*Indiana*.—*Barker v. State*, 48 Ind. 163 (1874); *Townsend v. State*, 2 Blackf. 151 (1828).

*Kentucky*.—*Thomas' ex'r v. Thomas*, 15 B. Mon. 178 (1854).

*Maryland*.—*Charleston, etc., Co. v. Corner*, 2 Gill 410 (1844).

*Massachusetts*.—*Com. v. Robinson*, 146 Mass. 571, 581, 16 N. E. 452 (1888); *Com. v. Anthes*, 5 Gray 185, 202 (1855).

*Michigan*.—*Wessels v. Beeman*, 66

Mich. 343, 49 N. W. 483 (1887); *Toulman v. Swain*, 47 Mich. 82, 10 N. W. 117 (1881).

*Missouri*.—*Straus v. Kansas, etc., R. Co.*, 86 Mo. 421, 432 (1885).

*New York*.—*New Jersey Steamboat Co. v. New York City*, 109 N. Y. 621, 15 N. E. 877 (1888).

*Oregon*.—*State v. Huffman*, 16 Oreg. 15, 16 Pac. 640 (1888).

*Pennsylvania*.—*Curry v. Curry*, 114 Pa. St. 367 (1886). “I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts and the Court as to the law.” *United States v. Battiste*, 2 Sumn. 240, Fed. Cas. No. 14,545 (1835). Per Story, J.

3. *Isaak v. Clark, Rolle*, 59: 2 Bulstr. 314 (1614).



§ 79. (*Coke's Maxim Considered*); "Ad Quaestionem Facti Non Respondent Judices." — So far as regards the first branch of the statement — that judges do not decide questions of fact — the announcement is so transparently false as not to be essentially misleading.<sup>1</sup> The only facts with which the jury is concerned are constituent facts, i. e., material facts in the *res gestæ* relevant to the issue raised by the pleadings;<sup>2</sup> or, where there are no pleadings, to the existence of the right or liability involved in the inquiry. Other questions of fact are normally for the court.

*It is a distinct object of judicial administration* that the attention of an easily distracted jury should continue focussed upon the few and simple issues of the case itself by the elimination from their consideration of all other questions of fact.<sup>3</sup>

§ 80. (*Coke's Maxim Considered*; "Ad Quaestionem Facti Non Respondent Judices"); *Incidental Findings*. — In the course of judicial administration the judge, even when sitting with a jury, has the duty of deciding a large number of questions of fact as they arise. On any trial "carried on at once before court and jury"<sup>1</sup> such questions are incessantly arising. Whether an expert is sufficiently qualified to make his "opinion" of value to the jury; a document has been "attested;" a confession offered in evidence is "voluntary;" whether the nonproduction of a document has been sufficiently explained — these and other subsidiary or preliminary questions of fact<sup>2</sup> can, under the rules of common law procedure, be decided only by the judge.<sup>3</sup>

1. "Courts pass upon a vast number of questions of fact that do not get on the record or form any part of the issue. Courts existed before juries; juries came in to perform only their own special office; and the Courts have continued to retain a multitude of functions which they exercised before ever juries were heard of, in ascertaining whether disputed things be true. In other words, there is not, and never was, any such thing in jury trials as an allotment of all questions of fact to the jury. The jury simply decides some questions of fact." Thayer, *Prelim. Treat.* 185.

2. *State v. Hodge*, 50 N. H. 510, 522 (1869).

*Infra*, § 47.

3. *Com. v. Porter*, 10 Metc. 263, 276, per Shaw, C. J., (1845).

1. *Com. v. Porter*, 10 Metc. (Mass.) 263, 284 (1845).

2. *Zipperlen v. Southern Pac. Co.*, (Cal. App. 1908) 93 Pac. 1049. (whether a party is surprised by the evidence of his witness).

3. *California*. — *Fairbank v. Hughson*, 58 Cal. 314 (1881).

*Illinois*. — *Miller v. Metzger*, 16 Ill. 390, 393 (1855).

*Massachusetts*. — *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452 (1888). (Existence of general plan); *Com. v. Porter*, 10 Metc. 263, 287 (1845).

*Pennsylvania*. — *Semple v. Callery*, 184 Pa. 95, 39 Atl. 6 (1898).

§ 81. (*Coke's Maxim Considered; "Ad Quaestionem Facti Non Respondent Judices"*); Preliminary Facts Conditioning Admissibility.—It is true that many such findings of fact are not final. The judge is of necessity the executive officer of the mixed tribunal and must deal with a number of preliminary or provisional findings.<sup>1</sup> It readily may happen that the admissibility of particular testimony is dependent upon or conditioned by the existence of a preliminary fact. The court could, were the facts relating to the matter definitely ascertained, easily decide such questions; as, for example, whether a witness is disqualified by interest,<sup>2</sup> whether one to whom a communication was made was, at the time,

*England.*—*Doe v. Davies*, 10 Q. B. 314, 323 (1847); *Bartlett v. Smith*, 11 M. & W. 483 (1843). "Ordinarily, questions of fact are exclusively for the jury, and questions of law for the court. But when, in order to pass upon the admissibility of evidence, the determination of a preliminary question of fact is necessary, the court in the due and orderly course of the trial must necessarily determine it, as far as is necessary for that purpose, and usually without the assistance, at that stage, of the jury." *Com. v. Robinson*, 146 Mass. 571, 581 (1888). "It is the province of the judge who presides at the trial to decide all questions as to the admissibility of evidence." *Gorton v. Hadsell*, 9 Cush. 508, *per Metcalf J.* (1852). "It may in short be stated as a universal rule that the Court always decides whether there has been any evidence upon a particular point, when there exists a legal necessity to produce such evidence in order to warrant the introduction of evidence upon some other point; to this extent the Court decides questions of fact." *Holly v. State*, 55 Miss. 424, 430 (1877). "Whatever else may be the value of the separation of questions which arise in a Court of Justice into questions of fact and of law, the separation is not, in practice, very rigidly adhered to." Sir William Markby, *Law and Fact*, *Law Mag. & Rev.*, 4th Ser., Vol II., 317.

"It is also his province to decide any preliminary question of fact, however intricate, the solution of which may be necessary to enable him to determine the other question of admissibility." *Bartlett v. Smith*, 11 M. & W. 483 (1843). Whether the record of a foreign judgment is properly authenticated is a question for the trial judge. *Clark v. Eltinge*, 38 Wash. 376, 80 Pac. 556 (1905).

1. **Demonstration** or the elimination of all doubt is not required. It is only necessary that there should be so much evidence as to make it proper to submit the whole evidence to the jury. *Com. v. Robinson*, 146 Mass. 571 (1888). "The court in the due and orderly course of the trial must necessarily determine it as far as is necessary for that purpose, and usually without the assistance, at that stage, of the jury." *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452 (1888).

2. "Whether a witness is interested upon this or that given state of facts is a question of law for the Court; whether the facts exist as claimed by one party or the other is a question of fact, which, when presented in the form of the preliminary inquiry as to the competency of witness, may be determined by the Court, or, in the exercise of their discretion, by the jury." *Bartlett v. Hoyt*, 33 N. H. 151, 165 (1856).

a legal adviser,<sup>3</sup> or the like. This it could do under the general administrative canon<sup>4</sup> that, where the necessary facts are found, admitted, or not controverted, the court will apply the rule of law to them; or, perhaps more properly, state the facts in terms of law, their legal effect, or, in other words, as a matter of law. If he reject the evidence on the ground that the preliminary fact does not exist, his action practically amounts to a ruling, in point of law, that the jury could not rationally find that it existed. Should he conclude to submit the evidence to the jury, his action involves making a ruling that, as a matter of law, the jury might rationally find from the evidence in the case the existence of the qualifying fact, and, by consequence that of the disputed fact itself.

*Controversy as to Facts.*—Where a serious conflict exists upon the evidence as to the existence of a conditioning or qualifying fact on which the admissibility of a particular piece of evidence is directly dependent, the judge may adopt one of several expedients: (1) He may hear the evidence and adjudicate as to the existence of the qualifying fact,<sup>5</sup> hearing the evidence as offered by both sides, and not in presence of the jury.<sup>6</sup> When he has decided whether the evidence in support of admissibility is such that the jury might rationally act on it, he will proceed as in a case where the evidence is uncontroverted.<sup>7</sup> It has been held that the propriety of the judges finding in this connection will not be reviewed in an appellate court.<sup>8</sup> It has been suggested that in a criminal case, the court, to find a fact against the prisoner, must be satisfied of the truth of the matter beyond a reasonable doubt.<sup>9</sup> The better view is to the effect that no such limitation on the court's action exists.<sup>10</sup> (2) He may ask the jury to find, specifically, as to the existence of the qualifying fact; and, upon receiving their report, proceed as where the evidence is uncontroverted. Or, (3) he may leave the entire matter to the jury, to whom it must ultimately go on the question of weight, under suitable instructions directing them as to their proper course in the event that they find, or fail to find, the existence of the qualifying fact. The

3. Hartford F. Ins. Co. v. Reynolds, 36 Mich. 502, 504 (1877).

4. *Infra*, §§ 385 et seq.

5. Cleve v. Jones, 7 Exch. 421 (1852) per Parke, B.

6. State v. Shaffer, 23 Oreg. 555, 558, 32 Pac. 545 (1893) (dying declarations).

7. *Infra*, §§ 385 et seq.

8. Com. v. Robinson, 146 Mass. 571, 16 N. E. 452 (1888).

9. Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1898).

10. Com. v. Robinson, 146 Mass. 571, 16 N. E. 452 (1888).

reason assigned for this course by the Supreme Court of Michigan<sup>11</sup> is that it "does not properly belong to a judge to decide upon the truth of matters which have come out during the examination of witnesses who conflict." But when these facts are not ascertained, because disputed, or for some other reason, the course is an easy not to say indolent one. It has the administrative infelicity that it calls upon the jury to do legal reasoning, for which they are by no means well fitted; while the matter of weight is always one of logical reasoning. They are, indeed, called upon to determine the probative weight of the evidence, but they should properly be confined to the use of logical reasoning; and not, without good cause, be required to diverge into reasoning which is *legal*.

**§ 82. (*Coke's Maxim Considered; "Ad Quaestionem Facti Non Respondent Judices"*); Function of the Jury.**—It has been suggested that certain preliminary questions of fact, e. g., the identity of a person heard through a telephone,<sup>1</sup> should be left to the jury. This may be and frequently is true so far as relates to the granting of probative weight to a particular piece of evidence; the judge may decline to pass upon such a preliminary question, leaving the jury to find as to the preliminary fact as well as the others, and decide accordingly, following appropriate instructions given by himself. Common practice permits a presiding judge, who feels that a jury may reasonably find to either effect regarding the existence of a disputed fact preliminary to the admissibility of evidence, to submit the evidence in its entirety to the jury, instructing them to regard or disregard it according as they shall find as to the existence of the preliminary fact upon which its admissibility is dependent.<sup>2</sup> But making such preliminary findings is not a recognized and essential part of the jury's duty.

11. *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502 (1877).

1. *American Nat. Bank v. First Nat. Bank*, (Tex. Civ. App. 1906) 92 S. W. 439.

2. *Central of Georgia Ry. Co. v. Harper*, 124 Ga. 836, 53 S. E. 391 (1906). (Sanity of plaintiff); *Com. v. Culver*, 126 Mass. 464 (1879) (Voluntary nature of confession).

In strictness, however, a litigant is entitled to have the competency of evidence passed upon by the judge himself. *Com. v. Robinson*, 146 Mass. 571, 581, 16 N. E. 452 (1888); *Com. v. Culver*, 126 Mass. 464 (1879).

*Infra*, § 409.

§ 83. (*Coke's Maxim Considered; "Ad Quaestionem Facti Non Respondent Judices"*); Administrative Details.— It has been said to be error for the presiding justice to leave such a preliminary question to the jury.<sup>1</sup>

§ 84. (*Coke's Maxim Considered*); "Ad Quaestionem Juris Non Respondent Juratores."— *The second division of the rule*— that the jury are not to answer questions of law — is more nearly accurate than is its associated branch of the rule. Their power of applying the rule of law announced by the judge to the constituent facts found by them and to returning a general verdict<sup>1</sup> seems, however, to approximate closely to dealing with a question of law. Such a verdict construes the rule of law in terms of constituent facts — and, to that extent, announces a proposition of law. For example, when a jury on an action for negligence, find the constituent facts, they are acting as the exponents of experience and as triers of fact upon the principles of logical reasoning. When they go further and say that, under an announcement by the court of a rule of law that reasonable care should be used, that a given defendant is or is not liable, they have, in effect, as it would seem, construed the rule of law, under the use of *legal* reasoning, in terms of the constituent facts. As is more fully stated elsewhere,<sup>2</sup> it is the substantive right of a party to have the judge exercise his allotted functions. He will not, therefore, as a rule, submit questions of law to the jury.<sup>3</sup>

§ 85. (*Coke's Maxim Considered; "Ad Quaestionem Juris Non Respondent Juratores"*); Collateral Rulings.— So far as the jury have invaded the natural province of the court as to what rule of law shall be applied to the facts, and to what is proper legal reasoning in applying this rule to the facts, i. e., construing the rule of law in terms of fact — this has happened only in connection with the constituent facts and as an incidental part of the jury's privilege of finding these facts in the form of a general verdict.<sup>1</sup> In other words, the jury, having the duty of finding the

1. *Bartlett v. Smith*, 11 M. & W. 433 (1843). It is, however a common practice for the judge to call in the aid of the jury to assist him. *O'Connor v. Hallinan*, 103 Mass. 547 (1870).

1. *Infra*, § 86.

2. *Infra*, § 409.

3. *Thomas v. Thomas*, 15 B. Mon. 178 (1854); *Hickey v. Ryan*, 15 Mo. 63, 67 (1851); *Fugate v. Carter*, 6 Mo. 267, 273 (1840); *United States v. Carlton*, 1 Gall. 400, Fed. Cas. No. 14,725 (1813).

1. *Infra*, § 86.

constituent facts, may find them either in terms of fact — which is normal; or they may go further, by returning a general verdict, and find them in terms of *law*, which seems *abnormal*.

*Collateral Matters.*—Where the ruling as to the law concerns a collateral matter, as in connection with the admissibility of evidence, statements as to the issue raised by the pleadings,<sup>2</sup> whether the evidence is sufficient in law to support a verdict<sup>3</sup> or the like, the power and duty of the court to make an authoritative ruling for the purposes of the case are unchallenged in any quarter.<sup>4</sup> Here, as elsewhere, the jury cannot properly fail to accept as authoritative in good faith the rule of law announced by the judge. The jury may refuse to follow evidence admitted by the judge, but they cannot disregard it.<sup>5</sup> For the court to instruct the jury that they may so act is error.<sup>6</sup>

§ 86. **General Verdicts.**—The distinctive feature of the function of the jury, as commonly exercised by them in returning a general verdict, is the determination as to the truth concerning a controverted proposition of fact placed in issue by the parties in their pleading.<sup>1</sup> This determination is the ultimate fact to which alone the law attaches immediate consequences.<sup>2</sup> The truth as to this proposition in issue is, in other words, the *rei veritas* which the jury are to declare, the

2. *Missouri Coal and Oil Co. v. Hannibal, etc., R. Co.*, 35 Mo. 84 (1864); *Dassler v. Wisley*, 32 Mo. 498 (1862).

3. *Harris v. Woody*, 9 Mo. 113 (1845); *Cole v. Hebb*, 7 Gill & J. 20 (1835); *Davis v. Davis*, 7 Har. & J. 36 (1826); *Tyson v. Rickard*, 3 Har. & J. 109, 116 (1810).

4. *Alabama*.—*Campbell v. State*, 23 Ala. 45, 75 (1853); *Scott v. Cox*, 20 Ala. 294 (1852).

*Connecticut*.—*Robinson v. Ferry*, 11 Conn. 460 (1836).

*Florida*.—*Carter v. Bennett*, 6 Fla. 214 (1855).

*Kentucky*.—*Carrico v. McGee*, 1 Dana 5 (1833).

*Massachusetts*.—*Gorton v. Hadsell*, 9 Cush. 508 (1852).

*Virginia*.—*Clayton v. Anthony*, 6 Rand. 235 (1828).

*England*.—*Rex v. Atwood*, 1 Leach. 464 (1788).

5. *Com. v. Knapp*, 10 Pick. 477, 496 (1830); *Rex v. Atwood*, 1 Leach. 464 (1788).

6. *Thomason v. Odum*, 31 Ala. 108 (1857); *Degraffenreid v. Thomas*, 14 Ala. 681 (1848); *Robinson v. Ferry*, 11 Conn. 460 (1836); *Ratliff v. Huntley*, 5 Ired. 545 (1845).

1. *Bennison v. Jenison*, 12 Jur. 485 (1848); *Bartlett v. Smith*, 11 M. & W. 483 (1843).

2. "Matter of Evidence" are the subsidiary facts — statements of witnesses, declarations in documents, inspection of the tribunal, etc. — constituting the basis of an inference as to this ultimate fact. See *Littleton's Case*, 10 Co. 56b.

declaration being their *veritatis dictum* or *veredict*. Trials do not primarily concern themselves with determining the truth of propositions of fact so much as with the legal consequences which follow such a determination. It is these consequences which in many cases it is the province of the jury to declare. This is implied in the general finding for one party or the other in a civil case, in finding a defendant guilty or not guilty in a criminal prosecution. Thus the result announced in such a general verdict is a composite one, blending a decision as to certain constituent facts with the application of a rule of law to them.<sup>3</sup> That it is the duty of the jury in thus blending the fact and law into a composite result to take the rule of law to be as stated by the presiding judge is entirely settled.<sup>4</sup> The right of the jury, by returning a general verdict, to make for themselves the application of the rule of law as stated by the court to the constituent facts ascertained by them is equally settled.<sup>5</sup> They may, in all cases, civil<sup>6</sup> or criminal,<sup>7</sup> return a general verdict. In the absence of regulation by statute,<sup>8</sup> the jury may decline to return any other verdict than a general one,<sup>9</sup> although the court may have required special findings. It follows from this power and practice of the jury to return a general verdict that the whole matter of law as well as of fact must be

3. "Ordinarily he [the judge] declares to the jury what the law is upon the fact which they find, and then they compound their verdict of the law and fact thus ascertained." Eyre C. J. in *Gibson v. Hunter*, 2 H. Bl. 187 (1793).

4. *Supra*, § 69.

5. *Kane v. Com.*, 89 Pa. 522, 526 (1879); *Rex v. Woodfall*, 5 Burr. 2661 (1770); *Francklin's Case*, 17 How. St. Tr. 625 (1731); *Bushell's Case*, Vaughan 135, 6 How. St. Tr. 999, 1008, 1013, 1014 (1670). "In both these instances the jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law and, without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant." 3 Black. Com. 378.

6. *Com. v. Porter*, 10 Metc. (Mass.)

263 (1845); *Mayor v. Clark* 3 A. & E. 506 (1835).

7. "It was never yet known that a verdict was set aside by which the defendant was acquitted in any case whatsoever, upon a criminal prosecution." *King v. Jones*, 8 Mod. 201, 208, per Pratt, C. J. (1723).

A power which is uncontrollable has been deemed, by certain judges, to be practically a right. It has accordingly been laid down as law that a jury in a criminal case have the right to judge of both law and fact by a general verdict. *Erving v. Cradock*, Quincy (Mass.) 553, 558-572 (1761); *Georgia v. Brailsford*, 3 Wall. (U. S.) (1794); 1 Bish. Crim. Proc., §§ 977, 983-988; 2 Thomp. Trials, § 2133.

8. *Infra*, §§ 96, 98 *et seq.*

9. *Devizes v. Clark*, 3 A. & E. 506 & Ad. 397, 403 (1833); *Moseley v. Walker*, 7 B. & C. 40, 53, 56 (1827).

stated and explained to the jury so that they may fully understand and apply it to the facts.<sup>10</sup>

*This position the jury has gained* in spite of a long-continued effort on the part of English judges for reasons satisfactory to them, and still of great moment, to confine the jury, in certain cases, to determining the truth as to the proposition in issue; reserving to themselves the application of the rule of law to the fact when so ascertained.

*The permanent gains in function* made by the court on the province of the jury are to be seen in connection with negligence,<sup>11</sup> reasonable diligence,<sup>12</sup> and especially as to probable cause in false imprisonment<sup>13</sup> and malicious prosecution.<sup>14</sup>

*The political aspect* of this essentially administrative matter as to which branch of the mixed tribunal shall do the legal reasoning<sup>15</sup> by applying the rule of law to the constituent facts, is distinctly visible throughout the stages of the discussion regarding it, both in England and America. Hence the infelicity of the result from an administrative point of view, and the consequent unwisdom of continuing the arbitrary and inverted arrangement under changed political conditions where the rights of the citizen are no longer imperiled by the overshadowing power of the prerogatives of the crown.

*In England responsibility for seditious libel* was the connection in which the right of the jury to find a general verdict was contested. Royal judges, representing and appointed by the party against whom these libels were directed, contended for the administrative rule, in itself just and sound, that the jury should find the facts, e. g., the fact of publication, and that the court would apply the rule of law to the constituent facts.<sup>16</sup> Sound, in point of principle, as the rule might have been, it meant, under the circumstances, curbing the right of citizens to complain of grievances or to criticize the acts of government. On this issue, purely political, the Whig party, from whom the criticism of government proceeded, waged its warfare and finally succeeded. Their leader at a particular period in the House of Commons, Charles James Fox,

10. *Higginbotham v. Campbell*, 85 Ga. 638 (1890); *Cain v. Porter*, 10 Metc. (Mass.) 263 (1845); *Com. v. McManus*, 143 Pa. St. 64 (1891).

11. *Infra*, § 123.

12. *Infra*, § 122.

13. *Infra*, § 126.

14. *Infra*, § 126.

15. *Supra*, § 68.

16. *Rex v. Woodfall*, 5 Burr. 2661 (1770); *Rex v. Shipley*, 3 T. R. 428 n (1789).



introduced and carried an act usually known as Fox's Libel Act,<sup>17</sup> which set this matter as to the right of a jury to return a general verdict at rest, so far as England itself was concerned, by expressly providing that on such prosecutions it should be the right of the jury to return a general verdict, passing not only upon the facts but applying the rule of law to them. Clearly, neither of these contestants for the success of certain political views were greatly concerned as to which of the proposed methods of conducting a jury trial was best adapted, as a matter of administration, to the effective doing of justice. That question seems at present an open one and worthy of consideration.

*In the American States* the contest settled by Fox's Libel Act was regarded, as in England, as being of great political importance to the rights of the people. The rule essentially of administration or, at most of procedure, upon this point has accordingly been given the high honor of being inscribed into most of the State constitutions, it being provided, for example, in Pennsylvania, that "in all indictments for libel, the jury shall have the right to determine the law and the facts under the direction of the court, as in other cases."<sup>18</sup> Other jurisdictions, with great uniformity, have enacted similar provisions, statutory<sup>19</sup> or constitutional.

*Very strong arguments* in favor of the contrary view, in point of administrative principle, may be found among the American courts. Prominent among these is the opinion of chief justice Lewis (in which Chief Justice Livingston concurred)<sup>20</sup> where, after an elaborate review of the authorities,<sup>21</sup> the conclusion is reached that Lord Mansfield was right in holding that judges had power to determine, after the fact of publication has been found, as to whether a given publication was or was not libellous.

**§ 87. (General Verdicts); Matter of Law for the Jury.**—The jury may insist upon returning a general verdict, in any given case, even when requested to make special findings or return a special verdict, unless, as has been said, the matter is otherwise regulated by statute. Under such circumstances the jury neces-

17. Stat. 32 Geo. III, c. 60.

(1770); *Rex v. Wilkes*, 4 Burr. 2527

18. Const. of Penn., Art. I, § 7.

(1770); *Rex v. Owens*, 10 How. St.

19. *People v. Croswell*, 3 Johns. Cas. 337 (1804).

Tr. App. 194 (1752); *Francklin's Case*, 17 How. St. Tr. 625 (1731);

20. *People v. Croswell*, 3 Johns. Cas. 337 (1804).

*Fuller's Case*, 14 How. St. Tr. 517 (1702); *Rex v. Withers*, 3 T. R. 428

21. *Rex v. Woodfall*, 5 Burr. 2661

(1789).

sarily apply the rule of law, furnished by the court, to the constituent facts found by them. To this extent matter of law, the use of legal reasoning, falls to the jury. It has been seen that on administrative principles, the better course is for the jury to find the constituent facts and return them to the judge that he may apply to them the rule of law. This is the ancient function of the jury as witnesses of facts covered by their *veredict*, *veredictum*, or verdict. It corresponds with the relation in the civil law between the *praetor* and the *iudex* — under which a formula giving instructions in points of law was sent to the trier of fact. Such a division of function between judge and jury is further in accordance with the more intelligent and scientific relations between law and fact existing under chancery practice where the chancellor might at any time satisfy his conscience and receive the benefit of common experience by taking the findings of a jury as to matters of fact, while reserving the right of applying the rule of law to the facts so found.

**§ 88. (General Verdicts; Matter of Law for the Jury); An Incidental Power.**— It is to be observed that the power of the jury to apply the law to the constituent facts, which would seem anomalous upon fundamental principles, is an incidental one. Only when the jury are themselves required to find the constituent facts and in connection with the discharge of such a duty may the jury apply the law to the facts. No practice exists under which the jury are to apply the rule of law, announced by the court, to constituent facts found by others, or to such facts when admitted not disputed or established beyond the point of successful contradiction. In all such cases, there being no necessity for the jury to find the constituent facts, there is neither reason nor opportunity for them to exercise legal reasoning concerning them; i. e., to apply to them the rule of law. The normal function of the presiding judge is not disturbed and he, as a matter of course, applies the rule of law. It might almost be said that the jury, having the duty of finding the ultimate facts on a given issue may, at their option or as required by the court, find these facts either in terms of logical or of legal reasoning, i. e., either in terms of logic or those of law. But, if the jury do not find the fact, they cannot find the law. The incidental follows only where the principle exists. If, for any reason, there is, as the common phrase goes, “nothing for the jury to try,” no suggestion arises from any

source that they have the right to apply the law to these constituent facts.

*In other words*, while the rule of administration is frequently implicit, its application is well-nigh universal, that where the constituent facts are found and all which remains to determine the action of the court is the application of the measuring rule of law, that the application of this rule is a question of law and within the function of the judge.

*Illustrative Instances.*—It is not material whether the right of the jury to apply the law is excluded because the constituent facts are agreed by the parties, as in agreed statements,<sup>1</sup> demurrers to evidence<sup>2</sup> or the like; or because the facts are uncontroverted, as where the court orders a verdict where only one outcome is rationally possible,<sup>3</sup> or, as in the case of the construction of documents<sup>4</sup> or where direct contempt takes place in presence of the court,<sup>5</sup> the judge is the percipient witness of all the constituent facts. In all such cases, it is not questioned that it is for the judge to apply the rule of law.

**§ 89. More Rational Expedients.**—*The common law* judge is not compelled, in all cases, to work out the substantial rights of the parties through the expensive and dilatory method of granting new trials. In certain cases the more normal relations of the judge and jury are maintained—the jury finding some or all of the constituent facts and the judge applying the rule of law.

**§ 90. (More Rational Expedients); Inference of Fact.**—A main difficulty encountered by a court in applying the rule of law to facts found by a jury, or agreed upon by the parties, is that certain inferences of fact, so called, still remain to be found. The facts are not *completely* found, that is found up to the logical point at which they are, as it were, ripe for the application of the rule of law. This rule of law can properly, as has elsewhere been said,<sup>1</sup> be applied only to the constituent facts,<sup>2</sup> the ultimate facts so called. But it frequently happens that the jury in finding the facts or the parties in agreeing on them rest content with finding the *probative* facts<sup>3</sup> without proceeding to ascertain the constituent facts to be proved by these probative ones.

1. *Infra*, § 91.

2. *Infra*, § 139.

3. *Infra*, § 390.

4. *Infra*, §§ 128 *et seq.*

5. *Infra*, § 255.

1. *Supra*, § 61.

2. *Supra*, § 47.

3. *Supra*, § 51.

Clearly these inferences from the existence of the probative to that of the constituent facts which they tend to establish is for the jury to draw, or, in case of a statement of agreed facts, for the agreement to cover. This administrative requirement that inferences from probative to constituent facts should be drawn by the finders or agreeers of fact, is frequently announced by saying that inferences of fact are themselves facts.

**§ 91. (*More Rational Expedients*); Agreed Statements of Fact.**

The normal division of functions between the court and jury in the decision of questions of fact may be waived or altered by agreement of the parties. Questions of fact may be submitted to the court in the form of an agreed statement. The function of applying the law to the facts is thus transferred to the judge. But the latter when so substituted for the jury by no means of necessity exercises the discretionary powers clearly vested in the larger body. Where only the probative facts are agreed upon the defect may be cured by a provision that the court may draw the inferences from the probative to the constituent facts. Unless this is done, the element of experience which the jury might have employed in using the probative facts to ascertain the constituent, cannot properly be supplied by the court. The task is to apply the rule of law to the probative facts. If these fall short by reason of the lack of this element of experience, common knowledge or general observation and the like, the actor loses.

**§ 92. (*More Rational Expedients*; Agreed Statements of Fact); Power to Draw Inferences; Express Authority Needed.—**

It has been deemed by certain courts advisable<sup>1</sup> and even necessary<sup>2</sup> that power to draw inferences other than those necessary, as matter of law,<sup>3</sup> should be conferred *totidem verbis* if the court is to exercise it.

*Otherwise* the province of the judge is limited in the original instance, to finding the effect of the facts thus stated on the record

1. *Cole v. Northwestern Bank*, L. R. 10, C. P. 354 (1875).

2. *Schwartz v. Boston*, 151 Mass. 226 (1890); *Old Colony Ry. Co. v. Wilder*, 137 Mass. 536 (1884); *Kinsley v. Coyle*, 58 Pa. St. 461 (1868); *Diehl v. Ihrie*, 3 Whart. (Pa.) 143 (1837); *Byam v. Bullard*, 1 Curt. C. 100 (1852).

3. *Later v. Haywood*, (Ida, 1908) 93 Pac. 374; *Mayhew v. Durfee*, 138 Mass. 584 (1885). A finding of ultimate facts includes a finding of all probative facts necessary to sustain a finding of the ultimate facts. *Later v. Haywood*, (Idaho, 1908) 93 Pac. 374.

as matter of law<sup>4</sup> and that of an appellate court to saying whether the ruling was right, or, if erroneous, what it should be; not, as in case of a finding of fact, as where the court is permitted to draw inferences of fact,<sup>5</sup> whether there was any evidence warranting a finding.<sup>6</sup>

**§ 93. (*More Rational Expedients; Agreed Statements of Fact; Power to Draw Inferences*); A Different View.**—The action of the parties in attempting to dispose of their difference in the manner adopted connotes a desire to secure final adjustment by the court's judgment, and may reasonably be regarded as implying liberty to use a certain discretion in drawing inferences from the facts stated. Even, therefore, in the case of stipulations where no express power of drawing inferences of fact has been conferred, certain judges have asserted and exercised the right of drawing these inferences,<sup>1</sup> while declining to exercise the same power in dealing with the facts found by a jury in the form of a special verdict.<sup>2</sup>

**§ 94. (*More Rational Expedients; Agreed Statements of Fact*); Effect of Agreement.**—But where a case is tried on an

4. *Koppel v. Massachusetts Brick Co.*, (Mass. 1906) 78 N. E. 128; *Schwartz v. Boston*, 151 Mass. 296 (1890). In a case presented on an agreed statement of facts which does not provide that the court may draw inferences of fact, the plaintiff cannot recover unless the matters stated entitle him to a judgment as a matter of law. *Coffin v. Artesian Water Co.*, 193 Mass. 274, 79 N. E. 262 (1906). "The only question presented by it is the question of law whether, upon the facts stated, the plaintiff has made a case which entitles him to judgment. Unless, upon such facts, with the inevitable inferences, or, in other words, such inferences as the law draws from them, a case is made out, the court would consider that the plaintiff has not sustained the burden of proof and therefore is not entitled to judgment." *Old Colony Ry. v. Wilder*, 137 Mass. 536 (1884).

5. *Charlton v. Donnell*, 100 Mass. 229 (1868) (where the finding is said

to be "conclusive"); *Cochrane v. Boston*, 1 All. (Mass.) 480 (1861).

6. *Schwartz v. Boston*, 151 Mass. 226 (1890).

1. *Jackson v. Whitbeck*, 6 Cowen (N. Y.) 632, 634 (1827); *Whitney v. Sterling*, 14 Johns. (N. Y.) 215, 217 (1817); *Tancred v. Christy*, 12 M. & W. 316, 324 (1843); *King v. Leake*, 5 B. & Ad. 469 (1833). But see, *contra*, under the Code, *Clark v. Wise*, 46 N. Y. 612 (1871). Where a cause is tried to the court on a stipulation as to the facts in detail, but not embracing an ultimate fact in issue, it is the duty of the court to find such fact if it may be inferred from the stipulated facts, and such a finding is entitled to the same weight as one based on conflicting evidence. *Crisman v. Lanterman*, 149 Cal. 647, 87 Pac. 89 (1906).

2. *Tancred v. Christy*, 12 M. & W. 316, 324 (1843); *King v. Leake*, 5 B. & Ad. 469 (1833).

agreed statement of facts, it is not necessary that the court should make separate findings of fact and law.<sup>1</sup> Where the facts are agreed on they are equivalent to facts found by the court.<sup>2</sup> Though findings of fact are not necessary to the validity of a judgment in a case submitted for decision on an agreed statement of facts, the court is not thereby precluded from making such findings.<sup>3</sup>

**§ 95. (*More Rational Expedients*); Advantages to Be Expected.**

— It can scarcely be asserted that the present division of function as between judge and jury as to which should apply the rule of law to the constituent facts, possesses elements of permanent stability. The position, on the contrary, seems one of unstable equilibrium. Should it happen in some cases that it is for the judge to make the application, and that, in other cases, not essentially differing, it is for the jury to do so, it would seem to suggest that a more basic principle of administration would be desirable. To dogmatise in such a matter is foolish as well as futile. That the jury should, in all cases, find the existence of all constituent facts about which a dispute exists between the parties, leaving the court, in all cases, to apply the rule of law, has certain attractive features as a satisfactory rule of administration.

(1) *It would preserve to the cause of judicial administration the maximum efficiency* of each branch of the joint tribunal, and with it the minimum of friction and error. The court is familiar with law, and psychological facts as revealed in the courtroom. Of these the jury are ignorant, while possessing knowledge of human nature as it exists in the world at large. The courtroom is far too apt to limit the mental horizon of the judge. For the latter truly to teach the jury law and the ways of witnesses and advocates within the time limits and practical conditions of a trial would be as miraculous as for the judge to gain an adequate ability to understand the point of view from which the average layman sees certain important sets of facts.

(2) *It fixes a well-defined responsibility.*—In the executive and legislative branches of government, it has come to be regarded as axiomatic that in order for a nation, state or

1. *Cincinnati, N. O. & T. P. Ry. Co. v. Hansford & Son*, 100 S. W. 251, 30 Ky. L. Rep. 1105 (1907). 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094 (1906).

2. *Anderson v. Messinger*, 146 Fed. 1905) 83 Pac. 74. 3. *Towle v. Sweeney*, (Cal. App.

municipality to receive the best service, it is essential that responsibility should not be divided or indeterminate. On the contrary, it is regarded as very much in the public interest that there should be an absolute and untransferable duty on someone, somewhere, for the reaching of *results*. Centralized power under popular control has succeeded as a political ideal that of a distribution of power among many coördinate branches as a safeguard against the danger of centralization. To obtain the political results for which it is seeking, *Democracy* requires responsibility on the part of its servants. It has come to recognize that to hold these servants to responsibility, it must give them *power*. A principle of government can scarcely be of transcendent value in connection with the executive and legislative branches of government and be of no value in respect to the judicial. Yet, in America the benefits of this elsewhere axiomatic proposition still remain to be applied to forensic jurisprudence. The theory that it is safe to trust no one with power, in discharging a public office lest he should abuse it or become a danger to liberty — the idea of distribution, of checks and balances, so that each part of the scheme alone can accomplish nothing by itself, but is limited by the power of others — discarded elsewhere alike by political men and students of institutions, here has unchallenged operation.

*The present relations between judge and jury* are a clear instance of the old theory of the value of divided responsibility and enumerated powers. The judge, indeed, has powers and on him is the responsibility of announcing the rule of law affecting the propositions raised by the pleadings. But, in a majority of instances, he has no ability to apply it to the facts, no right to direct the jury in applying it, except to the purely negative extent of nullifying their work when he thinks that they have not done it correctly. The jury, in a limited sense, have power, indeed, to find the ultimate, constituent facts. But in so doing, the judge is forbidden, in most cases, to give them any aid from his experience. All which the court can do, in this respect, is to rule as requested upon the tenders of counsel and to content himself with knowing when he sees the jury misled, that he can at least set aside the verdict, if unsatisfactory to himself. With an appellate court swift to reverse his rulings, even upon matters of pure administration, unable to do more than maintain order and veto the work of a jury

which he cannot guide, it should scarcely furnish ground for surprise that jurists of the highest qualifications for judicial office should feel that so perfunctory and fruitless a performance of public duty affords no opportunity for efficient social service. The jury have power, indeed, to render general verdicts applying the law given them by the judge to the constituent facts found by them. But this is done under no sufficient feeling of responsibility. Their action is not final, and therefore carefully to be considered. The judge may nullify it, if he see fit. No facts are specified as the basis of a verdict; no line of reasoning, for which the jury hold themselves responsible, is indicated.<sup>1</sup> A sphinx-like puzzle is handed to the court. If the ingenuity of counsel or of the judge can guess at a reasonable basis on which it may be sustained, the verdict will be allowed to stand as *res adjudicata* between the parties as to facts which must have been found in order that it should have been reached. These the jury itself might unanimously have repudiated.

*The method here suggested* — that of requiring the jury to find all constituent facts and report them to the court, with skilled clerical assistance if necessary in doing so, directing the judge to apply the rule of law to these facts, giving his reasons in awarding judgment, and allowing parties aggrieved to appeal, on a record so made up — might fairly be expected to fix a far more definite responsibility on each branch of the tribunal while conferring upon it the corresponding and qualifying extension of power. The jury would be placed publicly on record and their good faith and reasoning powers demonstrated; a finality might safely be conceded to such findings as could not, with social safety, be given to a general verdict. To the judge, in like manner, taking the facts found by the jury, having the power to perfect the law to the highest social usefulness, the public opportunity of doing so

1. "If caprice is not to be approved, how can we consistently prefer jury to judge? A judge is, by reason of his training and position, the least liable to the influence of the irrelevant. The dignified traditions of his office, and the need for reasoned decision, compel him to devote to a case all that ability which his experience ensures. A jurymen, on the other

hand, is untrained to his task, and also is completely irresponsible. He does not even give his reasons for the view he has chanced to take. At the close of a trial he disappears from publicity and the leaded type of the evening papers. He retires at once to the obscurity from which he should never have emerged." 20 Jurid. Rev., pp. 71, 72.



affords the stimulus for strenuous and careful work which could be created only in this way.<sup>2</sup>

(3) *It Would Check the Emotionalism of the Jury.*—This defect in the work of the jury is not an affection so much of the brain, as of the heart. It comes from a large sense of what is fair in a general way, not a little mixed, at times, with a pleasurable sensation of being able to relieve hardship, or gratify a justifiable resentment, at slight personal cost. But the same jurymen who would follow an impulse to be generous with other persons' estates would hesitate to stultify themselves intellectually by finding the existence of a specific fact which they knew did not exist. The pleasurable self-consciousness of intellectual prowess is as much a mental characteristic of the average man as is the sensation of exercising vicarious philanthropy or being able to assist in punishing a social enemy with whom he has no sympathy. In other words, the same man who will regard his oath as a jurymen as calling upon him to administer a rough kind of natural subjective justice, will feel that it constrains him to find specific individual facts to the best of his ability. The distinction is a fine one; but he takes it.<sup>3</sup> A further advantage of exceptional value

2. "If serious criminal cases were to be tried by judges without juries, I think that notes should be taken both by the judge and, in capital cases, by a shorthand writer as well; and I think the judge should give his reasons for his decision, and that if he did not give them in writing they should be taken down by a shorthand writer and read and corrected by the judge. In such cases I think there should be an appeal both on law and on the facts to the Court for Crown Cases Reserved, or whatever court might be substituted for it. In comparing trial by jury with trial by a judge without a jury, I assume the establishment of such a form of trial as this." Stephen's *Hist. of the Crim. Law of England*, Vol. I, p. 567 [quoted with approval in 20 *Jurid. Rev.*, p. 72]. "As has been aptly said, the necessity of reasoned judgment is the best security for soundness of decision; for while bad reasons may be

stated to support a correct conclusion, it is impossible to state good reasons for a bad one." 20 *Jurid. Rev.*, p. 73.

3. In jurisdictions where the jury may find a general verdict in the case but must also return answers to special interrogatories of fact, this peculiarity of the jury's action is brought into strong relief. It is the result of extended experience that while the impulse of the jury to the gratification of their sympathies or antipathies may cause great eccentricity in the general verdicts, that the answers to special interrogatories are much more closely in accordance with the evidence; that where crucial facts had been found under the influence of emotion their lack of harmony with facts found under purely intellectual conditions usually point out and segregate findings of facts so vitiated. See "Special Interrogatories to Juries" by W. W. Newton, 20 *Am. Law Rev.*, 366.

is found in the fact that part of a given verdict might be set aside; leaving the balance to stand.

(4) *It Makes the Action of the Jury Productive of the Most Comprehensive Results.*—Where the jury find the constituent facts, each of such facts may fairly be judged as *res judicata* between the parties.<sup>4</sup> A fact once established by verdict of a jury, if allowed by the court to stand, may well be regarded as a finality. In other words, a finding set aside as to part, may be given effect as to the remainder. If, for example, a verdict be set aside on the ground that damages are excessive, the only issue on a retrial might well be as to the amount of damages, the issue as to liability being concluded. A further advantage of permitting the jury to find the constituent facts *in specie* lies in the consideration that all such facts, whether given effect by the court or not, may be used to throw a light upon the action of the jury which will be of the highest consequence in acting upon a motion for a new trial. Instead of guessing at the basis of the jury's action and setting it aside as a whole, it may be possible with the additional information afforded to see that an apparently sustainable verdict is really a miscarriage of justice; or, on the contrary, it may appear that action at first sight irrational is, in reality, well grounded.

(5) *Final Adjudication is reached with the Minimum of Delay and Expense.*—It is no small part of the delay and expense of litigation, under the present system, that the appellate court is obliged to send the rock of Sisyphus down to the foot of the hill of repeated trials, in order that the suitor may roll it laboriously up again — perhaps to meet a similar rebuff. If the appellate courts, especially the court of last resort, could, if furnished with a proper

4. There is much value in the suggestion of Stephen: "Might it not be wise to authorize the superior courts to give a certificate, if they thought proper to do so, of the existence of any matter of fact which had been duly established before them in a suit *bona fide* contested, on the application of the successful party, such certificate to be evidence of the matter stated in it and raising a presumption of their truth whenever they are brought into ques-

tion in any subsequent proceedings? It seems monstrous that, when Orton had been prosecuted to conviction for perjury, the fact that he was Orton and not Tichborne, and the fact that Tichborne was dead, should have been, as far as the law went, open to future dispute, and that it should have been necessary to procure a private Act of Parliament to furnish satisfactory proof of these facts for future use." Stephen's Dig. Law of Ev., (3d ed.) Pref. 33.

record,<sup>5</sup> make the order in the case which it feels the trial court should have made, or, in default of such power, should be able to direct the trial court precisely what order it desires it to make in the matter, an obvious saving in time and cost would at once result. This may be done, at present, in causes in equity where the facts are all before the appellate court on a master's report. The difficulty in following, in actions at law, so excellent a practice consists largely in the circumstance that only a limited record is before the appellate court raising merely questions of law. But obviously, if the entire set of constituent facts to which the trial judge has applied the rule of law are to be before the court of last resort, no reason appears why the appellate court should not direct precisely what order it judges should be made when the rule of law is more carefully and accurately applied to the same facts. It will be noted that this requirement, is that the constituent facts be found. To report the *evidence* — as is frequently done, adds so greatly not only to the expense and hazard of litigation as itself to constitute, in many cases, a flagrant abuse of administration; but makes it extremely difficult for the appellate court to discover in the mass of undigested material before it, in view of the limited time accorded counsel for argument, precisely what are the points intended to be presented to them.

(6) *Perjury would be minimized in at least one particular.*—An additional advantage of no small consequence reasonably to be anticipated from the course suggested lies in the fact that changes of testimony by parties at a retrial of a cause once heard in an appellate court would be in measure prevented by this definite finding, once for all, of the constituent facts. It is notorious that, under the system at present existing, parties who have discovered in a court of last resort precisely what evidence is now needed to their success, regard themselves as sent back to a retrial for the purpose of procuring or inventing it. "It frequently happens," says the New York court of appeals,<sup>6</sup> "that cases appear and reappear in this court after three or four trials, where the

5. While in a trial to the court all evidence clearly incompetent and immaterial should be rejected, a liberal practice should be adopted in admitting evidence, so that the Supreme Court, in case of an appeal, will on a trial *de novo* have all material facts before it for consideration and

thus avoid the necessity of remanding the cause for the admission of material evidence erroneously rejected. *Degginger v. Martin*, (Wash. 1907) 92 Pac. 674.

6. *Walter v. Syracuse Rapid Transit Railway Company*, 178 N. Y. 50 (1904).

plaintiff on every trial has changed his testimony in order to meet the varying positions on the case upon appeal. It often happens that his testimony on the second trial is directly contrary to his testimony on the first trial, and, when it is apparent that it was done to meet the decision on appeal, the temptation to hold that the second story was false is almost irresistible."

**§ 96. (*More Rational Expedients*); Special Verdicts; Statutory.**

— While it may be doubtful whether, as is said, the rendering of special verdicts is as ancient a practice, on the part of the jury, as returning general verdicts, it is, at least, unquestioned that the habit of rendering special verdicts is one of considerable antiquity.<sup>1</sup> The difference between a special verdict and the answers to special interrogations, considered elsewhere,<sup>2</sup> is obvious and fundamental. The interrogations inquire as to the existence of one or more constituent facts.<sup>3</sup> The special verdict finds them all.<sup>4</sup> As is said in an early Indiana case,<sup>5</sup> by a special verdict is meant, "not an isolated fact, tending to support or defeat an issue, but it is an issue joined between the parties, arising upon a cause of action in the complaint, and a denial of it in the answer, or upon a defense set up in the answer, put in issue by the reply." The purpose of a special verdict is "to exhibit the facts of the case in such a manner that the court can decide according to law, and relieve the jury from the necessity of deciding legal questions on which they may have doubts. To justify the court in rendering a judgment for the plaintiff on a special verdict, the verdict must exhibit all the facts which it was necessary for the plaintiff to prove in order to recover."<sup>6</sup> No special interrogatories can be propounded, as of right, by a party when a special verdict is asked.<sup>7</sup> Should the jury have the option to return either a special or a general verdict, they need return special answers only in case they decide to return a verdict in general form.<sup>8</sup>

1. *First Nat. Bank v. Peck*, 8 Kan. 660 (1871); *Ross's Case*, 12 Ct. of Cl. 565 (1876).

2. *Infra*, §§ 98 *et seq.*

3. *Hazard Powder Co. v. Viergutz*, 6 Kan. 471, 486 (1870); *Smith v. Warren*, 60 Tex. 462 (1883).

4. *Housworth v. Bloomhuff*, 54 Ind. 487 (1876).

5. *Bird v. Lanius*, 7 Ind. 615 (1856).

6. *Pittsburg, etc., R. Co., v. Spencer*, 98 Ind. 186 (1884); *Goldsbey v. Robertson*, 1 Blackf. 247 (1823).

7. *Chapin v. Clapp*, 29 Ind. 614 (1868); *Rosser v. Barnes*, 16 Ind. 502 (1861).

8. *Hendrickson v. Walker*, 32 Mich. 68 (1875).

**§ 97. (*More Rational Expedients; Special Interrogatories*);**

**Common Law.**— The judge may protect the rules of law, fixed or inchoate, from interference by the jury in a specific case by requiring from them the special findings of fact, and using these as the basis of the application of the rule of law by himself. As the political importance of the jury has declined, and attention has become focused upon its usefulness in a judicial capacity, the value of general verdicts has been less esteemed, and the old practice of requesting special findings of fact has increased in popularity with judges<sup>1</sup> frequently acting under legislative sanction.<sup>2</sup> The course undoubtedly tends to the symmetry of the law, and its regularity in administration, for reasons elsewhere stated.<sup>3</sup>

The right to interrogate the jury, on returning a general verdict, as to the method in which they reached their conclusion in certain particulars has, indeed, been denied in England,<sup>4</sup> and by courts in this country, in the absence of agreement by the parties.<sup>5</sup> The practice, however, has obtained in certain sections of America, e. g., the presiding judge may ask the jury whether they read certain papers improperly taken by them to their consultation-room.<sup>6</sup> "Where the judge is surprised by the verdict, it is not unusual to ask the jury upon what principle it was found."<sup>7</sup> If the ground assigned by the jury for their action could not support it, the verdict is set aside.<sup>8</sup> The answers to such interrogations may also be used as part of a bill of exceptions or on motion for a new trial based on the insufficiency of evidence.<sup>9</sup> Other courts have been bolder and have directly submitted interrogations to the jury for

1. *Atchison, etc., Ry. Co. v. Morgan*, (Kan.) (1890), 22 Pac. 995; *Maceman v. Equitable Co.*, (Minn. 1897) 72 N. W. 111.

2. "All the statutes provide that if the special interrogatories are inconsistent with the general verdict they shall prevail over the latter." *Special Interrogatories to Juries*, 20 *Amer. Law Rev.* 382.

3. *Infra*, §§ 95, 95 n. 3, 100 n. 5.

4. *Mayor of Devizes v. Clark*, 3 A. & E. 506 (1835).

5. *Allen, etc., Co. v. Aldrich*, 9 Post. 63 (1854); *Willard v. Stevens*, 4 Post. 271 (1851).

Such consent has also been held not to be necessary. *Walker v. Sawyer*,

13 N. H. 191 (1842). See *Barston v. Sprague*, 40 N. H. 27 (1859); *Johnson v. Haverill*, 35 N. H. 74 (1857).

6. *Hix v. Drury*, 5 Pick. 296 (1827).

7. *Pierce v. Woodward*, 6 Pick. 206 (1828). See also *Roche v. Ladd*, 1 Allen, 436 (1861); *Stiles v. Granville*, 6 Cush. 458 (1850); *Spoor v. Spooner*, 12 Metc. 281 (1847); *Dorr v. Fenno*, 12 Pick. 521 (1832).

8. *Parrott v. Thacher*, 9 Pick. 426 (1830). See *Spurr v. Shelburne*, 131 Mass. 429 (1881).

9. *Monies v. City of Lynn*, 119 Mass. 273 (1876); *Mair v. Bassett*, 117 Mass. 356 (1875); *Lawler v. Earle*, 5 Allen, 22 (1862).

them to answer.<sup>10</sup> The power of interrogation has been spoken of as an incidental power arising when the jury return a general verdict,<sup>11</sup> to be exercised after the verdict has been returned and before it is received by the court.<sup>12</sup>

**§ 98. (*More Rational Expedients; Special Interrogatories*); Statutory.**— Many states of the American Union have re-enacted, with some variation in detail, the common law practice of submitting special interrogatories to the jury. The administrative rules affecting this expedient for arriving at truth are of interest and importance; while the side light which its practical working throws upon the actual capacity of the average jury to deal intelligently with questions of fact is highly illuminating.

A *typical statute* is that of Indiana: "In all actions, the jury, unless otherwise directed by the court, may, in their discretion, render general or special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues; and in all cases, when requested by either party, shall instruct them, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing. This special finding is to be recorded with the verdict. . . .<sup>1</sup> When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."<sup>2</sup>

**§ 99. (*More Rational Expedients; Special Interrogatories; Statutory*); Criminal Cases Excluded.**— The enabling statutes do not, in the absence of express language, apply to criminal cases.<sup>1</sup> *In equity causes* where the jury is brought in to assist the judge no binding effect attaches to the findings.<sup>2</sup>

**§ 100. (*More Rational Expedients; Special Interrogatories; Statutory*); Object of Special Findings.**— It has been said that the object of answers to special interrogatories is to obtain an explanation of a general verdict,<sup>1</sup> and to place upon record the details

10. *McMasters v. West Chester County, etc., Co.*, 25 Wend. 379 (1841).

11. *Johnson v. Haverhill*, 35 N. H. 74 (1857).

12. *Smith v. Putney*, 18 Me. 87 (1841).

1. Indiana Rev. Stats., 1881, § 546.

2. Indiana Rev. Stats., 1881, § 547.

1. *State v. Ridley*, 48 Iowa, 370 (1878); *People v. Marion*, 29 Mich. 32 (1874).

2. *Jennings v. Durham*, 101 Ind. 391 (1884); *Learned v. Tillotson*, 97 N. Y. 1 (1884).

1. *Hendrickson v. Walker*, 32 Mich. 68 (1875).

of this explanation.<sup>2</sup> In this way an advantage is gained to judicial administration which always attends the finding of the facts by the jury, leaving the rule of law to be applied by the court. If the jury finds simply a general verdict, and it should happen later, with greater leisure to investigate the matter, that the judge should be convinced that he had given the wrong rule of law to the jury, the obvious available course is to order a new trial. If the separate findings are before the judge on the record, he may, however, order such a verdict as would have been rendered, had the correct rule been given.<sup>3</sup> The same advantage may well be made to attend the case in an appellate court — with a marked increase in the dispatch of business.

*Special Finding.*—A special verdict or set of findings must set forth the existence of all constituent facts necessary to the actor's case.<sup>4</sup>

*Thus is the emotionalism of the jury in part controlled.* Much shrewd observation is shown in the suggestion of the supreme court of Kansas — “the main object of special questions is to bring out the various facts separately, in order to enable the court to apply the law accurately, and to guard against any misapplication of the law by the jury. It is a matter of common knowledge, that a jury influenced by a general feeling that one side ought to recover, will bring in a verdict accordingly, when at the same time it will find a certain fact to have been proved which in law is an insuperable barrier to a recovery in accord with the general verdict. And this does not imply intentional dishonesty in the jury, or a failure on the part of the court to instruct correctly, but rather a disposition to jump at results upon a general theory of right and wrong, instead of patiently grasping, arranging and considering details. Scarcely any jury will, when questioned as to a single separate fact, respond that it exists without some sufficient evidence of its existence. Its response will, as a rule, be correct, if direct, and if not correct, then evasive and equivocal.”<sup>5</sup> Error may be rectified by checking, by the knowledge furnished

2. *Durfee v. Abbott*, 50 Mich. 479 (1883).

3. *Moss v. Priest*, 19 Abb. Prac. 314, 1 Rob. 632 (1863). See *Dempsey v. Mayor, etc.*, 10 Daly 417 (1882); *Partridge v. Gilbert*, 3 Duer, 184 (1854).

4. *Elwood State Bank v. Mock*, 40 Ind. App. 685, 82 N. E. 1003 (1907).

5. *Morrow v. Commrs. Saline Co.*, 21 Kan. 484 (1879).

by separate findings, erroneous inferences from the facts found;<sup>6</sup> a consideration of no small consequence where any verdict is allowed to stand for which any logical basis can be assigned from the evidence.<sup>7</sup>

**§ 101. (*More Rational Expedients; Special Interrogatories; Statutory*); Administration by the Court.**—The court may, with great propriety, exert its administrative powers so to formulate the interrogations to the jury as to raise material questions, so framed as not to confuse or mislead them<sup>1</sup>—the object being to enable the judge to apply the law to the constituent facts.<sup>2</sup> Where, therefore, the question asked is as to the existence of a probative<sup>3</sup> as distinguished from a constituent<sup>4</sup> fact, it may properly be rejected.<sup>5</sup> The question should be specific, something more than a mere application of a rule of law to a particular branch of the case.<sup>6</sup> In other words, questions of mingled law and fact, as it is said, should not be permitted.<sup>7</sup> Of such a nature is the scope of a partnership.<sup>8</sup>

*On the other hand* where the jury, in reply to a proper question state a mere conclusion as to the law the answer may be disregarded.

6. *Morse v. Morse*, 25 Ind. 156 (1865); *Cole v. Boyd*, 47 Mich. 98 (1881).

7. *Buntin v. Rose*, 16 Ind. 209 (1861).

1. *Manning v. Gasharie*, 27 Ind. 399, 409 (1866); *Morse v. Morse*, 25 Ind. 156, 161 (1865); *Young v. Foshburg Lumber Co.*, (N. C. 1908) 60 S. E. 654; *Kampmann v. Rothwell*, (Tex. Civ. App. 1908) 107 S. W. 120 [judgment modified, (Supp.) 109 S. W. 1089].

2. *Plyler v. Pacific Portland Cement Co.*, (Cal. 1907) 92 Pac. 56.

**Inferences of fact.**—If the constituent facts found by the jury are ambiguous, they may be asked for a definite inference of fact from them. *Ft. Wayne Cooperage Co. v. Page*, (Ind. App. 1907) 82 N. E. 83. But they cannot be asked to draw a conclusion of law.

3. *Supra*, § 51.

4. *Supra*, § 47.

5. *Springfield Coal Min. Co. v. Gedutis*, 227 Ill. 9, 81 N. E. 9 (1907) [affirming judgment, 127 Ill. App. 327 (1906)]; *American Bonding Co. v. State*, 40 Ind. App. 559, 82 N. E. 548 (1907).

6. *Trentman v. Wiley*, 85 Ind. 33 (1882); *Todd v. Fenton*, 66 Ind. 25 (1879); *Toledo, etc., R. Co. v. Goddard*, 25 Ind. 185 (1865); *Atchison, etc., R. Co. v. Plunket*, 25 Kan. 188 (1881).

7. *Town of Albion v. Hetrick*, 90 Ind. 545 (1883); *Harbaugh v. Cicott*, 33 Mich. 241 (1876); *Dubois v. Compau*, 28 Mich. 304 (1873).

**The construction of an unambiguous writing** is of this nature. *Comer v. Himes*, 49 Ind. 482 (1875); *Symmes v. Brown*, 13 Ind. 318 (1859).

8. *Bonner Tobacco Co. v. Jennison*, 48 Mich. 459 (1882); *Dubois v. Compau*, 28 Mich. 304 (1873).



*Unless the statute is mandatory*, the judge may decline to order the submission of interrogatories to the jury,<sup>9</sup> even though a request is seasonably made. Even when the judge has granted the order for the submission of interrogatories he may revoke it at any time before answers to the questions have been returned.<sup>10</sup> A mandatory statute confers upon a party the right to insist upon the allowance of his request,<sup>11</sup> *provided* only that it be made at a proper time. It is equally beyond the power of the court to withdraw the questions from the jury.<sup>12</sup> But where a judge who might have refused an order as a matter of discretion actually refuses it on the erroneous supposition that he has no discretion to grant it, the action may be assigned as error.<sup>13</sup>

*It is the duty of the interrogating party* to bring to the attention of the judge the precise points on which he desires that the jury should be interrogated, and should request the judge to submit them to the jury, whether this be the original application or is intended to supplement the interrogation proposed by his opponent.<sup>14</sup> He cannot reasonably expect the trial judge to ascertain for him the facts on which an interrogatory should be put,<sup>15</sup> any more than he can require the judge to put the questions in his exact language. Clearness, perspicuity, logical arrangement are to be wrought into the questions by the presiding judge.<sup>16</sup> If a party has included matter in his question to which he is not entitled the court is not required to separate the good from the bad.

9. *McLean v. Burbank*, 12 Minn. 530 (1867); *Dempsey v. Mayor, etc.*, 10 Daly, 417 (1882).

10. *Moss v. Priest*, 19 Abb. Prac. 314, 1 Rob. 632 (1863). See *Dempsey v. Mayor, etc.*, 10 Daly, 417 (1882); *Ebersole v. Northern Cent. Ry. Co.*, 23 Hun, 114 (1880); *Fraschiero v. Henriques*, 6 Abb. Prac. (N. S.) 251 (1868).

11. *Clegg v. Waterbury*, 88 Ind. 21 (1882); *Williamson v. Yingling*, 80 Ind. 379 (1881); *Campbell v. Frankem*, 65 Ind. 591 (1879); *Glasgow v. Hobbs*, 52 Ind. 239 (1875); *Miller v. Voss*, 40 Ind. 307 (1872); *Maxwell v. Boyne*, 36 Ind. 120 (1871); *Malady v. McEnary*, 30 Ind. 273 (1868); *Ollam v. Shaw*, 27 Ind. 388 (1866);

*Noble v. Enos*, 19 Ind. 72 (1862); *City of Wyandotte v. Gibbon*, 25 Kan. 236 (1881); *Johnson v. Husband*, 22 Kan. 277 (1879); *Bent v. Philbrick*, 16 Kan. 190 (1876); *Farnsworth v. Coots*, 46 Mich. 117 (1881).

12. *Summers v. Greathouse*, 87 Ind. 205 (1882); *Otter Creek Block Coal Co. v. Raney*, 34 Ind. 329 (1870).

13. *Jaspers v. Lano*, 17 Minn. 296 (1871).

14. *Bradley v. Bradley*, 45 Ind. 67 (1873).

15. *Missouri Pac. R. Co. v. Reynolds*, 31 Kan. 132 (1883); *Foster v. Turner*, 31 Kan. 58 (1883).

16. *Missouri Pac. Ry. Co. v. Holley*, 30 Kan. 465 (1883).

He may simply reject the entire question, even after the objectionable portion has been withdrawn by the proponent.<sup>17</sup>

*Considerable strictness* hedges the right to have interrogations submitted to a jury. Even under a mandatory statute which gives the right to obtain the answers of the jury to special interrogatories *in connection* with the rendering of a general verdict, a request for special answers may be refused without impeachment of error, unless the return of a general verdict is also requested.<sup>18</sup> Under such circumstances, if the order is granted and the special answers are not accompanied by a general verdict, no judgment can be entered on such findings<sup>19</sup> but a new trial must be granted.<sup>20</sup> Where the judge is directed to instruct the jury in writing, a verbal instruction is not sufficient.<sup>21</sup>

**§ 102. (*More Rational Expedients; Special Interrogatories; Statutory; Administration by the Court*); Objectionable Questions.**—That a fact is compound or complex, inferred from other facts, is the result of one act of judgment, or even of several such acts is no ground for rejecting the findings.<sup>1</sup> The finding must, however, be sufficiently specific to be helpful and must admit of a direct answer.<sup>2</sup> It must go beyond merely restating a general finding on the issue.<sup>3</sup> Whether a fact stated in a complaint is true<sup>4</sup> is too general. If two issues are submitted together in a

17. *Brooker v. Weber*, 41 Ind. 426 (1872).

18. *Taylor v. Burk*, 91 Ind. 252 (1883); *Woolen v. Whitacre*, 91 Ind. 502 (1883); *Williamson v. Yingling*, 88 Ind. 379 (1881); *McIlvain v. State*, 80 Ind. 69 (1881); *Cleveland, etc., Ry. Co. v. Bowen*, 70 Ind. 478 (1880); *Killion v. Eigenman*, 57 Ind. 480 (1877); *Long v. Doxey*, 50 Ind. 385 (1875); *Schenck v. Butsch*, 32 Ind. 338 (1869); *Manning v. Gasharie*, 27 Ind. 399 (1866); *Michigan Southern, etc., R. Co. v. Bivens*, 13 Ind. 263 (1859); *Shultz v. Cremer*, 59 Iowa 182 (1882).

19. *Woolen v. Whiteacre*, 91 Ind. 502 (1883); *McIlvain v. State*, 80 Ind. 69 (1881); *Eudaly v. Eudaly*, 37 Ind. 440 (1871).

20. *Pea v. Pea*, 35 Ind. 387 (1871); *Paine v. Lake Erie, etc., R. Co.*, 31 Ind. 283 (1869).

21. *Trentman v. Wiley*, 85 Ind. 33 (1882).

1. *Howard v. Beldenville Lumber Co.*, (Wis. 1908) 114 N. W. 1114. "They can find the facts in great detail, or they can find them in very general or comprehensive terms. And where they find the facts both in detail and in general terms, we may disregard the general findings." *Atchison, etc., R. Co. v. Plunket*, 25 Kan. 188 (1881).

2. *Plyler v. Pacific Portland Cement Co.*, (Cal. 1907) 92 Pac. 56.

3. *Home Ins. Co. v. N. W. Packet Co.*, 32 Iowa 223, 246 (1871).

4. *Morse v. Morse*, 25 Ind. 156, 161 (1865). See *Crane v. Reeder*, 25 Mich. 304 (1872); *Hagan v. Chicago, etc., Ry. Co.*, 59 Wis. 139 (1883).

disjunctive form of interrogation, the error is fatal unless cured by instructions.<sup>5</sup> Questions as to the existence of immaterial facts may well be rejected.<sup>6</sup> The court may safely ignore a finding on such a fact, if made;<sup>7</sup> the jury may fail to answer it, with impunity,<sup>8</sup> as a new trial will not be awarded on such a ground.<sup>9</sup> A party cannot insist that inconclusive<sup>10</sup> or noncontrolling<sup>11</sup> questions should be asked.

*For a reversal* of the judge's action prejudices must be shown as well as error. Thus, if a suitable question is improperly refused, but another question covering the same ground is submitted to the jury, there will be no reversal.<sup>12</sup>

*Leading questions* are not objectionable by reason of possessing that form.<sup>13</sup> In fact, their use is encouraged.<sup>14</sup>

**§ 103. (*More Rational Expedients; Special Interrogatories; Statutory; Administration by the Court*); Number of Interrogatories.**—The number of questions may be as objectionable as their form or purport. The great number of such questions has fre-

5. *Howard v. Beldenville Lumber Co.*, (Wis. 1908) 114 N. W. 1114.

6. *Indiana*.—*Hamilton v. Shoaff*, 99 Ind. 63 (1884); *Northwestern Mut. Life Ins. Co. v. Heimann*, 93 Ind. 24 (1883); *Trentman v. Wiley*, 85 Ind. 33 (1882); *Manning v. Gasharie*, 27 Ind. 399, 409 (1866).

*Iowa*.—*Bonham v. Iowa Cent. Ins. Co.*, 25 Iowa 328 (1868).

*Kansas*.—*City of Wyandotte v. White*, 13 Kan. 191 (1874); *Kansas Pac. Ry. Co. v. Reynolds*, 8 Kan. 623, 634 (1871); *First Nat. Bank v. Peck*, 8 Kan. 660 (1871).

*Michigan*.—*Sheahan v. Barry*, 27 Mich. 217 (1873).

*Wisconsin*.—*Eberhardt v. Sanger*, 51 Wis. 72 (1881); *Singer Mfg. Co. v. Sammons*, 49 Wis. 316 (1880).

7. *Mays v. Foster*, 26 Kan. 518 (1881).

8. *Toulman v. Swain*, 47 Mich. 82 (1881); *Pettibone v. Maclem*, 45 Mich. 381 (1881); *Finch v. Greene*, 16 Minn. 355 (1871).

9. *Garretty v. Brazell*, 34 Iowa 100 (1871); *Dively v. Cedar Falls*, 27 Iowa 227 (1869); *City of Wyandotte*

*v. White*, 13 Kan. 191 (1874); *Kansas Pac. Ry. Co. v. Reynolds*, 8 Kan. 623 (1871); *Pettibone v. Maclem*, 45 Mich. 381 (1881).

10. *City of Wyandotte v. White*, 13 Kan. 191 (1874); *Kansas Pac. Ry. Co. v. Reynolds*, 8 Kan. 623, 634 (1871); *Dickerson v. Dickerson*, 50 Mich. 37 (1883); *Bonner Tobacco Co. v. Jenison*, 48 Mich. 459 (1882); *Swift v. Plessner*, 39 Mich. 178 (1878); *Michigan Paneling, etc., Co. v. Parsell*, 38 Mich. 475 (1878); *Frankenberg v. First Nat. Bank*, 33 Mich. 46 (1875).

11. *Campbell v. Frankem*, 65 Ind. 591 (1879); *Frankenberg v. First Nat. Bank*, 33 Mich. 46 (1875).

12. *Terry v. Shively*, 93 Ind. 413 (1883); *Scheible v. Slagle*, 89 Ind. 323 (1883); *Hopper v. Moore*, 42 Iowa 563 (1876); *Missouri Pac. Ry. Co. v. Reynolds*, 31 Kan. 132 (1883); *Chilson v. Wilson*, 38 Mich. 267 (1878).

13. *Rice v. Rice*, 6 Ind. 100 (1854).

14. *Marshall v. Blackshire*, 44 Iowa 475 (1876).

quently received the adverse criticism of the court.<sup>1</sup> The advantage of receiving such voluminous answers is that, should the jury be excused by agreement from returning a general verdict the answers may be made to serve instead of a special one.<sup>2</sup> This the court may order.<sup>3</sup> This may always be done where the answers cover the entire case.<sup>4</sup> No general verdict need be rendered.<sup>5</sup>

**§ 104. (*More Rational Expedients; Special Interrogatories; Statutory; Administration by the Court*); Form of Question.**—The form of the interrogation submitted to the jury is a matter of administration.<sup>1</sup>

Consequently, the judge may amend or modify the interrogations requested by counsel.<sup>2</sup> A party has no right to insist upon the question being stated as he has formulated it;<sup>3</sup> nor has he any grievance if the substance of his interrogation is given in the language of the court.<sup>4</sup> Each question should be so drawn by the court as to present a single material proposition to the consideration of the jury.<sup>5</sup>

**§ 105. (*More Rational Expedients; Special Interrogatories; Statutory; Administration by the Court*); Time of Requesting Submission.**—It has been suggested that a party desiring that special interrogatories should be put to the jury should ask for them before the trial begins.<sup>1</sup> Such stringency of requirement is not usually enforced and it will be deemed sufficient if the request

1. *City of Indianapolis v. Lawyer*, 38 Ind. 348 (1871); *Atchison, etc., R. Co. v. Plunket*, 25 Kan. 188 (1881).

2. *Carr v. Carr*, 4 Lans. 314 (1871).

3. *Longsdale v. Bonton*, 12 Ind. 467 (1859).

4. *Kealing v. Voss*, 61 Ind. 466 (1878); *Pea v. Pea*, 35 Ind. 387 (1871); *Toledo, etc., R. Co. v. Hammond*, 33 Ind. 379 (1870); *Terre Haute, etc., R. Co. v. M'Kinley*, 33 Ind. 274 (1870).

5. *Paine v. Lake Erie, etc., R. Co.*, 31 Ind. 283 (1869); *Crassen v. Swove-land*, 22 Ind. 427 (1864).

1. *Ormond v. Connecticut Mut. Life Ins. Co.*, 145 N. C. 140, 58 S. E. 997 (1907). The exact form of the issues submitted is immaterial, if under them each party has an opportunity

to present evidence of the facts relied on, and the privilege of having the same applied fairly. *Tuttle v. Tuttle*, (N. C. 1907) 59 S. E. 1008.

2. *Neumeister v. Goddard*, (Wis. 1907) 113 N. W. 733.

3. *American Co. v. Bradford*, 27 Cal. 360 (1865); *Nichols v. State*, 65 Ind. 512 (1879); *Campbell v. Frankem*, 65 Ind. 591 (1879); *Brooker v. Weber*, 41 Ind. 426 (1872); *Allen v. Davison*, 16 Ind. 416 (1861).

4. *Allen v. Davison*, 16 Ind. 416 (1861).

5. *Rosser v. Barnes*, 16 Ind. 502 (1861); *City of Wyandotte v. Gibson*, 25 Kan. 236 (1881).

1. *Moss v. Priest*, 19 Abb. Prac. 314, 1 Rob. 632 (1863).

is made before the arguments begin.<sup>2</sup> The Iowa practice is a fair one: that the interrogating party should submit his questions to the opposing party before the arguments.<sup>3</sup> It is too late when the opposite party has concluded his argument without having seen the interrogatories proposed.<sup>4</sup> *A fortiori*, it is too late when the jury have returned into court with a verdict, although it has not been received.<sup>5</sup>

**§ 106. (*More Rational Expedients; Special Interrogatories; Statutory; Administration by the Court*); Form of Answers.**—

The answers of the jury must be full and unequivocal.<sup>1</sup> It is therefore error to instruct them not to answer a question as to which there is a lack of evidence.<sup>2</sup> The answers must cover every question asked. Even where the existence of a fact is admitted,<sup>3</sup> a question as to it must be fully answered. To fail in compelling a jury to return full and specific answers is as much error as it would be to fail to submit the questions at all.<sup>4</sup> It is not sufficient for the jury to reply that there is a complete absence of evidence on the subject,<sup>5</sup> but if no answer to the question could materially assist the person asking it, he is not prejudiced.<sup>6</sup> Nor can the jury say that they don't know any thing about the matter.<sup>7</sup> It is their business to know or to say that they are unable to answer the question from the evidence in the case. If, however, there is no evidence upon which the jury can answer a question,

2. *Plyler v. Pacific Portland Cement Co.*, (Cal. 1907) 92 Pac. 56.; *Fleetwood v. Dorsey, etc., Co.*, 95 Ind. 491 (1884); *Nichols v. State*, 65 Ind. 512 (1879); *Glasgow v. Hobbs*, 52 Ind. 239 (1875); *Malady v. McEnary*, 30 Ind. 273 (1868); *Hopper v. Moore*, 42 Iowa 563 (1876). Such a request is not in derogation of the ancient right of trial by jury. *Pittsburg, C. C. & St. L. R. Co. v. Smith*, 207 Ill. 486, 69 N. E. 873 (1904).

3. *Crosby v. Hungerford*, 59 Iowa 712 (1882). Failure to exhibit to counsel before argument is a good reason for refusing to submit the interrogatories to the jury. *Sarchfield v. Hayes*, (Iowa 1907) 112 N. W. 1100.

4. *Wabash, etc., Ry. Co. v. Tretts*, 96 Ind. 450 (1884).

5. *Hairgrove v. Millington*, 8 Kan. 480 (1871).

1. *Summers v. Greathouse*, 87 Ind. 205 (1882); *Maxwell v. Boyne*, 36 Ind. 120 (1871); *Buntin v. Rose*, 16 Ind. 209 (1861); *First Nat. Bank v. Peck*, 8 Kan. 660 (1871).

2. *Maxwell v. Boyne*, 36 Ind. 120 (1871).

3. *Durfee v. Abbott*, 50 Mich. 479 (1883).

4. *City of Wyandotte v. Gibson*, 25 Kan. 236 (1881).

5. *Crane v. Reeder*, 25 Mich. 304 (1872).

6. *Johnson v. Continental Ins. Co.*, 39 Mich. 33 (1878).

7. *Maxwell v. Boyne*, 36 Ind. 120 (1871); *Buntin v. Rose*, 16 Ind. 209 (1861).

they are at liberty to say that such is the case.<sup>8</sup> Exactness in answer beyond that rendered possible by the evidence will not be required. Thus, where the evidence placed an occurrence "between 11:40 and 11:45 a. m.," the jury are excused from answering as to the "hour and minute" of the occurrence.<sup>9</sup>

**§ 107. (*More Rational Expedients; Special Interrogatories; Statutory; Administration by the Court*); Answers Must Be Responsive.**— Questions must be answered by the jury in such a way as to be certain, definite and so drawn as to exclude ambiguity.<sup>1</sup> The answer must not introduce an alternative statement not embraced in the question in such a manner as to render it doubtful as to precisely what the jury mean to assert regarding the subject-matter of the question. As, for example, a question as to "ash" wood cannot properly be answered by a statement as to "ash and oak."<sup>2</sup>

*Qualifying expressions*, "in our judgment"<sup>3</sup> and the like, which are not intended to express any uncertainty or lack of mental belief on the part of the jury in the accuracy of their conclusion may be disregarded. On the other hand, where the jury answer merely as to what they "think," it has been deemed insufficient.<sup>4</sup>

*Argumentative answers* — those which assign reasons for a conclusion — will be received where the purport is clear. Thus, where the jury, on being asked whether A at a certain time had a disease of the kidneys for which he received medical treatment, answered — "he may have received medical treatment for that disease, but if he did, he received treatment for a disease he did not have" — it was held that this was equivalent to an answer that he did not have a disease of the kidneys.<sup>5</sup>

*"Opinion."* As is frequently done in other connections, the jury may return an answer that certain facts, in their *opinion*

8. *Williamson v. Yingling*, 80 Ind. 379 (1881).

9. *Pittsburg, etc., R. Co. v. Williams*, 74 Ind. 462 (1881).

1. Where special interrogatories are submitted to the jury, it is satisfactory if the answers to all material questions are sufficiently responsive and definite to be fairly certain in meaning. *Ft. Wayne Cooperage Co. v. Page*, (Ind. App. 1907) 82 N. E. 83.

2. *Peters v. Lane*, 55 Ind. 391 (1876).

3. *Peters v. Lane*, 55 Ind. 391 (1876).

4. *Hopkins v. Stanley*, 43 Ind. 553 (1873).

5. *Mutual, etc., Ins. Co. v. Cannon*, 48 Ind. 264 (1874).

exist, when it is their meaning, not that they have any doubt on the matter, but that such is their settled inference or conclusion.<sup>6</sup>

**§ 108. (*More Rational Expedients; Special Interrogatories; Statutory*); Effect of General Verdicts.**—General verdicts cannot be made to take the place of special answers when the latter have been properly requested from the jury.<sup>1</sup> The return of a general verdict, without answering as required, the special interrogatories, will not prevent the judge, before the general verdict is confirmed, from sending it back to the jury and requiring answers to the special interrogatories also.<sup>2</sup> Definite special answers may well, even under these circumstances, be required.<sup>3</sup> Where the jury cannot agree on a general verdict, their special findings cannot be made the basis of a judgment.<sup>4</sup>

**§ 109. (*More Rational Expedients; Special Interrogatories; Statutory*); Effect of Special Answers.**—Special answers of a jury are without force and effect unless the questions were regularly submitted to them by the judge.<sup>1</sup> On the contrary, it is not error to fail to answer an interrogatory not submitted by the court.<sup>2</sup> The special answers are recorded with the general verdict and made part of the record in the same way.<sup>3</sup>

**§ 110. (*More Rational Expedients; Special Interrogatories; Statutory*); Inconsistency.**—It is an almost universal statutory provision, that where a jury return a general verdict and also answers to special interrogatories and the two announcements are inconsistent, that the findings of the special answers should prevail.

*The word inconsistent* “does not mean that the special find-

6. *City of Cincinnati v. Johnson*, 28 Ohio Cir. Ct. R. 377 (1905) [judgment affirmed, 76 Ohio St. 567, 81 N. E. 1182 (1907)].

1. *Leavenworth, etc., R. Co. v. Rice*, 10 Kan. 426 (1872).

2. *Tarbox v. Gotzian*, 20 Minn. 139 (1873).

3. *Urbanek v. Chicago, etc., Ry. Co.*, 47 Wis. 59 (1879).

4. *Leffel v. Leffel*, 35 Ind. 76 (1871); *Hardin v. Branner*, 25 Iowa 364 (1868).

1. *Hamilton v. Shoaff*, 99 Ind. 63 (1884); *Cincinnati, etc., R. Co. v. Heim*, 97 Ind. 525 (1884); *Graves*

*v. Thomas*, 95 Ind. 361 (1883); *Aiken v. Ising*, 94 Ind. 507 (1883); *Watkins v. Pickering*, 92 Ind. 332 (1883); *Elliott v. Russell*, 92 Ind. 526 (1883); *Astley v. Capron*, 89 Ind. 167 (1883); *Hervey v. Parry*, 82 Ind. 263 (1882); *Cleveland, etc., R. Co. v. Bowen*, 70 Ind. 478 (1880); *Fleming v. Potter*, 14 Ind. 486 (1860).

2. *Ogle v. Dill*, 61 Ind. 438 (1878).

3. *Boots v. Griffith*, 97 Ind. 241 (1884); *Salander v. Lockwood*, 66 Ind. 285 (1879); *Monroe v. Adams Express Co.*, 65 Ind. 60 (1878); *Horn v. Eberhart*, 17 Ind. 118 (1861).

ings are inconsistent with each other, nor does it mean that some of the special findings are inconsistent with the general verdict; but it means either that, taken as a whole, the special findings are inconsistent with the general verdict, or that the facts found in one or more of the answers to interrogatories exclude every conclusion that will authorize a recovery for the plaintiff.”<sup>1</sup> Only when one or more of the special findings are inconsistent with any theory on which the plaintiff can recover will a general verdict in his favor be nullified by the special findings.<sup>2</sup> The effect of the inconsistent special finding must not, in such a case, be itself offset or nullified by the effect of some other fact inconsistent with it. In such a case, the general verdict would be allowed to stand.<sup>3</sup> If two special findings are in conflict with each other and with the general verdict, they will be deemed to offset each other and, as foundation of a judgment, both will be disregarded.<sup>4</sup> Such findings may, however, reveal such a confusion of thought and entanglement of purposes on the part of the jury as to render it proper to award a new trial.<sup>5</sup> It would be error, under such conditions, to enter judgment in favor of either party.<sup>6</sup> For the results mentioned, the inconsistency must however, appear on the face of the record.<sup>7</sup> As is said by the supreme court of Indiana, “The special findings override the general verdict only when both cannot stand, and this antagonism must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues, before the court can be successfully called upon to direct judgment in favor of the party against whom a general verdict has been rendered.”<sup>8</sup> The inconsistency must be irreconcilable.

1. *Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 143, 147 (1876).

2. *Plyler v. Pacific Portland Cement Co.*, (Cal. 1907) 92 Pac. 56; *New York, etc., R. Co. v. Hamlin*, (Ind. 1908) 83 N. E. 343 [judgment modified, 79 N. E. 1040 (1907)].

3. *Ft. Wayne Cooperage Co. v. Page*, (Ind. App. 1907) 82 N. E. 83; *Noakes v. Morey*, 30 Ind. 103 (1868); *St. Louis, etc., Ry. Co. v. Ritz*, 33 Kan. 404 (1885); *Foster v. Gaffield*, 34 Mich. 356 (1876); *Keeler v. Robertson*, 27 Mich. 116 (1873).

4. *Robinson v. Ferrier*, 82 Ind. 506 (1882).

5. *Plyler v. Pacific Portland Cement Co.*, (Cal. 1907) 92 Pac. 56; *Shoemaker v. St. Louis, etc., Ry. Co.*, 30 Kan. 359 (1883); *Missouri Pac. Ry. Co. v. Holley*, 30 Kan. 465 (1883); *Atchison, etc., R. Co. v. Maher*, 23 Kan. 163 (1879).

6. *Shoemaker v. St. Louis, etc., Ry. Co.*, 30 Kan. 359 (1883).

7. *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143 (1876); *Amidon v. Gaff*, 24 Ind. 128 (1865).

8. *Amidon v. Gaff*, 24 Ind. 128 (1865).



§ 111. (*More Rational Expedients; Special Interrogatories; Statutory; Inconsistency*); The Inconsistency Must Be Irreconcilable.<sup>1</sup>—"It must be remembered that a special finding must be irreconcilably inconsistent with the general verdict, before the latter can be set aside and the former substituted in its place."<sup>2</sup>

*Directed verdict.* Special findings accompanying a verdict rendered on direction of court are immaterial.<sup>3</sup>

§ 112. (*More Rational Expedients; Special Interrogatories; Statutory; Inconsistency*); Trial Judge's Attitude.—The administrative power of the court will not be exerted in favor of the special but rather in aid of the general verdict.<sup>1</sup> In other, more customary, words, there is no presumption in favor of the special finding.<sup>2</sup> "The court will not presume anything in aid of the special findings of fact, but on the contrary, will indulge every reasonable presumption in favor of the general verdict."<sup>3</sup> Every

1. *California*.—Plyler v. Pacific Portland Cement Co., 92 Pac. 56 (1907); Leese v. Clark, 20 Cal. 387 (1862).

*Indiana*.—Croy v. Louisville, etc., Ry. Co., 97 Ind. 126 (1884); Anderson v. Hubble, 93 Ind. 570 (1883); Lassiter v. Jackman, 88 Ind. 118 (1882); Woollen v. Wishmier, 70 Ind. 108 (1880); Salander v. Lockwood, 66 Ind. 285 (1879); Scheible v. Law, 65 Ind. 332 (1879); Indianapolis, etc., R. Co. v. McCaffrey, 62 Ind. 552 (1878); Detroit, etc., R. Co. v. Barton, 61 Ind. 293 (1878); Wiley v. Pavey, 61 Ind. 457 (1878).

*Iowa*.—Baird v. Chicago, etc., R. Co., 55 Iowa 121, 7 N. W. 460 (1880); Hardin v. Branner, 25 Iowa 364 (1868); Lamp v. First Pres. Soc., 20 Iowa 127 (1865).

*Kansas*.—Gripton v. Thompson, 32 Kan. 367 (1884); Sims v. Mead, 29 Kan. 124 (1883); Partonier v. Pretz, 24 Kan. 238 (1880); Tobie v. Comms. of Brown County, 20 Kan. 14 (1878); Hazard Powder Co. v. Viergutz, 6 Kan. 471 (1870).

*Michigan*.—Dupont v. Starring, 42 Mich. 492 (1880).

*Nebraska*.—Ogg v. Shehan, 17 Neb. 323, 22 N. W. 556 (1885).

*New York*.—W. S. Trust Co. v. Harris, 2 Bosw. 75 (1857).

*Wisconsin*.—Davis v. Town of Farmington, 42 Wis. 425 (1877); Haas v. Chicago, etc., Ry. Co., 41 Wis. 44 (1876); Lemke v. Chicago, etc., Ry. Co., 39 Wis. 449 (1876).

*Wyoming*.—Chicago, B. & Q. R. Co. v. Morris, 93 Pac. 664 (1908).

2. Woollen v. Wishmier, 70 Ind. 108 (1880).

3. Missouri, etc., R. Co. v. L. A. Watkins Merchandise Co., 76 Kan. 813, 92 Pac. 1102 (1907).

1. New York, etc., R. Co. v. Hamlin, (Ind. 1908) 83 N. E. 343 [judgment modified, 79 N. E. 1040 (1907)]; Lassiter v. Jackman, 88 Ind. 118 (1882); Bonham v. Iowa Cent. Ins. Co., 25 Iowa 328 (1868).

2. Indianapolis Traction & Terminal Co. v. Holtzclaw, 40 Ind. App. 311, 82 N. E. 986 (1907); Lowden v. Pennsylvania Co., (Ind. App. 1907) 82 N. E. 941; Indianapolis, etc., R. Co. v. Stout, 53 Ind. 143, 147 (1876).

3. Mitchell v. Tell City (Ind. App. 1907) 83 N. E. 735 [judgment reversed on rehearing 81 N. E. 549 (1907)]; Indianapolis Traction & Terminal Co. v. Holtzclaw, 40 Ind. App. 311, 82 N. E. 986 (1907); Las-

reasonable administrative attempt will, however, be made to introduce and preserve harmony of effect between the special findings and the general verdict.<sup>4</sup> "All presumptions must be made in favor of harmony, when harmony is possible, because both findings are under the same oath."<sup>5</sup> Thus, though a single question and answer, taken alone, might seem inconsistent with the general verdict, the latter will not be overthrown, if the special answers, as a whole, are consistent with the general verdict.<sup>6</sup> Toward this end, the judge will exert his administrative function in various ways. Thus, if a question has been answered which should not have been asked, he may disregard it.<sup>7</sup> He may withdraw an improper question from the consideration of the jury.<sup>8</sup> But the trial judge cannot force a peace between general verdict and special findings; nor order the jury to make their special findings so as to harmonize them with their general verdict.<sup>9</sup>

*Aided by special answers.* On the other hand, a trial judge will be ready to avail himself of any answers to special interrogatories which tend to support and explain the general verdict.<sup>10</sup>

**§ 113. (*More Rational Expedients; Special Interrogatories; Statutory; Inconsistency*); How Advantage is Taken of Inconsistency.**—The inertia of the court to disturb a general verdict persists further. Even where the statute expressly declares that if the special findings are inconsistent with the general verdict, the judge *shall* enter judgment in accordance with the findings, still, if the party in whose favor the findings are desires judgment,

siter *v.* Jackman, 88 Ind. 118 (1882). A fact admitted in the pleadings will be assumed to exist, notwithstanding answers to special interrogations. City of Cincinnati *v.* Johnson, 28 Ohio Cir. Ct. 377 (1905) [judgment affirmed 76 Ohio St. 567, 81 N. E. 1182 (1907)].

4. Close *v.* Atkins, 39 Iowa 521 (1874); Mershon *v.* Nat. Ins. Co., 34 Iowa 87 (1871); Foster *v.* Gaffield, 34 Mich. 356 (1876); Jones *v.* Snider, 8 Oreg. 127 (1879).

5. Foster *v.* Gaffield, 34 Mich. 356 (1876).

6. Strecker *v.* Conn, 90 Ind. 469 (1883); Louisville, etc., Ry. Co. *v.* Head, 80 Ind. 117 (1881); McClure

*v.* McClure, 74 Ind. 108 (1881); Grand Rapids, etc., R. Co. *v.* Boyd, 65 Ind. 526 (1879).

7. Petrie *v.* Boyle, 56 Iowa 163 (1881); Foster *v.* Gaffield, 34 Mich. 356 (1876).

8. Morse *v.* Morse, 25 Ind. 156 (1865).

9. Usher *v.* Hiatt, 18 Kan. 195 (1877); People *v.* Murray, 52 Mich. 288 (1883); Cole *v.* Boyd, 47 Mich. 98 (1881). But see also Mooney *v.* Olsen, 22 Kan. 69 (1879).

10. Schillinger Bros. Co. *v.* Smith, 128 Ill. App. 30 (1906) [judgment affirmed, 225 Ill. 74, 80 N. E. 65 (1907)].

he must move for it.<sup>1</sup> More than this, he must move for precisely that to which he has become entitled and the court does not propose to aid him.<sup>2</sup> It is not sufficient should the motion cover part of the questions and answers; it must cover them all.<sup>3</sup> Nor is priority conceded, in legal effect to such a motion. It does not foreclose a motion for a new trial.<sup>4</sup> Nor is it an appropriate method by means of which to raise a question as to the adequacy of the special findings for overturning the general verdict.<sup>5</sup> The moving party has, however, a *right*, if he is only able to get at it and may proceed to enforce it on appeal.<sup>6</sup> A motion for judgment on answers to interrogatories notwithstanding the general verdict must be decided on the special findings and the pleadings alone, and the court cannot consider the sufficiency of the evidence to support the general verdict.<sup>7</sup> The question of inconsistency cannot be raised on a motion for a new trial.<sup>8</sup>

*Effect of Separation of Jury.*—Should a jury who have failed to answer a question submitted to them finally separate without objection, the error in not answering is waived.<sup>9</sup> So, if unresponsive or uncertain answers are returned, separation without a motion to send the jury back for better answers will operate as a waiver of the right to make such a motion.<sup>10</sup>

**§ 114. (*More Rational Expedients; Special Interrogatories; Statutory*); Effect of Granting a New Trial.**—As a matter of

1. *Brickley v. Weghorn*, 71 Ind. 497 (1880); *Stockton v. Stockton*, 40 Ind. 225 (1872).

2. *Farley v. Eller*, 40 Ind. 319 (1872).

3. *Byram v. Galbraith*, 75 Ind. 134 (1881).

4. *Nichols v. State*, 65 Ind. 512 (1879); *Indianapolis, etc., R. Co. v. McCaffrey*, 62 Ind. 552 (1878); *Murray v. Phillips*, 59 Ind. 56 (1877); *Brannon v. May*, 42 Ind. 92 (1873).

5. *Anderson v. Hubble*, 93 Ind. 570 (1883); *Brickley v. Weghorn*, 71 Ind. 497 (1880); *Stockton v. Stockton*, 40 Ind. 225 (1872); *Adamson v. Rose*, 30 Ind. 380 (1863).

6. *United States Health & Accident Ins. Co. v. Clark*, (Ind. App. 1908) 83 N. E. 760; *Stockton v. Stockton*, 40 Ind. 225 (1872).

7. *Lowden v. Pennsylvania Co.*, (Ind. App. 1907) 82 N. E. 941.

8. *Brickley v. Weghorn*, 71 Ind. 497 (1880); *Vater v. Lewis*, 36 Ind. 288 (1871); *McElfresh v. Guard*, 32 Ind. 408 (1869). But see *contra*, *Peters v. Lane*, 55 Ind. 391 (1876).

9. *Bradley v. Bradley*, 45 Ind. 67 (1873); *Vater v. Lewis*, 36 Ind. 288 (1871); *Long v. Duncan*, 10 Kan. 294 (1872).

10. *Bradley v. Bradley*, 45 Ind. 67 (1873); *Kansas Pac. Ry. Co. v. Pointer*, 14 Kan. 37 (1874); *Arthur v. Wallace*, 8 Kan. 267 (1871); *Hazard Powder Co. v. Viergutz*, 6 Kan. 471 (1870); *Barkow v. Sanger*, 47 Wis. 500 (1879).

fact granting the new trial sets aside a special finding.<sup>1</sup> But a motion for a new trial is not a waiver of a motion for a judgment on facts specially found.<sup>2</sup> Nor can such a motion be used for the purpose of testing the sufficiency, as matter of law, of findings to support a judgment.<sup>3</sup> The insufficiency, however, of the evidence to support the special findings may properly be raised on such a motion.<sup>4</sup> Unless, however, the evidence is furnished to the appellate court, it will assume that the action of the jury was within the bounds of reason.<sup>5</sup> The relations between the special finding and the general verdict may be used by the trial court to decide as to whether a new trial should be awarded.<sup>6</sup> Such findings are, at times, excellent tests of the mental attitude of the jury and may reveal such a lack of comprehension of the case<sup>7</sup> or some of its more important features<sup>8</sup> as would warrant a new trial. The same results follow if the special answers fail to furnish a fair basis for a judgment upon them.<sup>9</sup> The special verdict may, however, aid as well as assist in disturbing a verdict on a motion for a new trial. Thus such a finding may show that although the court charged wrongly, the jury were not, in point of fact, misled.<sup>10</sup> But error in law may be committed in awarding a new trial and this also may be shown by the special finding.<sup>11</sup> When a motion for judgment has been properly refused in the trial court, the appellate court will not order a new trial, but direct the entry of the proper judgment by the trial

1. *Hollenbeck v. Marshalltown*, 62 Iowa 21 (1883).

2. *Leslie v. Merrick*, 99 Ind. 180 (1884).

3. *Hartman v. Flaherty*, 80 Ind. 472 (1881); *Williamson v. Yingley*, 80 Ind. 379 (1881); *Spraker v. Armstrong*, 79 Ind. 577 (1881); *Byram v. Galbraith*, 75 Ind. 134 (1881); *West v. Cávins*, 74 Ind. 265 (1881).

4. *Murray v. Phillips*, 59 Ind. 56 (1877); *Howe v. Lincoln*, 23 Kan. 468 (1880).

5. *Blew v. Hoover*, 30 Ind. 450 (1868).

6. See *Atchison, etc., R. Co. v. Weber*, 33 Kan. 543 (1885); *Union Pac. Ry. Co. v. Shannon*, 33 Kan. 446 (1885).

7. *Atchison, etc., R. Co. v. Brown*, 33 Kan. 757 (1885).

8. *Baldwin v. St. Louis, etc., Ry. Co.*, 63 Iowa 210 (1884). See *McCarty v. James*, 62 Iowa 257 (1883); *Hazard Powder Co. v. Viergutz*, 6 Kan. 471, 486 (1870).

9. *Minneapolis Harvester, etc., Co. v. Cummings*, 26 Kan. 367 (1881).

10. *Worley v. Moore*, 97 Ind. 15 (1884); *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836 (1885).

11. *Baird v. Chicago, etc., Ry. Co.*, 61 Iowa 359 (1883) [distinguishing *Roberts v. Corbin*, 28 Iowa 355 (1869)].

judge.<sup>12</sup> But in such a case the special findings must clearly entitle the moving party to judgment.<sup>13</sup>

**§ 115. (*More Rational Expedients; Special Interrogatories; Statutory*); Error and Prejudice.**— Failure to secure a specific answer may well be regarded as a matter of prejudice.<sup>1</sup> No prejudicial error, however, is committed where an excluded question is in reality, covered by other questions which have been submitted,<sup>2</sup> whether the latter have been requested or the submission has been made by the judge of his own motion.<sup>3</sup> If the statute require that the special findings be signed by the foreman of the jury, it is error to receive them without such a signature.<sup>4</sup> But that the error should be deemed prejudicial it is essential that the party should have objected when the answers were received; otherwise, the error is waived.<sup>5</sup>

*Reversal, How Secured.*—A party who desires effectively to object to the allowance of an interrogation to the jury must take his exception before the jury retire.<sup>6</sup>

*Attitude of Appellate Court.*—In an appellate court, the question on reviewing the ruling of a trial court as to the inconsistency between a general verdict and special findings of fact, in most cases is, and in all cases should be, simply as to whether the trial judge used his administrative power unreasonably; or, as is more frequently said, “abused” it. It is practically an equivalent statement to say that every reasonable assumption (usually styled “presumption”) is in favor of the propriety of the trial judge’s action.<sup>7</sup>

12. *Smith v. Zent*, 77 Ind. 474 (1881).

13. *Croy v. Louisville, etc., Ry. Co.*, 97 Ind. 126 (1884). See *Newell v. Houlton*, 22 Minn. 19 (1875). See *Phoenix Water Co. v. Fletcher*, 23 Cal. 481 (1863); *McDermott v. Higby*, 23 Cal. 489 (1863).

1. *Kansas Pac. Ry. Co. v. Pointer*, 14 Kan. 37 (1874).

2. *Ft. Wayne Cooperage Co. v. Page*, (Ind. App. 1907) 82 N. E. 83; *Bice v. Wheeling Electrical Co.*, (W. Va. 1907) 59 S. E. 626; *Hemmingsen v. Chicago & N. W. Ry. Co.*, (Wis. 1908) 114 N. W. 785.

3. *Strand v. Grinnell Automobile Garage Co.*, (Iowa 1907) 113 N. W. 488.

4. *Sage v. Brown*, 34 Ind. 465 (1870).

5. *Vater v. Lewis*, 36 Ind. 288 (1871).

The practice is established to sign each answer separately. *Sage v. Brown*, 34 Ind. 465 (1870). Questions orally answered are not considered in this connection. *Moss v. Priest*, 19 Abb. Prac. 314 (1863).

6. *Brooker v. Weber*, 41 Ind. 426 (1872); *Dupont v. Starring*, 42 Mich. 492 (1880); *Manny v. Griswold*, 21 Minn. 506 (1875); *Gerhardt v. Swaty*, 57 Wis. 24 (1883).

7. *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143 (1876); *Nichols v. Weaver*, 7 Kan. 373 (1871); *Burleson v. Burleson*, 28 Tex. 383 (1866).

**§ 116. (*More Rational Expedients; Special Interrogatories; Statutory*); Judge Sitting as a Jury.**— While the matter of inconsistency between special findings and a general verdict is most applicable to the verdicts of a jury, the provisions apply equally to cases where the judge sits as a jury.<sup>1</sup>

**§ 117. Matters of Argument, Opinion or Judgment.**— Not all matters of fact involved in the province of the jury are the subject of evidence. “Matters of law” are, as has been seen,<sup>1</sup> eliminated from the list, being transferred from the field of evidence to the functions of the court. Constituent facts are to be found by the jury from the evidence; but antecedent to the relevancy of evidence, and between the probative and the constituent facts, lie, at every stage, the supplied data which alone make possible the exercise of reasoning. These supplied data and propositions of experience, common knowledge,<sup>2</sup> and the like are also removed from the field of proof and placed, as to the truth of propositions in issue within the province of the jury. The rules of reasoning and their application to the evidence, though in themselves facts<sup>3</sup> inseparably involved in the determination of the issue, are not the subject of judicial evidence. Within limitations imposed by the rule of law which requires the exercise of reason, the judging of the issue, the exercise of the reasoning faculty on the facts involved in the case as to the truth of the proposition in issue or as to the existence of any constituent fact is a function of the jury. A witness, therefore, is not at liberty (1) to testify to the existence and nature of the rules of reasoning applicable to the case;<sup>4</sup> (2) to argue a proposition in issue or the inferences from any fact in evidence, or (3) to state the effect which the evidence as to the existence of any probative or constituent facts has produced in

1. *Gebhart v. Merchant*, 84 Ark. 359, 105 S. W. 1034 (1907).

1. *Supra*, § 41.

2. *Infra*, §§ 691 *et seq.*

3. “An inference from facts is itself a fact.” “It is not because facts are admitted that it is therefore for the judge to say what the decision on them should be.” *Davey v. London, etc., Ry. Co.*, L. R. 13 Q. B. D. 70, 76 (1883), per Bowen, L. J. “I do not believe that because the facts are admitted the functions of the jury as to drawing inferences from them are

altered at all.” *Williams, J. in Pearce v. Lansdowne*, 69 L. T. Rep. 316 (1893).

4. The nature and scope of the rules of correct reasoning or the necessary laws of thought are discerned intuitively or constitute subjects of immediate consciousness and form part of the general knowledge of the jury (or judge, as the case may be) to which, as part of the mental equipment of the tribunal of fact appeal is constantly, if unconsciously, made in the course of judicial inquiries.

his mind. The logical bearing and effect of facts introduced in evidence upon the existence of the constituent facts are therefore facts constituting part of the province of judgment, the judicial function of decision. Legally, these facts are treated as a separate class designated as "Matters of Opinion,"<sup>5</sup> and, except under special circumstances, are reserved for employment by the jury alone.

**§ 118. (*Matters of Argument, Opinion or Judgment*); Sound Reasoning.**—What constitute the rules of sound reasoning, or as to what inferences should properly and logically be drawn from the evidence as to the truth of propositions in issue, is within certain limits also a matter for the jury.<sup>1</sup> This process is essential in reaching the constituent from the probative or evidentiary facts. It is within the function of counsel, at the stage of argument to call the jury's attention to such rules and their application to the facts of the particular case, and so to arrange the inferences from the evidence, as to sustain, so far as possible, his particular contention as to the truth of the proposition under investigation.<sup>2</sup> It is the duty of the court to bring the same matters to the jury's attention, at an appropriate stage. But while the application of reason to the evidence with a view to reaching the constituent facts is part of the jury's duty in finding these facts, the insistence that they *shall* use reason, rather than caprice, emotion or any less worthy means of arriving at their conclusion, is imposed by the substantive law—formulated and enforced so far as they are concerned, by the presiding judge.<sup>3</sup>

5. *Infra*, §§ 1791 *et seq.*

1. *Com. v. Anthes*, 5 Gray 185, 193 (1855) (adjudicate; "the power to exercise that reason and judgment, acting upon all the appropriate premises"). "It is the office of jurors to adjudge upon their evidence." *Littleton's Case* (1612), cited in 10 Co. 56b.

2. **A changed position.**—In thus stating to the jury the rules of sound reasoning and those of law, substantive or procedural, counsel are following in a change of function, the altered conditions of a modern trial in appealing to reason from those of the earlier formal contest where proof was by the issue of a mechanical test

of procedure. In the earlier law, counsel rather stated the formularies, as of sacramental efficacy, than considered the effect of what they were doing on the mind of anyone. "The science of statement was far more important than the substance of the right, and that rights of litigants themselves were comparatively unimportant, unless they illustrated some obscure, interesting and subtle point of the science of stating those points." Lord Chief Justice Coleridge.

3. In such cases the evidence is "insufficient in law to support a verdict." *Denny v. Williams*, 5 Allen 1, 4 (1862). *Infra*, §§ 385 *et seq.*

*Reason Imperative on the Judge.*— This obligation to employ correct reasoning is imposed by substantive law on the jury. But it has been placed by that law equally on the judge. It matters little, therefore, whether the judicial, judging, act is by the jury in dealing with the truth of a proposition in issue or whether the judging is done by the court in the interpretation of writings, in subsidiary findings of fact, or indeed any discharge of administrative functions.<sup>4</sup> The effect of the thinking, the goal to which the reasoning shall verge, is left to the judge or jury, in accordance with their respective functions. But that *reason* — and nothing else — shall be the guide and conditioner of each step is beyond either branch of the tribunal to vary. The requirement is matter of law, to be enforced by all branches of the tribunal upon themselves and enforced by all courts having power of regulation over juries or inferior judges. The use of reason constitutes the necessary atmosphere in which the modern trial lives, moves and has its being.

§ 119. *Matter of Law.*— Consideration has thus been given to “matter of fact” as rather loosely used in the phraseology of judicial proceedings; and as to the manner and extent to which, under the generally prevailing system of English jurisprudence, issues involving matters of fact are decided by a jury. It remains to turn attention to the many and important issues, or questions of fact which are decided by the *judge*. While these matters of fact, grouped under the heading of “matter of law,” present the common feature that they embody the use of legal reasoning, i. e., involve the application of the rule of law to a set of facts, they yet present among themselves certain points of difference. Among them, for example, are the meaning of words and the general requirement of the use of reason in extrajudicial as well as in judicial conduct, especially in relation to certain branches of the substantive law. In addition to these more general matters, it is the practice of the courts when certain sets of constituent facts have been found by the jury, or where these are admitted or not controverted, to apply to them the rule of law for themselves. A familiar instance of this is in connection with the construction of documents. As has been observed elsewhere, this course of judicial administration seems to be in the interest of sane public policy.

4. *Lane v. Moore*, 151 Mass. 87, 91 (1890).



However this may be, it is well to notice that all these instances of the dealing by the court with issues or other matters of fact, have been, as a rule, spoken of by judges as being "matters of law." If it were true that all questions of fact were for the jury and all questions of law for the judge, it would be equally true that all questions decided by the judge are "matters of law;" and it is generally with this in view that the phrase is used.<sup>1</sup> There is weight, however, in the suggestion of Chief Justice Cockburn,<sup>2</sup> "The right mode of dealing with a question of fact which it is thought desirable to withdraw from the jury is to say that it shall, though a question of fact, be determined by the judge."<sup>3</sup> The judge's function in this connection, though dealing with facts, varies from his province in finding the existence of other facts, e. g., those preliminary to the admissibility of evidence.<sup>4</sup> In deciding a preliminary fact, the judge definitely passes, finally or provisionally, upon the existence of all facts necessary to his decision.

In the present connection the existence of the primary facts, if disputed, is matter for the jury. The court draws the inference from these constituent facts found by the jury and applies the rule of law to reach a judgment. He is solving, as the phrase goes, "a mixed question of law and fact."<sup>5</sup> The actual situation would be more nearly described by saying that the judge is construing a broad rule of law in terms of a particular set of facts.<sup>6</sup> The jury find the constituent facts. The judge decides what the inference from them shall mean in terms of the liability claimed. He is so cautious about interfering or appearing to interfere with the jury's exercise of a function which they have no natural capacity for employing, but which the interests of society demand should be discharged as he only is fitted to do it, that he speaks of his action as a matter of law and makes his ruling in terms of evidence — that there is or is not "evidence" for the jury as if, at

1. *Duncan v. Duncan*, 1 Watts 322, 325 (1833) (whether a document is under seal).

2. Letter of June 12, 1879, to House of Commons, printed by order of the House.

3. "The allotment to the jury of matters of fact, even in the strict sense of fact which is in issue, is not exact. The judges have always

answered a multitude of questions of ultimate fact, or facts which form part of the issue." Thayer, *Prel. Treat.* 202.

4. *Supra*, § 81.

5. *Johnstone v. Sutton*, 1 T. R. 493, 545 (1786); *Bulkeley v. Smith*, 2 Duer (N. Y.) 261 (1853).

6. Thayer, *Prelim. Treat.*, 225.

most, it were a question of administration. Whatever may be the circumlocution, he is applying the rule of law to the facts in review or anticipation of the action of the jury in doing so; and he is acting wisely.

**§ 120. Meaning of Words.**—The meaning of words is equally a question of fact, whether the meaning is of words taken separately of themselves, as definitions or when the inquiry is as to the meaning in which they have been used in a given context or under a certain set of circumstances. In other words, definition as well as interpretation presents a question of fact. The function of defining words used in connection with rules of law necessarily, however, fell to the court as part of its duty of administration as presiding officer of a mixed tribunal charged by the sovereign with the work of administering justice.<sup>1</sup> These definitions may well be so drawn as to exclude from the consideration of the jury many inferences of fact otherwise permissible, and in this way to take over into the custody of the judge the decision of numerous matters of fact. This function blends with and reinforces the discharge of other judicial duties. For example, many of the rules of substantive law are framed in terms of what is "reasonable."<sup>2</sup> The power of defining the term being with the judge,<sup>3</sup> the cognate duty of enforcing on the jury the rules of correct reasoning becomes at once more easily applied and more cogently enforced. In other words, in dealing with the language of a domestic statute the judge defines its meaning, not only in exercise of the power of definition but also by virtue of his power of construing the written law of the forum incidental to its administration.<sup>4</sup>

1. *Massachusetts*.—*Com. v. Crowley*, 145 Mass. 430 ("baker") (1888).

*Minnesota*.—*Taylor v. Horst*, 52 Minn. 300 ("book account") (1893).

*New Hampshire*.—*State v. Jones*, 50 N. H. 369 (1871); *State v. Pike*, 49 N. H. 399, 430, 442 (1869); *Boardman v. Woodman*, 47 N. H. 120, 146 (1866).

*New York*.—*Hartung v. People*, 22 N. Y. 95 (*ex post facto*) (1860).

*Vermont*.—*State v. Stevens*, 69 Vt. 411 ("a set line") (1897).

*United States*.—*McCulloch v. Maryland*, 4 Wheat, 316 ("necessary

and proper") (1819); *Calder v. Bull*, 3 Dall. 386 (*ex post facto*) (1798).

*England*.—*Russell v. Russell*, L. R. A. C. ("cruelty") 395 (1897); *Homer v. Taunton*, 5 H. & N. 661, 667 (1860); *Barnett v. Allen*, 3 H. & N. 376 (1858); *Hoare v. Silverlock*, 12 A. & E. (N. S.) 624 (1848).

2. *Infra*, §§ 121 *et seq.*

3. *Twyne's case*, 3 Coke 80b (1610).

4. "Whether or not a definitely described game falls within the prohibition of the statute against gambling is a question of law." *Com. v. Sullivan*, 146 Mass. 142, 145 (1888). But see *Pearce v. Lansdowne*, 69 L. T.

*The judge may, however, ask the opinion of the jury, if so inclined, as to the significance of a word used in a statute.<sup>5</sup> But the assistance rendered by them is merely an aid to the judge in discharging a duty of his own, is rendered necessary by a practical uncertainty in the mind of the court, and by no means signifies that such a construction is within the province of the jury as a matter of right.<sup>6</sup>*

**§ 120a. The Use of Reason; By the Jury.**— The power of the jury to deal with the facts as measured by the rule of law given to them by the court for that purpose is not, however, unlimited. Among matters of law, i. e., rules of legal requirement, which still remain in the handling of the judge, is the requirement that the jury must proceed according to reason, whether the reasoning is logical or legal. No enthusiasm of partisanship for the power of the jury has gone so far as to concede them an absolute and unlimited control of their reasoning processes, except in criminal cases, where the resulting unreversibility rather follows from the provision of substantive law against being twice placed in jeopardy than is due to any principal contrary to the duty of the court to insist upon the use of reason.

**§ 121. Use of Reason; By Others.**— A practical way of working out this requirement that the jury should use reason is in connection with its use by others. The general standard of conduct is that to be legally justified, it should be reasonable. That is, in dealing with others so far as his conduct affects them, he must act reasonably. This issue of reasonableness is frequently left to the jury, as the rule of law which they are to apply to the constituent facts.<sup>1</sup> This power of applying the rule of law (i. e., the test

Rep. 316 (1893), (whether a "pot-man" is a "domestic or menial servant") where the court proceed upon the assumption that the question is one for the jury.

5. *Com. v. Wright*, 137 Mass. 250 (whether the game of policy is a "lottery") (1884).

6. "It is not necessary to go on forever taking the opinion of the jury in each new case that comes up." *Com. v. Sullivan*, 146 Mass. 142, per Holmes, J. (1888).

1. *Missouri*.— *Gerdes v. Iron & F. Co.*, 124 Mo. 347, 25 S. W. 557 (1894).

*South Carolina*.— *Chesterfield v. Ratliff*, (S. C. 1898) 30 S. E. 593 (unreasonable shooting).

*Utah*.— *White v. Pease*, 15 Utah 170, 49 Pac. 416 (1897) (reasonable delivery of goods).

*United States*.— *Chesapeake Ins. Co. v. Starke*, 6 Cranch 268, 278 (1810) (reasonable abandonment of vessel).

of reasonableness) to the constituent facts is, as generally in such cases, merely incidental to find the facts themselves. After these facts are found,<sup>2</sup> or appear to be admitted or uncontroverted,<sup>3</sup> the rule of reasonableness may well be applied by the court. The greater definiteness of substantive law — toward which courts are very properly aiming,<sup>4</sup> operates also to restrict the jury's function of applying the law to the constituent facts.<sup>5</sup> To a greater or less extent the judicial importance of the element of the ascertainment of fact is eliminated or subordinated. As this element is withdrawn by agreement or ascertainment as to what the facts are, only the rule of law remains, and this, so far as the rule itself is concerned, is for the court and, under the circumstances, carries with it the right to do also the legal reasoning, i. e., to apply the law to the facts.

**§ 122. (*Use of Reason*); Reasonable Time.**—In any case where the facts relating to what is a reasonable time are established by admission or otherwise, the question is one of law.<sup>1</sup> This question of due and reasonable diligence in giving notice of dishonor of commercial paper has been held to be one of law where the facts are proved or admitted.<sup>2</sup> As in other cases where the

*England.*—Burton v. Griffiths, 11 M. & W. 817 (1843) (reasonable time); Facey v. Hurdom, 3 B. & C. 213 (1824) (reasonable time). "Whether there has been, in any particular case, reasonable diligence used or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided upon by the jury, acting under the direction of the judge, upon the particular circumstances of each case." Mellish v. Rawdon, 9 Bing. 416 (1832).

2. Joyner v. Roberts, 114 N. C. 389, 392, 19 S. E. 645 (1894) (reasonable inquiry before issuing a marriage license).

3. Comer v. Way, 107 Ala. 300, 19 South. 966 (1896) (reasonable time); American Surety Co. v. Pauly, 18 C. A. 644, 72 Fed. 470 (1896) (reasonable diligence in sending notice); Earnshaw v. U. S., 146 U. S. 60, 67, 13 Sup. 14 (1872) (reasonable notice).

4. *Infra*, §§ 145 *et seq.*

5. Ryder v. Wombwell, L. R. 4 Exch. 32 (1868) (what are necessities for an infant?).

1. American Window Glass Co. v. Indiana Natural Gas & Oil Co., (Ind. App. 1906) 76 N. E. 1006.

2. Walker v. Stetson, 14 Oh. St. 89 (1862); Bank of Upper Canada v. Smith, 4 Q. B. U. C. 483 (1847). "Notice, of course, means knowledge; and there has been no direct attempt to deny that this is a question of fact. But there has been a strong and persistent attempt to lay down rules as to what constitutes evidence of notice. This, if successful, is, of course, in reality a roundabout way of altering the law as to notice. When a man says to me that henceforth, under all circumstances, upon certain facts being proved I shall be presumed to know a thing, he really says that consequences, which formerly only resulted from knowledge, shall now result from circumstances other than

issue of reasonable time is raised<sup>3</sup> and the facts are in controversy, their existence is a question for the jury, who may find whether due diligence has been used under proper instructions from the judge.<sup>4</sup>

*Other Applications.*—There is, however, no absolute uniformity in the matter.

Other applications of the standard of reasonableness to states of fact claimed to ground a legal liability are recognized as within the trial function of the jury. It is conceded that the circumstance that the requirement of reasonableness itself is a rule of the substantive law pertaining to the subject-matter does not extend the province of the judge. Thus, what is "reasonable time" within which to do certain things,<sup>5</sup> is properly deemed to present a question of fact. The existence of the standard is not in question. A given set of circumstances may, when applied to the prescribed standard of conduct, present such clearness of result that but one inference is logically possible. The judge may intervene in such a case to enforce the rule of law requiring that the jury should exercise sound reason. But this does not make a question of law out of a question of fact. It merely announces the rule of logic—sustained and enforced as a rule of law—that there is, in reality, no question of fact at all. In certain special instances, of actions or failures to act, the court may seem to be doing more than this. It is seldom, however, in reality that this is a correct view of the matter. The peculiarity in these cases is merely that, in adopting the standard of reasonableness, the court has necessarily imported a non-legal test as part of a rule of law. The natural desire and tendency is to clarify and define this element of the rule of limiting the debatable ground which is a matter of fact for the jury. The gain which courts have made in this particular is by no means uniform and is the cause of some appearance of anomaly in function along certain lines.

knowledge." Sir William Markby, *Law and Fact*, Law Mag. & Rev., 4th Ser., Vol. II, 319.

3. *Jenkins v. Sykes*, 19 Fla. 148 (1882) (cut and carry away wood).

4. *Wyman v. Adams*, 12 Cush. 210 (1853).

5. *Haskins v. Hamilton, etc., Ins. Co.*, 5 Gray (Mass.) 432 (1855) (finish

machinery); *Chesapeake Ins. Co. v. Stark*, 6 Cranch (U. S.) 268 (1810) (make an abandonment); *Cocker v. Franklin Hemp., etc., Co.*, 3 Sumn. (U. S.) 530 (1839) (deliver goods); *Facey v. Hurdum*, 3 B. & C., 213 (1824) (compare tithe with residue of crop).

§ 123. (*Use of Reason*); *Negligence*.—The principle—that where the facts are proved or undisputed, their effect is a matter of law—is applied to cases involving alleged negligence.<sup>1</sup> The legal standard involved—the action of a reasonably prudent man in the exercise of due care—implies a reference to the conduct and experience of mankind, at large, in the community from which the jury are drawn and therefore falls with peculiar appropriateness within the function of the jury. *Per contra*, important considerations make the intervention of the court at this stage both easy and, within certain limits, beneficial. The control of the court is facilitated by the fact that it is an appropriate and constant function of the judge as is more fully stated elsewhere,<sup>2</sup> not only to exercise the rules to correct reason-

1. *California*.—Herbert v. R. Co., 121 Cal. 227, 53 Pac. 651 (1898).

*Illinois*.—Terre Haute & I. R. Co. v. Voelker, 129 Ill. 540, 22 N. E. 20 (1899).

*Indiana*.—Young v. R. Co., 148 Ind. 54, 47 N. E. 142 (1897); Stroble v. New Albany, 144 Ind. 695, 42 N. E. 806 (1896).

*Maine*.—Blumenthal v. R. Co. 97 Me. 255, 54 Atl. 747 (1903).

*Michigan*.—Lake Shore, etc., Ry. Co. v. Bangs, 47 Mich. 470 (1882); Joslin v. Le Baron, 44 Mich. 160 (1880).

*Missouri*.—Keown v. St. Louis Ry. Co., (Mo. 1897) 41 S. W. 926; Mauer-  
man v. Siemerts, 71 Mo. 101 (1879).

*Nebraska*.—Spears v. R. Co., 43 Nebr. 720, 62 N. W. 68 (1895).

*New Jersey*.—Goldsboro v. R. Co., 60 N. J. L. 49, 37 Atl. 433 (1897); Pennsylvania Ry. Co. v. Righter, 42 N. J. Law, 180 (1880).

*New York*.—Stackus v. New York, etc., Ry. Co., 79 N. Y. 464 (1880).

*North Carolina*.—Ward v. Odell Mfg. Co., 123 N. C. 248, 31 S. E. 495 (1898); White v. R. Co., 121 N. C. 484, 27 S. E. 1002 (1897); Tillett v. R. Co., 118 N. C. 1031, 24 S. E. 111 (1896); Woodward v. Hancock, 7 Jones (Law) 384 (1860).

*Pennsylvania*.—Boyle v. Mahanoy City, 187 Pa. 1, 40 Atl. 1093 (1898);

Gates v. R. Co., 154 Pa. 566, 572, 26 Atl. 598 (1893).

*West Virginia*.—Hanley v. Huntington, 37 W. Va. 578, 16 S. E. 807 (1893).

*Wisconsin*.—Morrison v. Madison, 96 Wis. 452, 71 N. W. 882 (1897); Hart v. R. Co., 86 Wis. 483, 490, 57 N. W. 91 (1893); Salladay v. Dodgeville, 85 Wis. 318, 328, 55 N. W. 696 (1893).

*United States*.—Patton v. R. Co., 27 C. C. A. 287, 82 Fed. 979 (1897); Pyle v. Clark, 25 C. C. A. 190, 79 Fed. 744 (1897); Northern P. R. Co. v. Peterson, 5 C. C. A. 338, 55 Fed. 940 (1893); Gardner v. M. C. R. Co., 150 U. S. 349, 361, 14 Sup. 140 (1893); Richmond & D. R. Co. v. Powers, 149 U. S. 43, 45, 13 Sup. 748 (1893); Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 580, 13 Sup. 557 (1893); Delaware L. & W. R. Co. v. Converse, 139 U. S. 469, 11 Sup. 569 (1891); Kane v. R. Co., 128 U. S. 91, 9 Sup. 16 (1888).

*England*.—Metropolitan R. Co. v. Wright, L. R. 11 App. Cas. 152 (1886); Metropolitan R. Co. v. Jackson, L. R. 3 App. Cas. 193 (1877); Dublin, etc., R. Co. v. Slattery, L. R. 3 App. Cas. 1155 (1878); Bridges v. R. Co., L. R. 7 H. L. 213 (1874) per Brett, J.

2. *Infra*, § 118.

ing in his own action but to enforce the observance of these rules upon the jury in connection with the work of that body.<sup>3</sup> The same correct use of the reasoning faculty is the test of negligence.

**§ 124. (Use of Reason; Negligence); Action of the Judge.—**

The substantive law of negligence requires that the party whose conduct is in question should have exercised the same reasoning faculty regarding the facts presented to him which the jury are called upon to exercise upon the facts as they appear in evidence, due allowance being made for lack of adequate time, imperfect apprehension of modifying facts, which attended its exercise in the first instance. But as it is not reasoning to any particular effect but the use of reason itself upon which the court insists in dealing with the inferences of the jury, any violation of which it would be the duty of the court in the exercise of its other functions to prevent or nullify,<sup>1</sup> the judge does not set aside a verdict based upon a logically permissible inference merely because he himself would have drawn a different one.<sup>2</sup> The ruling may be to the effect that, under the processes of sound reasoning, certain acts or omissions amount to negligence.<sup>3</sup> On the other hand, it may be to the effect that, by the rules of reason, the defendant cannot be found liable. In other words, it is in the extreme cases, where liability or its absence is rationally clear, that the court, by way of enforcing the requirement of sound reasoning, rules as to the existence of negligence; and such a ruling is practically equivalent to holding that

**3. *Infra*, §§ 120a, 122.**

1. *Stackus v. New York, etc., Ry. Co.*, 79 N. Y. 464 (1880); *Schofield v. Chicago, etc., Ry. Co.*, 114 U. S. 615, 618 (1884); *Anderson County Comm'rs v. Beal*, 113 U. S. 227, 241 (1884); *Randall v. Baltimore, etc., Ry. Co.*, 109 U. S. 478, 482 (1883); *Phoenix Ins. Co. v. Doster*, 106 U. S. 30 (1882); *Griggs v. Houston*, 104 U. S. 553 (1881); *Dublin, etc., Ry. Co. v. Slatery*, 3 App. Cas. 1155 (1878). "It would be an idle proceeding to submit the evidence to the jury when they could justly find only in one way." *North Pennsylvania, etc., Ry. v. Commercial Bank*, 123 U. S. 727, 733 (1887). "It is, indeed, impossible to lay down any rule except \* \* \* that

from any given state of facts the judge must say whether negligence can legitimately be inferred and the jury whether it ought to be inferred." *Metropolitan R'y Co. v. Jackson*, 3 App. Cas. 193, 200 (1877).

2. *Stackus v. R. R. Co.*, 79 N. Y. 464 (1880); *Belt v. Lawes*, London Times of March 18, 1884, (where Brett. M. R. says:—"To ask 'Should we have found the same verdict?' is surely not the same thing as to ask whether there is room for a reasonable difference of opinion").

3. *Minor v. Sharon*, 112 Mass. 477, 487 (1873) (knowingly letting a house, infected with small pox); *Delaware etc., Ry. Co. v. Converse*, 139 U. S. 469 (1890) ("running switch"); *Stan-*

the jury would not be justified, as a matter of reasoning, i. e., as a matter of law,<sup>4</sup> in reaching any other result.<sup>5</sup>

Where essential facts are controverted, the court may properly give hypothetical instructions as to the effect of the facts, as matter of law, in establishing negligence, according as the jury shall find or fail to find the existence of the disputed facts.<sup>6</sup>

**§ 125. (Use of Reason; Negligence); Duty of the Jury.**—It is not disputed that the finding of the constituent facts is matter for the jury.<sup>1</sup> It is only in cases where but one inference is logically permissible, that the court says that all facts are established and rules, as a matter of law, as to the existence of negligence, ignoring the possibility that the jury might have reached a conclusion not permitted by the rules of reasoning.<sup>2</sup> States of fact, from which more than one inference is reasonably possible,<sup>3</sup> or

ner v. London, etc., Ry. Co., 5 Exch. 787 (1850). This power of the court has been controverted and it has been held that even in a case to which the doctrine *res ipsa loquitur* applies, it is error to charge that a given state of facts either constitutes or affords *prima facie* proof of negligence when there is no statute expressly declaring that this is true as matter of law. Augusta R'y & Electric Co. v. Weekly, 124 Ga. 384, 52 S. E. 444 (1905).

"In reviewing a nonsuit, the evidence is to be construed most favorably for the plaintiff." *Stackus v. New York, etc., Ry. Co.*, 79 N. Y. 464 (1880).

4. The party aggrieved by such a ruling is entitled to have the same considered by an appellate tribunal. *Terre Haute, etc., Ry. Co. v. Voelker*, 129 Ill. 540 (1889).

5. *Crafton v. Metropolitan R'y Co.*, L. R. 1 C. P. 300 (1866) (brass nosing worn smooth on railway steps not evidence of negligence).

6. *Williams v. Greely*, 112 Mass. 79 (1873); *Kearney v. London, etc., Ry. Co.*, L. R. 5 Q. B. 411, 414, 417, S. C. 6 id. 759 (1870); *Byrne v. Boadle*, 2 H. & C. 722 (1863).

1. *Pennsylvania Co. v. Conlon*, 101 Ill. 93 (1881).

2. *Stackus v. New York, etc., Ry. Co.*, 79 N. Y. 464 (1880). "It is only in cases where the act or omission is negligent *per se* that courts should assume to decide it as a question of law." *Stackus v. New York, etc., Ry. Co.*, 79 N. Y. 464 (1880).

3. *Kansas*.—*Kansas Pacific R'y Co. v. Richardson*, 25 Kans. 391 (1881).

*Maryland*.—*Cumberland Valley, etc. R'y Co. v. Mangans*, 61 Md. 53 (1883).

*Massachusetts*.—*Doyle v. Boston, etc., R'y Co.*, 145 Mass. 386 (1888); *Randall v. Connecticut R'y Co.*, 132 Mass. 269 (1882); *Minor v. Sharon*, 112 Mass. 477 (1873) (negligence in not having children vaccinated); *Wheeler v. Boston & Albany R'y Co.*, 105 Mass. 203 (1870).

*Michigan*.—*Seipel v. Hilsendegen*, 44 Mich. 461 (1880).

*New York*.—*Payne v. Troy, etc., R'y Co.*, 83 N. Y. 572 (1881); *Stackus v. New York, etc., R'y Co.*, 79 N. Y. 464 (1880).

*Pennsylvania*.—*Stager v. Pass. R'y Co.*, 119 Pa. St. 70 (1888).

*United States*.—*Baltimore, etc., R'y Co. v. Griffith*, 159 U. S. 603 (1895);



where the evidence as to the existence of material facts is conflicting,<sup>4</sup> present questions for the jury; whose finding, if rational, should not be reversed.<sup>5</sup>

§ 126. (*Use of Reason*); Probable Cause.—In like manner, on an action for malicious prosecution where the facts are proved or conceded,<sup>1</sup> the existence of reasonable and probable cause for instituting proceedings is said to be a question of law,<sup>2</sup> even where the facts are numerous and complicated.<sup>3</sup> In part this is by reason of considerations of public policy. As was said in a celebrated case in the English House of Lords:<sup>4</sup> “Probably it became so from anxiety to protect parties from being oppressed or harassed in consequence of having caused arrests or prosecutions in the

*Jones v. East Tenn. R’y Co.*, 128 U. S. 443 (1888); *Railroad Co. v. Stout*, 17 Wall. 657 (1873).

*England*.—*Metropolitan R’y Co. v. Jackson*, 3 App. Cas. 193, 197 (1877).

4. *Randall v. Connecticut, etc., R’y Co.*, 132 Mass. 269 (1882); *R. R. Co. v. Fraloff*, 100 U. S. 24, 31 (1879); *Parsons v. Bedford*, 3 Pet. 433, 447 (1830).

5. “We have no authority to review their finding in that respect.” *Delaware, etc., R’y Co. v. Converse*, 139 U. S. 469 (1890).

1. *White v. McQueen*, 96 Mich. 249, 254, 55 N. W. 843 (1893); *Diers v. Mallon*, 46 Neb. 121, 64 N. W. 722 (1895); *Wass v. Stephens*, 128 N. Y. 123, 28 N. E. 21 (1891).

2. *California*.—*Ball v. Rowles*, 93 Cal. 227 (1892).

*Illinois*.—*Jacks v. Stimpson*, 13 Ill. 701 (1852).

*Maine*.—*Humphries v. Parker*, 52 Me. 502 (1864); *Taylor v. Godfrey*, 36 Me. 525 (1853).

*Maryland*.—*Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089 (1896).

*Massachusetts*.—*Stone v. Crocker*, 24 Pick. 81 (1832).

*Michigan*.—*Filer v. Smith*, 96 Mich. 347, 102 Mich. 98, 55 N. W. 999, 60 N. W. 297 (1894).

*New York*.—*Besson v. Southard*, 10 N. Y. 236 (1851); *McCormick v. Sisson*, 7 Cow. 715 (1827).

*Ohio*.—*Ash v. Marlow*, 20 Ohio 119 (1851).

*Oregon*.—*Hess v. Bank*, 31 Oreg. 503, 49 Pac. 803 (1897).

*Vermont*.—*Barron v. Mason*, 31 Vt. 189 (1858).

*United States*.—*Sanders v. Palmer*, 5 C. C. A. 77, 55 Fed. 217 (1893); *Stewart v. Sonneborn*, 98 U. S. 187, 194 (1878); *Munns v. Dupont*, 3 Wash. C. Ct. 31 (1811).

*England*.—*Abrath v. N. E. R’y Co.*, 11 App. Cas. 247 (1886); *Lister v. Perryman*, L. R. 4 H. L. 521 (1870); *Panton v. Williams*, 2 Q. B. 169 (1841); *Sutton v. Johnstone*, 1 T. R. 493 (1786).

*Canada*.—*Olsen v. Lantalum*, 32 N. Brunsw. 526 (1894).

“This is the doctrine generally adopted.” *Stewart v. Sonneborn*, 98 U. S. 187, per Strong, J. (1878). “What is reasonable and probable cause in an action for malicious prosecution or for false imprisonment, is to be determined by the judge. In what other sense it is properly called a question of law I am at a loss to understand.” Lord Chelmsford in *Lister v. Perryman*, L. R. 4 H. L. 521 (1870).

3. *Panton v. Williams*, 2 Q. B. 169 (1841).

4. *Lister v. Perryman*, L. R. 4 H. L. 521, (1870), per Lord Colonsay.

fair pursuit of their legitimate interests, or as a matter of duty in a country where parties injured have not the aid of a public prosecutor to do these things for them." In part, also, the rule is due to the technical nature of the questions which this issue brings to the attention of the mixed tribunal. In itself considered, there is little doubt that as said by Lord Westbury in *Lister v. Perryman*,<sup>5</sup> "the existence of reasonable and probable cause is an inference of fact." There are no rules or principles of law by which the court ought to be guided in drawing that inference.<sup>6</sup>

*Though the function of the court* in dealing with questions of probable cause has been treated as similar to that exercised in cases of negligence, viz., holding the jury to the use of the reasoning faculty,<sup>7</sup> the weight of authority places the responsibility of drawing the final inference of fact, i. e., whether a state of circumstances existed upon which a reasonable and discreet person would have acted, upon the judge.

**§ 127. (Use of Reason; Probable Cause); Province of the Jury.**—If the existence of these circumstances is controverted, the question is one for the jury.<sup>1</sup>

When the constituent facts are in dispute,<sup>2</sup> the court may submit the question of probable cause to the jury with alternate rulings adapted to their action in determining the question of fact.<sup>3</sup> For, "whether the facts controverted in evidence are true or false is a question of the jury<sup>4</sup> and the justice of the inferences to be drawn from such facts"<sup>5</sup> are questions for them. But it is necessary for the court, in each instance, to determine whether the facts which the jury may find from the evidence will or will not establish probable cause.<sup>6</sup>

5. L. R. 4 H. L. 521 (1870).

6. *Lister v. Perryman*, L. R. 4 H. L. 521 (1870), per Lord Colonsay. See also "Probable cause is in the nature of the judgment to be rendered by the court upon a special verdict of the jury." *Ball v. Rawles*, 93 Cal. 222, 227 (1892).

7. *Wass v. Stephens*, 128 N. Y. 123, 127 (1891).

1. *Neilson v. Harford*, 8 M. & W. 806 (1841).

2. "Whether they exist or not, in any particular case, is a pure question

of fact." *Stone v. Crocker*, 24 Pick. (Mass.) 81, 85 (1832).

3. *Schattgen v. Holnback*, 149 Ill. 646, 652, 36 N. E. 969 (1894); *Ash v. Marlow*, 20 Ohio 119 (1851); *Hess v. Oregon German Baking Co.* (Oreg. 1897) 49 Pac. 803; *Stewart v. Sonneborn*, 98 U. S. 187 (1878).

4. *Sutton v. Johnstone*, 1 T. R. 493 (1786).

5. *Panton v. Williams*, 2 Q. B. 169 (1841).

6. *Hess v. Oregon German Baking Co.*, (Oreg. 1897) 49 Pac. 803.

**§ 128. Construction of Documents.**— Among these subjects is the construction of constituent or probative writings. The real question in connection with such instruments, is largely one of fact — what intention the language used discloses<sup>1</sup> in view of all the circumstances submitted to the tribunal for its consideration. Where the facts are not in dispute and the intention of the writer is to be gathered from the document itself, its discovery is said to present merely a question of law.<sup>2</sup> This is to be ascertained by the judge, whose ruling must be accepted by the jury.<sup>3</sup> In the same way, where there is no dispute as to the character or device used in the

1. *Edes v. Boardman*, 58 N. H., 580 (1879).

The fair meaning of common words, as employed in a document, in view of the context, is part of the court's duty in this connection. *Atty.-Gen. v. Dublin*, 38 N. H. 459 (1859) ("congregational persuasion"). The consideration of the circumstances under which or concerning which they were used so far as they vary the meaning of the words employed in a given document is also within the province of construction. *Allgood v. Blake*, L. R. 8 Exch. 160 (1873).

In connection with the law of libel, it has been held that the court may properly rule as to the meaning of the words used under given circumstances, not as establishing the fact of the declarant's intention; but their effect upon the mind of persons to whose attention they should come as libelous or otherwise. *Hazy v. Woitke*, 23 Colo. 556 (1897). *Com. v. Anthes*, 5 Gray (Mass.) 185 (1855); *Capitol, etc., Bank v. Henty*, 7 App. Cas. 741, 31 W. R. 157 (1882); *King v. Dean of St. Asaph's*, 3 T. R. 428 (1789).

2. *Georgia*.— *Allen v. Frost*, 62 Ga. 659 (1879).

*Illinois*.— *Graham v. Sadlier*, 165 Ill. 95 (1897).

*Iowa*.— *State v. Delong*, 12 Iowa 453 (1861).

*Massachusetts*.— *Smith v. Faulkner*, 12 Gray 251, 254 (1858).

*North Carolina*.— *Lindsay v. Hamburg, etc., Ins. Co.*, 115 N. C. 212 (1894); *Young v. Jeffreys*, 4 Dev. & B. 216 (1839). per Gaston, J. ("the ascertainment of the intentions of the parties, as well as the effect of that intention is a pure question of law").

*South Carolina*.— *Jones v. Swearingen*, 42 S. C. 58, 67 (1894).

*Tennessee*.— *R. R. Co. v. McKenna*, 13 Lea 280 (1884).

*Vermont*.— *Morse v. Weymouth*, 28 Vt. 824 (1856).

*United States*.— *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 242 (1889); *Goddard v. Foster*, 17 Wall, 123 (1872); *United States v. Shaw*, 1 Cliff. 317 (1859); *Brown v. McGraw*, 114 Pet. 479, 493 (1840).

*England*.— *Lyle v. Richards*, L. R. 1 H. L. 222, 241 (1866).

3. *Delaware*.— *Staunton v. Smith*, (Del. 1906) 65 Atl. 593.

*Florida*.— *Upchurch v. Mizell*, (Fla. 1905) 40 So. 29.

*Missouri*.— *Brewer v. White*, (Mo. App. 1905) 85 S. W. 641.

*South Carolina*.— *Reid v. Courtenay Mfg. Co.*, 68 S. C. 466, 47 S. E. 718 (1904) (deed).

*United States*.— *Hamilton v. Ins. Co.*, 136 U. S. 242, 255, 10 Sup. 945 (1889).

*England*.— *Lyle v. Richards*, L. R. 1 H. L. 222, 241 (1866); *Stammers v. Dixon*, 7 East 200, 209 (1806).

*Canada*.— *Betts v. Venning*, 14 N. Brunsw. 267, (1 Pugsley) 270 (1873).

execution of a written instrument, it is for the court to determine whether the device as used constitutes a seal.<sup>4</sup> This ruling is made upon the ground that all facts as to the intention being disclosed by the writing itself, nothing remains for decision but the legal effect of the instrument, which is merely a matter of legal reasoning, or the use of reason as applied in part, at least, to propositions of law.<sup>5</sup>

**§ 129. (*Construction of Documents*); Surrounding Circumstances.**—The court, as incidental to its function of construction of writings, will always permit and, indeed, require, production of all relevant “surrounding circumstances” — as the time-honored but somewhat tautological phrase is. The judge knows that he never can know what a party has said until he ascertains what he meant to say. Any evidence which fairly tends to place the judge when construing A’s writing in the mental attitude of A when he wrote it, will usually be received. What effect will be accorded this class of testimony is conditioned by the use which can be made of it when received, and this, in turn is a matter of substantive law, borrowing the phraseology of the law of evidence, and elsewhere<sup>1</sup> considered under the title of the “Parol Evidence Rule.” But it is one of the peculiarities of the puzzling situation arising under that rule, that the evidence of the facts themselves is actually received, though the substantive law may not permit the judge to give effect to them. So necessary is it to sound construction that the judge is justified, as a matter of administration, in declining to construe the writing until the extrinsic evidence is received.<sup>2</sup> This is, distinctly, the modern method of construction, widely differing from the limitation to the “four corners of the paper” which characterized the earlier method of interpretation.<sup>3</sup>

4. *Langley v. Owens*, (Fla. 1906) 42 So. 457.

5. *Supra*, §§ 59, 63.

This is said to be a question of law. *Smith v. Faulkner*, 12 Gray (Mass.) 251, 254 (1858).

1. See PAROL EVIDENCE RULE.

2. *Shaw v. Pope*, 80 Conn. 206, 67 Atl. 495 (1907).

3. “The matter might present itself in a somewhat different aspect were the construction of a document that which it once was — a rigidly

strict and literal interpretation of the instrument itself, and not a search through the words for the intention of the parties. The grammatical method of interpretation has however given way entirely to the logical; and the logical method has extended the basis of its inferences beyond the four corners of the instrument itself. Whatever remnants of the old language may survive, there is no doubt that modern judges do really collect the intention of the parties from evi-

**§ 130. (*Construction of Documents*); Probative Writings.—**

Documents other than constituent, i. e., probative writings, may well be construed by the judge as matter of law. Thus, a judge will be justified in not leaving the construction of a letter<sup>1</sup> to the jury.

**§ 131. (*Construction of Documents*); Statutes.—**For especial reasons the construction of written laws is within the province of the court. It is not only his general duty to construe constituent documents, but judicially to know the law, written or unwritten.<sup>1</sup> For example, it is the duty of the judge under the law to construe all written papers,<sup>2</sup> including acts of the general assembly and minutes of the city council, and submit such construction to the jury.<sup>3</sup> And such is the general rule in relation to national, state<sup>4</sup> or local<sup>5</sup> statutes. The duty of the court being to construe statutes, the judge may construe them in terms of fact. That is, he may state whether a case before him, resting on undisputed facts, is within the statute. It is error for the judge under these circumstances, to decline and submit to the jury the application of the statute to the case.<sup>6</sup> The interpretation of statutes passed by the law-making power of the sovereignty under which the court is organized "in order to ascertain the true intent and meaning of the legislature,"<sup>7</sup> though evidently involving a matter of fact,<sup>8</sup> is like the facts of the date, suspension, repeal or expiration by limitation of the statute,<sup>9</sup> a recognized and legitimate part of the judge's function of knowing and administering the law of the forum.<sup>10</sup> This requirement entails the result that when all the constituent facts are found by the jury, and nothing remains but

dence of which the writing forms the chief, but not the only part. If it is inaccurate to call this a question of construction, it is an inaccuracy of established language." Sir William Markby, *Law and Fact*, Law Mag. & Rev., 4th Ser. Vol. II, 314.

1. *Ellis v. Littlefield*, (Tex. Civ. App. 1906) 93 S. W. 171.

1. *Infra*, §§ 583 *et seq.*

2. *Schilansky v. Merchants' & Manufacturers' F. Ins. Co.*, (Del. 1903) 55 Atl. 1014.

3. *Bedenbaugh v. Southern Ry Co.*, 69 S. C. 1, 48 S. E. 53 (1904).

4. *Barnes v. Mayor of Mobile*, 19

Ala. 707 (1851); *Fairbanks v. Woodhouse*, 6 Cal. 433 (1856); *Peoria v. Calhoun*, 29 Ill. 317 (1862); *Carleton v. People*, 10 Mich. 250 (1862).

5. *Barton v. City of Odessa*, 109 Mo. App. 76, 82 S. W. 1119 (1904).

6. *Winchell v. Town of Camillus*, 95 N. Y. Sup. 688, 109 App Div. 341 (1905).

7. *Com. v. Anthes*, 5 Gray (Mass.) 185, 190 (1855).

8. *Edes v. Boardman*, 58 N. H. 580, 592 (1879).

9. *Com. v. Anthes*, 5 Gray (Mass.) 185, 190 (1855).

10. *See infra*, JUDICIAL KNOWLEDGE.

the application of the rule of law, that function devolves, as of old, upon the judge, as a matter of law.

**§ 132. (*Construction of Documents*); Limits of Judicial Action.**—The function of the court does not extend to deciding whether a writing was intended to have a certain effect as between the parties to it, e. g., to be the final repository of their completed agreement,<sup>1</sup> or as to what inferences are to be drawn from the existence of the writing, or of the statements contained in it,<sup>2</sup> considered as evidence.<sup>3</sup> Where letters written between insurer and insured with reference to an arbitration did not constitute a compact or obligation between the parties to carry out such arbitration, but were mere evidence that either or both of the parties did not in fact desire the arbitration to be effectual, the inference to be drawn from such letters was for the jury, and not for the court.<sup>4</sup>

**§ 133. (*Construction of Documents*); Function of the Jury.**—Where the terms of a document are vague, technical, in a foreign language, or the like, all the facts are not found, and evidence may be introduced before the jury as to the meaning of such language. If there be conflict between the testimony on these or similar points, it will be settled by jury.<sup>1</sup> The meaning of the writing is still for the judge, who will use, in declaring such meaning, the facts as to local custom, technical usage or the like, as determined by the jury.<sup>2</sup> “The jury are only to find facts, and leave the court to judge of their meaning.”<sup>3</sup>

1. *Bloom v. Cox, etc., Mfg. Co.*, 83 Hun 611 (1894); *Holm v. Coleman*, 89 Wis. 233 (1895).

2. *Enterprise Soap Works v. Sayers*, 55 Mo. App. 15 (1893).

3. *Teesdale v. Bennett*, (Wis. 1904) 101 N. W. 688. The rule that the court must determine the meaning of documentary evidence is inapplicable where the dispute is not as to the legal meaning of letters, but as to their tendency to prove one side or the other of an issue of fact, and different inferences may be fairly drawn from them as to the truth. *Carp v. Queen Ins. Co.*, 104 Mo. App. 502, 79 S. W. 757 (1904).

4. *Carp v. Queen Ins. Co.*, 116 Mo. App. 528, 92 S. W. 1137 (1906).

1. *Rochester & P. Coal & Iron Co.*

*v. Flint, Eddy & Co.*, 84 N. Y. Supp. 269 (1903).

2. In an action to recover a balance due on chattels sold, the questions as to what writings should be considered, and whether those considered constituted a written contract, or whether the written contract fully expressed the agreement between the parties, were for the court. *Telluride Power Transmission Co. v. Crane Co.*, 208 Ill. 218, 70 N. E. 319 (1904) [*affirming* 103 Ill. App. 647 (1902)]. It is for the court to decide as a matter of law what are the letters and figures of an instrument offered in evidence, and the meaning to be attached to them. *Recke v. Sayers*, 106 Ill. App. 283 (1902).

3. *Robertson v. Showler*, 13 M. & W. 609, 612 (1845), per Alderson, B.

**§ 134. (Construction of Documents; Function of the Jury); Collateral Facts.**—“Where the effect of the instrument depends not merely on its construction and meaning, but upon collateral facts and circumstances, the inferences of fact to be drawn from the paper must be left to the jury.<sup>1</sup> The jury will ascertain the existence of any custom or usage by which the language employed in an instrument has any trade or local meaning<sup>2</sup>

**§ 135. (Construction of Documents; Function of the Jury); Ambiguity.**—In this, or any other connection where the language of the document is ambiguous,<sup>1</sup> its meaning, in that particular, should be left to the jury; to be used by the judge in connection with his duty of construing the instrument as a whole.

**§ 136. Construction of Oral Contracts.**—By a parity of reasoning when the terms of an *oral* contract are undisputed its construction and effect are to be determined by the court as a matter of law.<sup>1</sup> It is error for the court to leave to the jury to decide what the parties *meant* by the use of entirely unambiguous language in the formation of a contract.<sup>2</sup> “If the language, being thus free from ambiguity, leaves the meaning of the parties in doubt, it is the duty of the court and not of the jury to determine its legal effect.”<sup>3</sup> “If no definite meaning can be attached to such language, it is the duty of the court to so hold.”<sup>4</sup>

**§ 137. (Construction of Oral Contracts); A Question of Fact.**—It is, nevertheless, plain that the work of construction or inter-

1. *West v. Smith*, 101 U. S. 263, 270 (1879).

2. “The law I take to be this, that it is the duty of the Court to construe all written instruments; if there are peculiar expressions used in it, which have in particular places or trades a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the Court to decide what the meaning of the contract was.” *Hutchison v. Bowker*, 5 M. & W. 535, 541 (1839), per Parke, B. (“good barley”).

1. *Ricketts v. Rogers*, 53 Nebr. 477, 73 N. W. 946 (1898); *Meeks v. Willard*, 57 N. J. L. 22, 25, 29 Atl. 318 (1894); *Rankin v. Fidelity Ins., etc.*,

Co. 189 U. S. 242, 23 Sup. 553 (1903); *M’Namee v. Hunt*, 87 Fed. 298, 30 C. C. A. 653 (1898). “The interpretation of writings is always for the Court except when they are ambiguous.” *State v. Brown*, 171 Mo. 477, 71 S. W. 1031 (1903).

1. *Globe Works v. Wright*, 106 Mass. 207, 216 (1870); *Spragins v. White*, 108 N. C. 449 (1891); *Festerman v. Parker*, 10 Ired. (N. C.) 474 (1849).

2. *Spragins v. White*, 108 N. C. 449 (1891).

3. *Spragins v. White*, 108 N. C. 449 (1891).

4. *Spragins v. White*, 108 N. C. 449 (1891).

pretation in the light of what are called "the surrounding circumstances," frequently involves drawing inferences of fact which are themselves facts. For this reason the court will not only receive evidence of such circumstances<sup>1</sup> as to the local or technical meaning of the oral language employed,<sup>2</sup> but will, when the language employed is disputed, or evidence as to its meaning is in conflict, leave the question of what was the agreement of the parties to the jury, under instructions as to their action in the matter, conditioned upon their findings of fact on the disputed points.<sup>3</sup>

**§ 138. (Construction of Oral Contracts); Province of Jury.—**

If the terms of an oral contract are in dispute or must be ascertained by the use of extrinsic facts, the question is one for the jury.<sup>1</sup> In such cases the court should generally give the jury instructions as to the meaning and effect of the contract, according as they may find it to be.<sup>2</sup> If any part of the evidence is wholly unintelligible, no injury can arise, provided the jury is properly instructed as to the burden of proof.<sup>3</sup>

While it is declared to be error to submit to the jury the construction of a writing<sup>4</sup> where the meaning can be collected from the instrument itself,<sup>5</sup> the construction of a document, so far as

1. *Smith v. Faulkner*, 12 Gray, (Mass.) 251, 254 (1856).

2. *R. R. v. McKenna*, 13 Lea. (Tenn.) 280 (1884) (railroad orders). See also *Atty.-Gen. v. Dublin*, 38 N. H. 459 (1859) (congregational persuasion); *Spragins v. White*, 108 N. C. 449 (1891); *Matthews v. Park*, 159 Pa. St. 579 (1894). For some consideration of the court's judicial knowledge of language used in its ordinary sense, see *infra*, § 762.

3. *Nash v. Classen*, 163 Ill. 409, 45 N. E. 277 (1896); *Eureka F. Co. v. B. C. S. & R. Co.*, 78 Md 179, 188, 27 Atl. 1035 (1893); *Spragins v. White*, 108 N. C. 449, 13 S. E. 171 (1891). See also *Capital & Counties Bank v. Henty*, L. R. 7 App. Cas. 741 (1882) (libel), "where a contract is to be gathered from talk between the parties, and especially from talk on more than one occasion, the question as to what the contract was, if controverted, must usually be tried by

the jury as a question of fact." *Gassett v. Glazier*, 165 Mass. 473, 43 N. E. 193 (1896) (agency).

1. *Shragins v. White*, 108 N. C. 449 (1891).

2. *Rice v. Dwight Mfg. Co.*, 2 Cush. (Mass.) 80 (1848); *Shragins v. White*, 108 N. C. 449 (1891); *Mossey v. Beliste*, 2 Ired. (N. C.) 170 (1841); *Silverthorne v. Fowle*, 4 Jones L. (N. C.) 359 (1857).

3. *Rice v. Dwight Mfg. Co.*, 2 Cush. (Mass.) 80 (1848).

4. *Illinois Central R'y Co. v. Murphy*, or Ill. App. 65 (1893) (printed railroad regulations). *Morse v. Weymouth*, 28 Vt. 824 (1856) (construction of a deed submitted "without limitation or restriction or without specific instructions" held to be erroneously left to the jury; but where, the jury take the correct view, a new trial will not be granted).

5. *Giles v. Gilead, etc., Society*, 38 Conn. 153 (1871).



affected by usage<sup>6</sup> or other extrinsic facts, translation from a foreign language<sup>7</sup> or the existence of an ambiguity resolvable only by conflicting evidence,<sup>8</sup> may be left to the jury, under alternative instructions from the court.<sup>9</sup>

**§ 139. Demurrers to Evidence.**— Only when some fact is in dispute or a question arises as to what are the proper inferences to be drawn from conceded facts does necessity arise for appealing to the common standards of experience represented by the jury. Were both the facts and what are the fair inferences of fact to be drawn from them fully admitted, the only questions would be those raised on a demurrer, viz.: Is there a rule of law applicable to such a state of facts and, if so, what is it?<sup>1</sup> These questions are evidently matter of law.<sup>2</sup> A demurrer to the evidence by operation of law admits the facts proved.<sup>3</sup>

**§ 140. Demurrers to Evidence versus Motions to Direct a Verdict.**— The demurrer to evidence as a method of raising the question of the legal, i. e., rational sufficiency of the evidence to sustain a verdict<sup>1</sup> has been practically rendered obsolete in many English law jurisdictions by the more convenient modern substitute—motion to direct a verdict for rational insufficiency.<sup>2</sup> In fact, a motion at the close of all the evidence, that an instruction

6. *Hutchinson v. Bowker*, 5 M. & W., 535, 542 (1839).

7. *Gibbs v. Gilead, etc., Society*, 38 Conn. 153 (1871); *Badart v. Foulon*, (Mich. 1894) 61 N. W. 536.

8. *Enterprise Soap Works v. Sayers*, 55 Mo. App. 15 (1893); *Ginnuth v. Blankenship*, (Tex. Civ. App. 1894), 28 S. W. 828; *Woodbury Granite Co. v. Milliken*, 66 Vt. 465 (1894); *Becker v. Holm*, 89 Misc. 86 (1894).

9. *Smith v. Faulkner*, 12 Gray, (Mass.) 251, 256 (1858). "This is not leaving the whole construction of a written contract to the jury." *Field, C. J. in Bascom v. Smith*, 164 Mass. 61, 76 (1895).

1. It need not be observed that as pleading was understood at common law, as modified by the Hilary rules, a demurrer admitted the existence of *component* facts while a demurrer to evidence, as is frequently

the case under code or statutory pleading in case of a demurrer, admitted the existence of probative and constituent facts.

2. *Coy v. Missouri Pac. R'y Co.*, (Kan. 1904) 76 Pac. 844.

3. *Bensiek v. St. Louis Transit Co.*, 125 Mo. App. 121, 102 S. W. 587 (1907); *Des Moines Life Ass'n v. Crim*, 134 Fed. 348, 67 C. C. A. 330 (1904).

1. *Golden v. Knowles*, 120 Mass. 336 (1876); *Colegrove v. New York, etc., R'y Co.*, 20 N. Y. 492 (1859).

2. *Infra*, §§ 391 *et seq.*  
*Grooms v. Neff Harness Co.*, (Ark. 1906) 96 S. W. 135.

The phrase "*demurrer to evidence*" has even been used as synonymous with the motion to withdraw for insufficiency. *Weber v. Kansas City, etc., Co.*, 100 Mo. 194 (1889).

be given that the other party is not entitled to recover is in the nature of a demurrer to the evidence.<sup>3</sup> On such a demurrer, the judge may discharge the jury of the issue of fact, and, if the demurrer be sustained, enter final judgment thereon, on the evidence — as a final judgment on a demurrer to the pleading.<sup>4</sup> Or the judge may, if he prefer, direct the jury to return a verdict for the other side.<sup>5</sup> A defendant cannot demur to plaintiff's testimony, unless he also rests his case, and a motion for nonsuit is the only proceeding for insufficiency of evidence open to defendant at the close of plaintiff's case.<sup>6</sup>

*An important distinction* is to be taken. By joining issue on a demurrer to evidence the case is withdrawn from the jury and is submitted to the court.<sup>7</sup> When action has been taken on it by the judge the defeated party is not at liberty to introduce evidence.<sup>8</sup> The party who makes a motion to direct a verdict at the close of his opponent's case, is not precluded from introducing evidence if his motion be overruled.<sup>9</sup>

#### § 141. (*Demurrers to Evidence*); Demurrers and Nonsuits.—

A motion for nonsuit is in the nature of a demurrer to the evidence, and when it is sought to take advantage of a defect in the pleadings by such a motion, the pleadings should be construed liberally as if on a motion by defendant for judgment notwithstanding the verdict against him.<sup>1</sup> A party against whom a motion for nonsuit has been made is, as a general rule, entitled to the most favorable inferences deducible from the evidence, and contested facts are to be presumed in his favor.<sup>2</sup> It is immaterial that the

3. *Phelan v. Granite Bituminous Paving Co.*, 115 Mo. App. 423, 91 S. W. 440 (1905). A distinction has, however been taken. Sustaining a demurrer to the evidence in either a law or equity case means that, as a matter of law, there is some evidence to be weighed, but, as a matter of law, the evidence, when weighed by the trier of fact, is not satisfactory. See also *Mobile, J. & K. C. R. Co. v. Bromberg*, (Ala. 1904) 37 So. 395; *Anthony v. Kennard Bldg. Co.*, 188 Mo. 704, 87 S. W. 921 (1905).

4. *Myers v. Hodges*, (Fla. 1907) 44 So. 357.

5. *Myers v. Hodges*, (Fla. 1907) 44 So. 357.

6. *Brown v. Lewis*, (Or. 1907) 92 Pac. 1058.

7. *Nashville, C. & St. L. R'y Co. v. Sansom*, (Tenn. 1904) 84 S. W. 615.

8. *Woldert Grocery Co. v. Veltman*, (Tex. Civ. App. 1904) 83 S. W. 224.

9. *Woldert Grocery Co. v. Veltman*, (Tex. Civ. App. 1904) 83 S. W. 224.

1. *Jackson v. Sumpter Valley R'y Co.*, (Or. 1908) 93 Pac. 356.

2. *Konigsberg v. Davis*, 108 N. Y. S. 595, 57 Misc. Rep. 630 (1908); *Berlin v. Weir*, 108 N. Y. S. 1063 (1908); *Janvey v. Loketz*, 106 N. Y. S. 690, 122 App. Div. 411 (1907); *McCaskill v. Walker*, 145 N. C. 252, 58 S. E. 1073 (1907); *Degginger v. Martin*, (Wash. 1907) 92 Pac. 674.

evidence in support of a plaintiff's claim may be very slight, provided that it amounts to more than a mere scintilla. If there be any evidence which alone would justify an inference of the disputed facts on which his right to recover depends, it must, according to the well-settled rule, be submitted to the jury. It is their exclusive province to pass upon the credibility of witnesses, weigh the evidence, and ascertain the facts.<sup>3</sup> More than this, the plaintiff should be permitted, where it can be done without unreasonable delay, or unwarrantable interference with the course of the trial, to supply proof as to the points wherein it was claimed that the evidence was deficient.<sup>4</sup> Unless this is done, he does not derive the advantage from the rule requiring specification of particulars on which the motion for a nonsuit is based, which the rule was intended to secure to him.<sup>5</sup> In fact the same question presented by a motion for a nonsuit may be raised by a motion to direct a verdict or by motion for judgment notwithstanding the verdict.<sup>6</sup>

**§ 142. (*Demurrers to Evidence*); English Rule.**—The great advantage which the litigant anticipated from the earlier practice of demurring to the evidence was that this course enabled him to have the judge, rather than the jury, find the constituent facts from the evidence. This was an abuse; as the finding of constituent facts from the probative, and *a fortiori* from the evidence is a distinct and undisputed part of the jury's function.<sup>1</sup> In England, the death blow was dealt to this abuse, and, incidentally, it may be remarked, to the attractiveness of the demurrer to evidence itself as a means of circumventing the jury, by the requirement that where the evidence of a fact is circumstantial, loose or indeterminate, i. e., where the inference of fact as to the existence of a constituent fact was not a legal, rationally necessary one—the party demurring should state in writing precisely what facts he admitted.<sup>2</sup> In other words, a party, in the language of chief

3. *American Mfg. Co. v. S. Morgan Smith Co.*, 33 Pa. Super. Ct. 469 (1907).

4. *Gesas v. Oregon, etc., R. Co.*, (Utah 1907) 93 Pac. 274, 13 L. R. A. (N. S.) 1074.

5. *Gesas v. Oregon, etc., R. Co.*, (Utah 1907) 93 Pac. 274, 13 L. R. A. (N. S.) 1074.

6. *Adams v. Peterman Mfg. Co.*, (Wash. 1907) 92 Pac. 339.

1. *Patrick v. Hallett*, 1 Johns. (N. Y.) 241 (1806); *Lickbarrow v. Mason*, 2 H. Bl. 211 (1793); *Cockridge v. Fanshaw*, 1 Doug. 119 (1779).

2. *Gibson v. Hunter*, 2 H. Bl. 187 (1793). See also *Sewell v. Burdick*, 10 App. Cas. 74, 99 (1885).

justice Eyre,<sup>3</sup> was not permitted to demur to the evidence, "without distinctly admitting upon the record every fact and every conclusion which the evidence given (for the plaintiff) conduced to prove,"<sup>4</sup> and was not at liberty to introduce facts in opposition to those to which he demurred. As the party offering the evidence could thus receive, under the sanction of the judge, the benefit of all facts offered by him and all legitimate inferences from them, taken most strongly in his favor, it is plain that nothing would then remain for the jury to try;<sup>5</sup> and the proponent, having all to which he was entitled, might fairly be required to join in the demurrer. Accordingly, he was, in a civil case, required to do so.<sup>6</sup>

*In criminal cases* the government counsel are not compelled to join in a demurrer upon evidence.<sup>7</sup>

**§ 143. (*Demurrers to Evidence*); American Rule.**—The English practice in requiring a party to specify what he admits seems not to have obtained generally in America;<sup>1</sup> though certain states have taken steps in that direction.<sup>2</sup> The court cannot, it is

3. *Gibson v. Hunter*, 2 H. Bl. 187 (1793).

4. *Colegrove v. New York, etc., Ry. Co.*, 20 N. Y. 492 (1859).

5. *Bulkeley v. Butler*, 2 B. & C. 434 (1824).

6. *Trout v. Virginia, etc., Ry. Co.*, 23 Gratt. (Va.) 619 (1873) (holding that negligence is no exception); *Ware v. Stephenson*, 10 Leigh (Va.) 155 (1839) (holding that a fair test of whether the demurree is entitled to the benefit of an inference is to consider whether the court would set aside the verdict of a jury who had drawn it. If not, the demurree is entitled to the inference); *Green v. Buckner*, 6 Leigh (Va.) 82 (1835).

An exception to the right of the party to demur is introduced in Virginia where the case is clearly against the demurrant or when the court doubts what facts should reasonably be inferred. *Trout v. Virginia, etc., Ry. Co.*, 23 Gratt. (Va.) 619 (1873). *Gibson v. Hunter*, 2 H. Bl. 187 (1793) (in which the earlier cases are said to "prove that if a party *may* demur,

the other party *must* join in demurrer").

Should the evidence be that of a record, or sentence, in an ecclesiastical court, or other matter in writing, the party offering such evidence must join in a demurrer tendered on it, or the benefit of it will be considered as having been waived. *Baker's Case*, 5 Coke 104 (1600).

7. *Baker's Case*, 5 Coke 104 (1600).

1. See *Trout v. Virginia, etc., Ry. Co.*, 23 Gratt. (Va.) 619 (1873) (where the court do not "know of any authority for making the mere uncertainty as to the facts, a ground of exception to the general rule"); *Hansborough v. Thom*, 3 Leigh (Va.) 147 (1831) (where it is said that the fact that the evidence is complicated or circumstantially probative does not affect the right of a party to demur to it); *Green v. Judith*, 5 Rand. (Va.) 1 (1827).

2. *Skinner Mfg. Co. v. Wright*, (Fla. 1906) 41 So. 28; *Atlantic Coast Line R. Co. v. Dexter*, (Fla. 1905) 39 So. 634. Where the parol evidence in a

said, weigh the evidence, if in conflict;<sup>3</sup> but must assume as true all the evidence tending to prove the allegations of the party to whose evidence the demurrer has been filed,<sup>4</sup> by whomever produced.<sup>5</sup> The party against whose evidence a demurrer has been filed will be entitled to the benefit of every reasonable inference fairly deducible from the facts proved.<sup>6</sup> Where these sustain a *prima facie* case, judgment will be ordered in his favor.<sup>7</sup> If the evidence, so regarded, fails to establish every material element of the party's case, the demurrer will be sustained.<sup>8</sup> Where there are several issues raised and a general demurrer to the evidence is filed as to all of them, the judge may sustain the demurrer as to

cause is indeterminate or circumstantial, the defendant cannot demur to the evidence, and oblige the plaintiff to join in a demurrer, without distinctly admitting on the record every fact which plaintiff's evidence conduces to prove. *Bass v. Rublee*, (Vt. 1904) 57 Atl. 965.

3. *Mugge v. Jackson*, (Fla. 1905) 39 So. 157; *Coon v. Atchison, T. & S. F. Ry. Co.*, 75 Kan. 282, 89 Pac. 682 (1907); *Buoy v. Clyde Milling & Elevator Co.*, (Kan. 1904) 75 Pac. 466; *Edmisson v. Drumm-Flato Commission Co.*, 13 Okl. 440, 73 Pac. 958 (1903). The purpose of a demurrer to the evidence is not to bring before the court an investigation of facts in dispute, nor the weight of evidence, but to refer to the court questions of law arising on the facts as ascertained. *Bass v. Rublee*, (Vt. 1904) 57 Atl. 965. But see *Barrett v. Raleigh Coal & Coke Co.*, (W. Va. 1904) 47 S. E. 154.

4. *Jones v. Adair*, (Kan. 1907) 91 Pac. 78; *Ferguson v. St. Louis & S. F. R. Co.*, 123 Mo. App. 590, 100 S. W. 537 (1907); *Pendleton's Adm'r v. Richmond, F. & P. R. Co.*, (Va. 1906) 52 S. E. 574.

5. *Jordan v. St. Louis Transit Co.*, 202 Mo. 418, 101 S. W. 11 (1907).

A party may defeat his own recovery by establishing a defense to his own contention. *Kibby v. Gibson*, (Kan. 1905) 83 Pac. 968.

6. *Missouri*.—*Fassbinder v. Missouri Pac. Ry. Co.*, 126 Mo. App. 563, 104 S. W. 1154 (1907); *Koerner v. St. Louis Car Co.*, 209 Mo. 141, 107 S. W. 481 (1907); *Hach v. St. Louis, etc., Ry. Co.*, 208 Mo. 581, 106 S. W. 525 (1907); *Forbes v. Dunnivant*, 198 Mo. 193, 95 S. W. 934 (1906); *Charlton v. St. Louis & S. F. R. Co.*, 200 Mo. 413, 98 S. W. 529 (1906); *Moore v. St. Louis Transit Co.*, 194 Mo. 1, 92 S. W. 390 (1906).

*North Carolina*.—*Geroock v. Western Union Telegraph Co.*, (N. C. 1906) 54 S. E. 782.

*Oklahoma*.—*Conklin v. Yates*, 16 Okl. 266, 83 Pac. 910 (1905); *Edmisson v. Drumm-Flato Commission Co.*, 13 Okl. 440, 73 Pac. 958 (1903).

*Texas*.—*Chicago, etc., R. Co. v. Cleaver*, (Tex. Civ. App. 1908) 106 S. W. 721.

*West Virginia*.—*Kirchner v. Smith*, 61 W. Va. 434, 58 S. E. 614 (1907) (inference from withholding material evidence). A demurrer to the evidence is to be taken most strongly against the demurrant. *Mugge v. Jackson*, (Fla. 1905) 39 So. 157.

7. *Collier v. Monger*, 75 Kan. 550, 89 Pac. 1011 (1907); *Hollweg v. Bell Telephone Co.*, 195 Mo. 149, 93 S. W. 262 (1906).

8. *Kennedy v. Metropolitan St. Ry. Co.*, (Mo. App. 1907) 107 S. W. 16; *Pringey v. Guss*, 16 Okl. 82, 86 Pac. 292 (1906).

certain of these issues and overrule it as to others, evidence on the latter being left to the jury.<sup>9</sup> In other words, if there be any testimony tending to establish the constituent facts of the case of the proponent, the demurrer to his evidence should be overruled.<sup>10</sup> If there be no such evidence, the demurrer to it will be sustained.<sup>11</sup> In order to sustain a demurrer to the evidence, the court must be able to say as a matter of law that the party introducing the evidence has not proved his case.<sup>12</sup> The court on a demurrer may render any verdict which a jury might rationally have rendered, on the same basis;<sup>13</sup> he cannot consider the evidence against the party to whose evidence a demurrer has been filed.<sup>14</sup> Only the evidence in his favor is to be regarded,<sup>15</sup> unless the preponderance on the other side be so great that a verdict against it must be set aside.<sup>16</sup>

#### § 144. (*Demurrers to Evidence*); Court Sitting as a Jury.—

Where the judge sits as a jury, i. e., for the determination of issues of fact, a demurrer to evidence may be taken before him. In such a case, the judge must consider as true all portions of the evidence tending to prove the allegations of the petition.<sup>1</sup> As on a jury trial, where a judge is sitting, a motion to find for the moving party at the close of the evidence is, in reality a demurrer to the evidence.<sup>2</sup>

9. Where an answer contains several defenses, and at the conclusion of defendants' evidence plaintiff interposes a demurrer to the evidence, and the court sustains it as to one defense and overrules it as to the other, it does not withdraw from the jury the evidence applicable to the remaining defenses. *Troutman v. Behoteguy*, (Kan. 1904) 76 Pac. 446.

10. *Duncan v. Huse*, (Kan. 1906) 85 Pac. 589; *Acker v. Norman*, 72 Kan. 586, 84 Pac. 531 (1906); *Marion Mfg. Co. v. Bowers*, (Kan. 1905) 80 Pac. 565; *McCaffery v. St. Louis & M. R. R. Co.*, 192 Mo. 144, 90 S. W. 816 (1905); *Harrison v. Lakenan*, 189 Mo. 581, 88 S. W. 53 (1905).

11. *Milliken v. Thyson Commission Co.*, 202 Mo. 637, 100 S. W. 604 (1907); *Willoughby v. Ball*, 18 Okl. 535, 90 Pac. 1017 (1907).

12. *Conklin v. Yates*, 16 Okl. 266, 83 Pac. 910 (1905).

13. *Lane Bros. & Co. v. Bott*, (Va. 1905) 52 S. E. 258; *Barrett v. Raleigh Coal & Coke Co.*, (W. Va. 1904) 47 S. E. 154.

14. *Missouri Can Co. v. Ross*, (Kan. 1905) 83 Pac. 616.

15. *Chesapeake & O. Ry. Co. v. Pierce*, 103 Va. 99, 48 S. E. 534 (1904); *Kelley v. Ohio River R. Co.*, (W. Va. 1906) 52 S. E. 520.

16. *Watkins v. Havighorst*, 13 Okl. 128, 74 Pac. 318 (1903); *Kelley v. Ohio River R. Co.*, (W. Va. 1906) 52 S. E. 520. See also *Barrett v. Raleigh Coal & Coke Co.*, (W. Va. 1904) 47 S. E. 154.

1. *Wehe v. Mood*, (Kan. 1904) 75 Pac. 476.

2. *Crerar v. Daniels*, 209 Ill. 296, 70 N. E. 569 (1904).

*In chancery causes* the demurrer to evidence has been held to be improper.<sup>3</sup> There is, under such circumstances, no nonsuit; but the whole evidence is submitted to the court for final judgment.<sup>4</sup>

**§ 145. Certainty of Law.**— In assuming the right of applying the rule of law to the facts when nothing remains as to them but to find their legal effect, judges have realized that only in this way can certainty in the rules of law be acquired and maintained. Where a given state of constituent facts is measured by a rule of law and the result is announced in the reports, it amounts *pro tanto* to a construction of the law, in terms of fact. If this process were left to the variant action of successive juries nothing but a very undesirable uncertainty, vagueness and confusion could result. Where this is necessary by reason of the circumstance that some disputed proposition of fact is to be determined, the mischief must, possibly, be endured. But where all the facts are before the court, it realizes the great social advantages of deciding for itself as to what is correct legal reasoning. For example, as Parke, B., said in *Nelson v. Hartford*,<sup>1</sup> in ruling that where the facts relating to an oral contract were undisputed, its interpretation and construction were for the court as a matter of law, "Unless this were so, there could be no certainty in the law, for a misconstruction by the jury cannot be set right at all effectually." The law, like an individual, should learn from experience; and it is evidently good legal growth that repeated occurrences of a similar nature should result in a broader generalization which should render their further occurrence unnecessary. As Lord Mansfield says, there is a constant and, on the whole a valuable tendency to transfer a question of fact to the province of the judge whenever a rule about it can be laid down.<sup>2</sup>

**§ 146. (Certainty of Law); Broad Legal Precepts.**— In no connection is this aim of judges to introduce and maintain certainty in the substantive law of greater consequence or more frequent application than where the positive law announces its commands in broad and general terms. As

3. *Hiss v. Hiss*, 228 Ill. 414, 81 N. E. 1056 (1907).

1. 8 M. & W. 806 (1841).

4. *Stevens v. Trafton*, 36 Mont. 520, 93 Pac. 810 (1908); *Streicher v. Murray*, 36 Mont. 45, 92 Pac. 36 (1907).

2. *Tindal v. Brown*, 1 T. R. 167 (1786).

Sir William Markby points out,<sup>1</sup> certain precepts of substantive law are announced rather as moral principles than as specific rules. The State commands its citizens so to use each his own property as not to injure another, to be honest, to use due and reasonable diligence, to exercise care and prudence, or the like. These, the *arbitrium boni viri* as it has been shortly called, the acute English critic properly regards as *law* within the definition of Austin, elsewhere quoted,<sup>2</sup> and judges that Austin himself could scarcely have decided differently, had his attention been directly called to the matter.<sup>3</sup> To this it seems necessary to agree; as, for example, the use of *reason* is the test of proper legal conduct, whether in judicial administration or the other affairs of life where no more specific rule has been prescribed. The peculiarity in the matter is that the courts having left the jury to apply the rule of law to the constituent facts find, in such cases, a necessity for retaining in themselves some control of the jury's action.<sup>4</sup> The advantage of having a more definite rule is marked; and to this end the court seeks to manipulate the verdicts of successive juries. This is done principally in two ways.

**§ 147. (Certainty of Law); (1) Presumptions of Law.—**

Where the juries for a series of verdicts have decided that certain acts do or do not constitute negligence, e. g., that it is negligence in one approaching a grade crossing of a railroad not to stop and listen, the judge may employ what may be called the machinery of a presumption of law, to which reference is elsewhere made.<sup>1</sup> Succeeding jurors are informed that there is a presumption of fact

1. Sir William Markby, *Law and Fact*, *Law Mag. & Rev.*, 4th Ser., Vol. II, 322.

2. *Supra*, § 66 n. 1.

3. "Austin would almost seem to deny that the *arbitrium boni viri*, or, as French lawyers call it, *le bon sens et l'équité*, can determine a legal duty. If Austin really means, as he seems to imply, that there is in such a case no law at all—(see 3d Edition, p. 687)—the world is in a strange position. But I do not think that if it had occurred to Austin to consider this condition of things, he would have said that a command by the Sovereign authority to act in accordance with

what a *vir bonus* would consider honest, prudent, skilful, or the like, this command being enforced by a sanction, was not a law." Sir William Markby, *Law and Fact*, *Law Mag. & Rev.*, 4th Ser., Vol. II, 332.

4. "This assignment of functions, if boldly and consistently followed, would lead to no confusion. But having laid down this fundamental rule, the Judges almost invariably proceed in a round-about way to undermine it." Sir William Markby, *Law and Fact*, *Law Mag. & Rev.*, 4th Ser., Vol. II, 322.

1. *Infra*, §§ 1085 *et seq.*



which will warrant them in following the inference. If this continue to be adopted by juries and seems wise, the ruling is made that there is a presumption of law that the inference must or should be followed—thus do judges, as Sir William Markby puts it, “hover between direction and advice”—in the absence of evidence to the contrary. This presumption being sustained, binds subsequent juries. The result is a new proposition in the substantive law; though it might be still wiser, in many cases, to leave the presumption one of fact than to attempt its projection into the domain of substantive law.<sup>2</sup>

**§ 148. (*Certainty of Law*); (2) Tentative Rulings.**—The judge may, according to circumstances, wisely exert his administrative powers in a different way. The jury may hear the evidence, or perhaps, listen merely to the statement of counsel as to what he expects to prove. The judge may then rule “that there is no evidence” for the jury of the negligence or other right or liability asserted. This is heard in an appellate court and, according, to the ruling of that tribunal, the substantive law becomes *pro tanto* determined; the broad, general precept of the law acquires a greatly to be desired fixedness and certainty. This is extremely valuable work—perhaps as beneficial as any on which courts can well be engaged. The English judge is debarred from the privilege which the jurisconsult conferred on the civil law—that of formulating principles that shall govern future cases. The English judge can only deal with cases as they actually arise. He is like a surveyor driving down fixed stakes in the field of the substantive law, announced by a broad and general principle. He is most useful, in proportion to the number and fixity of these stakes; for each one that is permanent tends to settle more definitely the form of the final state which the law shall assume. As Mr. Justice Hammond of Massachusetts says,

2. “I think it would be advantageous if, in the matter of authority, a distinction were made between prior decisions upon law and prior decisions upon questions dependent on experience, and if the binding authority of the former were distinguished from the guiding authority of the latter, I do not think this separation would impede the growth of useful rules of law, whilst it would confer upon

Judges an advantageous degree of freedom in the exercise of their judgment. Surely if experience is to be appealed to, it is the experience of our own times which is chiefly to guide our judgment, and not that of a hundred or two hundred years ago.” Sir William Markby, *Law and Fact*, *Law Mag. & Rev.*, 4th Ser., Vol. II, 331.

"It frequently is not possible by a general formula to mark out the dividing line with reference to every conceivable case, and it is not wise to attempt it. The best and only practicable course is to consider the cases as they arise, and bearing in mind the grounds upon which the soundness of each principle is supposed to rest, by a process of elimination and comparison to establish points through which the line must run."<sup>1</sup>

**§ 149. (*Certainty of Law*); "No Evidence for the Jury."**—

While the result sought is clearly beneficial the means by which it is reached seems objectionable, because confusing and misleading. After considerable time has been consumed in hearing evidence, and a mass of testimony has accumulated before the jury; nay, even when the jury have weighed this evidence and, as triers of the fact decided that the evidence is sufficient, e. g., that certain conduct is negligent and their decision comes up for review in an appellate court, the ruling is made by the trial judge or by the appellate court, as the case may be, that *there is no evidence for the jury*. This is putting the matter in a false light. There is evidence and plenty of it. What the court is really regulating is the rule of law. It has lengthened the rule which it is stretching over the constituent facts and, having made the application finds that the facts fall short. The ruling is not one as to evidence at all, but as to substantive law. Much of this ambiguity and confusion might be avoided, if the original administrative error had not been committed of permitting the jury to apply the rule of law to the constituent facts.

The expedient is, however, a common one. The habit of speaking of rulings on substantive law in terms of evidence has been adopted by the courts even in speaking of their own work of construing documents. Here, in the so-called "*Parol Evidence Rule*,"<sup>1</sup> judges chronically say that "*parol evidence is not admissible*" for a given purpose when the truth is that that which blocks the way to admissibility is the rule of substantive law; that the proponent cannot use his *factum probandum*. His proof would be good if his fact were a constituent one. Indeed, in most cases, as in the ruling on negligence, the evidence not only is, but is admitted and submitted to the rule of substantive law governing the right or liability asserted, and, being found to fall short, the an-

1. *Martell v. White*, 185 Mass. 255, 258 (1904).

1. See *PAROL EVIDENCE RULE*.

nouncement is made that there is no evidence, in the one case, or that the (already admitted) evidence is not admissible in the other. It is a *façon de parler*, merely; but it is an important, because misleading and confusing one.

**§ 150. (Certainty of Law; "No Evidence for the Jury"); Rules of Negligence.**— Thus, in cases of injury caused by collision with railroad trains, a failure to look in either direction before crossing the tracks and listen for the purpose of ascertaining whether a train is approaching, has been ruled to be negligent.<sup>1</sup> The plaintiff has been required to stop for the purpose of exercising the senses of sight and hearing,<sup>2</sup> and in case of special modes of travel even stopping has been deemed an insufficient exercise of due care,<sup>3</sup> thus gradually limiting the scope of this debatable ground as the question becomes one of frequent adjudication. The growth in definiteness is made by the fixing by judges of an outside limit of what is reasonably tenable in the way of a finding.<sup>4</sup>

*Due Diligence in Giving Notice of Dishonor.*— So in case of what length of time is reasonable within which notice of the dishonor of negotiable paper to persons collaterally liable, has been, in reality, determined by successive judges in much the same way.

**§ 151. Trial by Inspection.**— The determination of a plea of *nul tiel record* is one of a class of issues of fact, determined by the presiding judge by his own perception in much the same way that he needs no evidence to decide on an issue of direct contempt.<sup>1</sup> At common law, these were grouped under the general title of

1. *Lavareng v. Chicago, etc., Ry. Co.*, 56 Iowa 689 (1881); *Fletcher v. Fitchburg Ry. Co.*, 149 Mass. 127 (1889); *Rodrian v. New York, etc., Ry. Co.*, 125 N. Y. 526 (1891).

In New York the traveller "is not obliged, however, as matter of law, to stop his team, to rise up in his wagon, or to get out and go to the track to make observations." *Stackus v. New York, etc., Ry. Co.*, 79 N. Y. 464 (1880). To the contrary, i. e., that failure to look in both directions when approaching a railroad crossing is merely a fact for the consideration of the jury, see *Terre Haute, etc., Ry. Co. v. Voelker*, 129 Ill. 540 (1889);

*Plummer v. Eastern Ry. Co.*, 73 Me. 591 (1882); *Texas, etc., Ry. Co. v. Chapman*, 57 Tex. 75 (1882). The traveller has been excused from the absolute necessity of stopping for the purpose of looking and listening. *Manley v. Canal Co.*, 69 Vt. 101 (1896).

2. *Pennsylvania Ry. Co. v. Beale*, 73 Pa. St. 504 (1873).

3. *Robertson v. Pennsylvania Ry. Co.*, 180 Pa. St. 43 (bicyclist required to dismount) (1897).

4. *Paine v. Railroad Co.*, 118 U. S. 152, 160 (1885); *Tindal v. Brown*, 1 T. R. 167, 169 (1786).

1. *Infra*, §§ 205 *et seq.*

trial by inspection.<sup>2</sup> Under this form of trial the nonage of an infant,<sup>3</sup> whether a party alleged to be dead was in fact alive, issues of idiocy, mayhem, or the like were decided by the judge. Early law points to the conclusion that trial by inspection antedates the more modern form of trial by jury.<sup>4</sup> So far as it applies to determination of a constituent fact, e. g., whether certain pieces of wood submitted to inspection were "chips" or "shingles"<sup>5</sup> it is probably no longer permissible. A close approximation to the finding of a fact by the court upon inspection is furnished where the judge decides from the examination of a document as to whether it is sealed or not sealed.<sup>6</sup>

**§ 152. (*Trial by Inspection*); Nul Tiel Record.**— When it is claimed by one party and denied by the other that there is a judicial record to a given effect; in other words, on *nul tiel record* pleaded, the issue if the record was in the court of the trial, is determined by the judge simply by looking at or inspecting it.<sup>1</sup> Under these circumstances, the record is one which the court judicially knows.<sup>2</sup> The record, therefore, needs no identification; and, the issue is determined by the court upon simple inspection. Properly speaking, the issue is one of fact—the actual existence of a record—and the judge settles it by perception, the use of his own faculties. Here he is the percipient witness.

2. "Trial by inspection . . . [is when the issue] being evidently the object of sense, the judges of the Court, upon the testimony of their own senses, shall decide the point in dispute; . . . when the fact from its nature must be evident to the Court, either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the Court alone." 3 Black. Comm. 331 (1768).

3. Co. Litt. 380b.

4. Thayer, Preliminary Treatise, 19-24.

5. Morton v. Fairbanks, 11 Pick. 368, 370 (1831).

6. "The existence or non-existence of the seal [on a deed] is to be ascertained by an appeal to the senses;

and when that is the case, the judges of the Court shall decide." Cromwell v. Tate's Ex'r, 7 Leigh 301, 305 (1836).

1. Adams v. Betz, 1 Watts 425, 427 (1833); State v. Grayton, 3 Hawks 187 (1824). "If such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself." Co. Litt. 260a (1628). "Where a matter of record is pleaded in any action—as, a fine, a judgment, or the like—and the opposite party pleads *nul tiel record*, . . . the trial therefore of this issue is merely by the record; . . . it shall not receive any trial by witness, jury, or otherwise, but only by itself." 3 Black. Comm. 330.

2. *Infra*, §§ 583 *et seq.*

**§ 153. (*Trial by Inspection; Nul Tiel Record*); Judgment of Sister State.**—This, however, must not be so understood as to extend to judgments of a sister state of the American Union where the Constitution of the United States requires that “full faith and credit” shall be accorded by other courts of the Union. In such a case, *nul tiel record* is the appropriate plea,<sup>1</sup> as in case of a domestic judgment.

**§ 154. (*Trial by Inspection*;) Foreign Law; Unwritten.**—The existence of a foreign written or unwritten law is said to be a question of fact.<sup>1</sup> This is true, in the sense that such a fact must be established by evidence and is not the subject of the judge’s judicial knowledge as in the case of domestic law; and that, so far as the foreign law is unwritten, the proof is usually by witnesses.<sup>2</sup> But the question whether evidence as to the existence of an unwritten rule of foreign law should be presented to the judge or to the jury is still open.

*Function of the Judge.*—Great practical advantage is to be found in treating the question as one of fact to be determined by the judge. The presiding justice is naturally fitted to deal with such matters. The power has accordingly been added to the province of the court in certain jurisdictions, by judicial decision<sup>3</sup> or statu-

1. *Hall v. Williams*, 6 Pick. 232, 237 (1828). Such a judgment “may be proved in the manner prescribed by the Act, and such proof is of as high a nature as an inspection by the Court of its own record.” *Mills v. Duryee*, 7 Cranch 481, 485 (1813). But see also, *contra*, *Carter v. Wilson*, 1 Dev. & B. 362 (1835). For a valuable contribution to the law as to the proof and effect of judgments of a sister state, see 5 L. R. A. (N. S.) 938.

1. *Cook v. Bartlett*, 179 Mass. 76, 61 N. E. 266 (1901); *Gibson v. Ins. Co.*, 144 Mass. 81, 10 N. E. 729 (1887); *Kline v. Baker*, 99 Mass. 253 (1868); *Charlotte v. Chouteau*, 33 Mo. 194, 200, 201 (1862); *Lycoming Ins. Co. v. Wright*, 60 Vt. 522, 12 Atl. 103 (1888); *Mexican Cent. Ry. Co. v. Chantry*, 69 C. C. A. 454, 136 Fed. 316 (1905).

2. *Wakeman v. Marquand*, 5 Mart. (N. S.) (La.) 265 (1826); *Stewart*

*v. Swanzy*, 23 Miss. 502 (1852); *Dougherty v. Snyder*, 15 Serg. & R. (Pa.) 84, 22 Am. Dec. 520 (1826). See also *Drake v. Hudson*, 7 Harr. & J. (Md.) 399 (1826).

3. *Maryland*.—*Cecil Bank v. Barry*, 20 Md. 287, 295 (1863).

*Massachusetts*.—*Cook v. Bartlett*, 179 Mass. 76, 61 N. E. 266 (1901); *Bowditch v. Solytk*, 99 Mass. 136 (1868); *Kline v. Baker*, 99 Mass. 253 (1868).

*Missouri*.—*Charlotte v. Chouteau*, 33 Mo. 194 (1862); *Charlotte v. Chouteau*, 25 Mo. 465, 473 (1857).

*New Hampshire*.—*Pickard v. Bailey*, 26 N. H. 152 (1852).

*Vermont*.—*State v. Rood*, 12 Vt. 396 (1840).

*United States*.—*Ottawa v. Perkins*, 94 U. S. 260 (1876); *Consequa v. Willings*, Pet. C. C. 225 (1816); *Livingston v. Maryland Ins. Co.*, 6 Cranch 274 (1810).

tory enactment.<sup>4</sup> The convenience of the court would be greatly facilitated by permitting the judge to ascertain for himself the existence of a rule of foreign law as part of his function of administration. This has been permitted, with or without statutory authority; especially where the evidence is in conflict between the witnesses.<sup>5</sup> Where the fact of the foreign law is not one within the province of the jury to find the constituent facts, e. g., where the finding is one preliminary to the admissibility of evidence<sup>6</sup> the meaning of a foreign law, though unwritten, is for the judge.

**§ 155. (*Trial by Inspection; Foreign Law; Unwritten*); Province of the Jury.**— Leaving the question to the jury seems to be an instance of their deciding a question of law; while the distinctive treatment of the fact of an unwritten foreign law as compared to the fact of a domestic one seems unwarranted in reason and confusing in practice. The decision has, however, been intrusted to the jury,<sup>1</sup> especially where evidence has been furnished on the point, and the proof is conflicting<sup>2</sup> or inconclusive.<sup>3</sup>

**§ 156. (*Trial by Inspection; Foreign Law*); Written.**— The function of the judge of the forum in dealing with a written foreign law is frequently increased over what it would be were the foreign law unwritten. The existence and meaning of the rule of written law is still a matter of fact. But it is a fact of the special and peculiar nature that it cannot well be satisfactorily considered by a jury but its determination is closely analogous to the normal duties of the judge in case of domestic law. Where the foreign law is written, the cumulative suggestion is presented that the construction of documents is a function of the presiding judge.<sup>1</sup> The same function has been conferred on him regarding the written law of a sister state or foreign country.<sup>2</sup>

4. *Lockwood v. Crawford*, 18 Conn. 361 (1847).

5. *Rice v. Gunn*, 4 Ont. 579 (1884); *Breme v. Freeman*, 10 Moore P. C. 306 (1857).

6. *Pickard v. Bailey*, 26 N. H. 152, 169 (1852).

1. *Hancock v. Western Union Tel. Co.*, (N. C. 1905) 49 S. E. 952.

2. *Hancock Nat'l Bank v. Ellis*, Mass. 39, 51 N. E. 207 (1898).

3. *St. Louis & S. F. Ry. Co. v. Conrad*, (Tex. Civ. App. 1907) 99 S. W. 209.

1. *Infra*, §§ 128 *et seq.*

2. *Hancock Nat'l Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207 (1898); *Frasier v. Charleston & W. C. Ry. Co.*, 73 S. C. 140, 52 S. E. 964 (1905).

**§ 157. (*Trial by Inspection; Foreign Law*); Use of Skilled Witnesses.**—This by no means dispenses with the evidence of skilled witnesses familiar with the foreign written law.<sup>1</sup> The written law itself may be essentially modified by other laws of that jurisdiction, written or unwritten; the apparent effect of the language of a statute, code or the like, may have been seriously modified by constructions in the courts of the foreign forum. If so, the fact is of great consequence. The right of a jurisdiction to settle authoritatively, the meaning and effect of its own statutes, e. g., as to contracts made within their limits, is generally conceded.<sup>2</sup> These modifying elements the domestic judge should know, for the question before him is not “what is the statute?” but, “what is the law, as a whole, statutory or unwritten, on the point?” As Lord Langdale says,<sup>3</sup> “The judge is not supposed to know all the authorities applicable to the case or whether any older laws or authorities which may be cited, have been repealed or altered by subsequent laws or authorities, or what are the rules of construction properly applicable to the authorities when ascertained,” and it is precisely for those reasons that the oral testimony of skilled witnesses is required in preference to production of a written law itself and why such witness is required to state “on his responsibility, what that law is and not to read any fragments of a code which would only mislead.”<sup>4</sup> Where the foreign law is in written form the testimony of the skilled witness in construing it is said to be “addressed to the judge to aid him in his rulings.”<sup>5</sup>

**§ 158. (*Trial by Inspection; Foreign Law*); Function of Administration.**—In all cases, even where evidence is submitted to the jury, the matter does not cease to be to a marked degree one of administration. The court may examine standard treatises on foreign law, e. g., Code Napoleon,<sup>1</sup> or Spanish law,<sup>2</sup> especially when referred to in the evidence of witnesses.<sup>3</sup>

*Administrative Details.*—Where a foreign law is in the documentary form, whether of a statute or written decisions, the judge

1. *Infra*, § 894.

2. *Walker v. Forbes*, 31 Ala. 9 (1857); *Davidson v. Sharp*, 28 N. C. 14 (1845).

3. *Nelson v. Bridport*, 8 Beav. 547, 560 (1846).

4. *Cocks v. Purday*, 2 C. & K. 269 (1846).

5. *Mexican N. R. Co. v. Slater*, 115 Fed. 593, 606, 53 C. C. A. 239 (1902).

1. *Bromer v. Freman*, Deane & G. 192, 226 (1856).

2. *Picton's Case*, 30 Howell's St. Trials, 806, 863 (1808).

3. *Nelson v. Bridport*, 8 Beav. 547, 560 (1846).

of the forum will justly deem it good administration to require that the document itself be produced, so far as is practically feasible. Proof is usually made by officially printed copies; and, as there is often no difficulty presented to obtaining these or other copies the general rule of administration or practice is well settled, that oral evidence will not be received of the contents of a foreign written law unless a statute shall definitely provide otherwise.<sup>4</sup> Where the administrative situation is different; where the proponent is seeking to prove the contents of a written law of which it is not easy to procure official copies, the requirements of judicial administration are relaxed to meet the changed situation, and the proponent will be permitted to prove the law by the best evidence practically available to him.<sup>5</sup>

**§ 159. (*Trial by Inspection; Foreign Law; Function of Administration*); English Practice.**—The English rule of administration is a shade more liberal, in its first aspect, than the American. It receives any probative evidence, not necessarily formal copies of the written law,<sup>1</sup> in proof of its contents. Indeed, it is rather deemed the work of the skilled witness to diagnose the fact and nature of the foreign law on a given point, using the existence of the written law, so far as he gives it weight in reaching his "opinion," i. e., his conclusion or judgment.<sup>2</sup> In the end, the English and American rules reach the same result, receiving all relevant evidence, the best available preferred, which throws

**4. Arkansas.**—*McNeill v. Arnold*, 17 Ark. 154 (1856).

**Georgia.**—*Leonard v. Peeples*, 30 Ga. 61 (1860).

**Illinois.**—*McDeed v. McDeed*, 67 Ill. 545 (1873).

**Indiana.**—*Line v. Mack*, 14 Ind. 330 (1860).

**Louisiana.**—*Phillips v. Murphy*, 2 La. Ann. 654 (1847).

**Michigan.**—*Kermott v. Ayer*, 11 Mich. 181 (1863).

**Missouri.**—*Charlotte v. Chouteau*, 25 Mo. 465 (1857).

**Texas.**—*Holliday v. Harvey*, 39 Tex. 670 (1873); *Martin v. Payne*, 11 Tex. 292 (1854).

**Vermont.**—*Smith v. Potter*, 27 Vt. 304, 65 Am. Dec. 198 (1855); *Danforth v. Reynolds*, 1 Vt. 259 (1828).

**United States.**—*Church v. Hubbard*,

2 Cranch 187, 2 L. ed. 249 (1804); *Seton v. Delaware Ins. Co.*, 21 Fed. Cas. No. 12,675, 2 Wash. C. C. 175 (1808).

**5. Drake v. Hudson**, 7 Harr. & J. (Md.) 399 (1826); *Livingston v. Maryland Ins. Co.*, 6 Cranch (U. S.) 274, 3 L. ed. 222 (1810).

**1. People v. Lambert**, 5 Mich. 349, 72 Am. Dec. 49 (1858); *Vander Donckt v. Thellusson*, 8 C. B. 812, 19 L. J. C. P. 12, 65 E. C. L. 812 (1849); *De Bode's Case*, 8 Q. B. 208, 55 E. C. L. 208 (1845); *In re Sussex Peerage*, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844).

**2. R. v. Povey**, 6 Cox C. C. 83, Dears. C. C. 32, 17 Jur. 120, 22 L. J. M. C. 19, 1 Wkly. Rep. 40, 14 Eng. L. & Eq. 549 (1852).



light upon the meaning of the foreign law,<sup>3</sup> with the lack of technical embarrassment characteristic of the handling of judicial matters in which the jury are not concerned.<sup>4</sup> Great importance is naturally attached to the construction which the court of last resort in the sister state or foreign country have placed upon their own written laws.<sup>5</sup>

**§ 160. (*Trial by Inspection; Foreign Law; Function of Administration*); Judicial Assumptions.**—When nothing appears as to certain essential facts regarding the interstate or foreign law, the administrative problem presented is as to what assumptions the court will make. The case must be disposed of, in connection with the administrative duty of expediting trials.<sup>1</sup> Evidence being absent, it is usually said that certain things are “presumed.” It would be more nearly descriptive of the process to say that these things were assumed.<sup>2</sup> The function is rather one of administration than of logic; though, as must necessarily happen in any instance of the employment of administration the essential and conditioning requirement as to which is that it should be *reasonable*, the element of logic is not absent. Much will depend as to the exact situation presented, the object being that of all judicial administration — justice as conventionalized by law. It will, for example, not be assumed that the foreign law is statutory, especially where the country in question has a common law jurisprudence. He who would show, contrary to the assumption that the foreign provision is unwritten, has, as in all cases of an adverse assumption,<sup>3</sup> the burden of evidence to establish the written form of the foreign law.<sup>4</sup> In matters, on the other hand, which were not matters of common law regulation, the court must, almost of necessity, assume that if the matter is regulated, the regulation is statutory.

3. *Dyer v. Smith*, 12 Conn. 384 (1837); *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49 (1858); *In re Sussex Peerage Case*, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844).

4. *St. Louis, etc., R. Co. v. Stewart*, 68 Ark. 606, 61 S. W. 169, 82 Am. St. Rep. 311 (1901); *Dyer v. Smith*, 12 Conn. 384 (1837); *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49 (1858).

5. *Horton v. Reed*, 13 R. I. 366 (1881); *St. Louis, etc., R. Co. v. Stewart*, 68 Ark. 606, 61 S. W. 169, 82 Am. St. Rep. 311 (1901).

1. *Infra*, §§ 544 *et seq.*

2. *Infra*, §§ 1211 *et seq.*

3. *Infra*, § 1017.

4. *Dougherty v. Snyder*, 15 Serg. & R. (Pa.) 84, 16 Am. Dec. 520 (1826); *Livingston v. Maryland Ins. Co.*, 6 Cranch (U. S.) 274, 3 L. ed. 222 (1810).

**§ 161. (*Trial by Inspection; Foreign Law; Function of Administration; Judicial Assumptions*); Rate of Interest.**—

Among subjects of this nature, where the foreign law is assumed to be statutory, is the rate of *interest*. No allowance of interest being provided at common law in case of the detention of money, it will in certain jurisdictions, be assumed that where the allowance under the law of another state is under a provision of law, rather than by custom, the statute must be produced before secondary evidence of its contents can be used.<sup>1</sup> The better administration makes no assumption that the foreign law or the allowance of interest is statutory. That fact may be left to proof;<sup>2</sup> and while, where the law is shown to be statutory, the statute must be produced, or its absence explained,<sup>3</sup> this ruling is not made applicable by virtue of an assumption as to the statutory nature of the law. In other words, if the rule is not shown to be statutory parol evidence as to the fact is receivable.<sup>4</sup> In point of principle, the requirement that a statute should be produced in specie where it exists, actually or by assumption, is not an application of the best evidence rule relating to documents which is based upon the convention of the parties in relation to constituent instruments. So far as properly operative at all, this requirement of the production of a foreign statute is under the general administrative principle requiring the most probative evidence.<sup>5</sup> This is a flexible tool in the hands of the court for so moulding the evidence as to make it effective in the furtherance of justice. It is not a rule of procedure.

**§ 162. (*Trial by Inspection*); Foreign Records.**—Foreign judgments, and other foreign judicial records, are provable by copy and, being without the range of judicial knowledge are not determined by inspection.<sup>1</sup>

1. *Talbot v. Peeples*, 6 J. J. Marsh. (Ky.) 200 (1831); *Tryon v. Rankin*, 9 Tex. 595 (1853).

2. *Wakeman v. Marquand*, 5 Mart. N. S. (La.) 265 (1826).

3. *Mason v. Mason*, 12 La. 589 (1838); *Minor v. Harding*, 4 La. 378 (1832); *Glasgow v. Stevenson*, 6 Mart. N. S. (La.) 567 (1828).

4. *Boggs v. Reed*, 5 Mart. (La.) 673, 12 Am. Dec. 482 (1818).

5. *Infra*, §§ 464 *et seq.*

1. *Baldwin v. Hale*, 17 John. 272 (1820); *Collins v. Mathew*, 5 East 473 (1804). "It is to be tried by the country . . . and not by the Court." *Walker v. Witler*, 1 Doug. 1, 7 (1778), per Buller, J.

## CHAPTER IV.

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*Functions of the judicial office.**executive.**protect the course of justice.**magistrates and inferior tribunals, 236.**newspapers, 237.**embarrassing the administration of justice, 238.**past proceedings, 239.**improper influence, 240.**intimidation, 241.**special orders as to publication, 242.**place of publications, 243.**parties and public, 244.**service of process, 245.**witnesses, 246.**arrest, 247.**bribery, 248.**false swearing, 249.**illustrations, 250.**intimidation, 251.**suppressing testimony, 252.**enforcement by contempt proceedings, 253.**civil and criminal cases, 254.**direct and constructive, 255.**constructive presence of judge, 256.**Judge sitting as a jury, 257.**administrative orders, 258.**rulings of law, 259.**use of argument, 260.**view by judge, 261.**weight of evidence, 262.**Action of appellate courts, 263.**distinctions between law and fact, 264.**Federal courts, 265.**Evidence as a matter of administration, 266.**Stare decisis as applied to the law of evidence, 267.**Recapitulation, 268.*

§ 163. (*Court and Jury*); *Court*.—Before proceeding to consider in some detail the respective functions of the court and jury, it may be of advantage to take a brief survey of the general constitution and relations of the two branches of the mixed tribunal so

familiar to the English law. The central figure of the courtroom is unquestionably the judge. The office, and, much more frequently than not, the individual, are hedged about with a dignity based upon varied and highly important considerations. This is due not alone to the great antiquity of the office of judge and to the universal social respect in which, wherever worthily exercised, the office has uniformly been held. The title of judge is, indeed, venerable with age and revered for the wisdom with which the age-enduring traditions of the past have enriched it. Compared with the institution of judge, that of the jury is extremely recent. For uncounted centuries the judges have exercised the critical duties of their great office among highly civilized peoples before the institution of the jury began its embryonic stage in the gloom of the Thuringian forests. The veneration for long tried worth and the reverence for demonstrated wisdom do not stand alone by the judicial chair of the judge. The demonstrated ability for the highest social service is there also. With the earliest advent of the crudest form of government, the awarding of justice among the governed has been instinctively recognized as a high, possibly the highest, attribute of sovereignty. It was the responsibility which all exercise of power by implication assumed — the basis on which personal liberty was surrendered and individual loyalty accorded. The office of judge was in him who was the head of the society as then organized, or of him to whom the latter should depute his power. The tribesman looked to his chief for justice, the member of the patriarchal family demanded it from the head of the family. The king was the fountain of justice to his subjects. When the growth of national life required that the king or other head of the state should place this element of his sovereignty in the hands of others, the recognition was general, and clear in proportion to social evolution and advance, that no service to the state was more vital in importance or more permanently beneficial and far-reaching in its effects than the orderly, speedy and exact administration of justice. Thus the administration of justice is essentially an attribute of sovereignty — the necessary part of the return which organized society makes for the general concessions from which its powers are derived. But the chief crown of the judicial office lies not in the veneration due to meritorious antiquity or to the respect won by high and long continued social service. It would seem to lie rather in the fact that through the features of the ideal judge

shine those of Justice herself. Herein consists the chief claim of the law to the loyalty of the legal profession — the professed ministers of justice, and the general respect of the right-thinking portion of the community. It is a settled conviction in the mind of civilized man that the base line from which human rights and obligations are reckoned whether in relation toward each other or to the state is, simply, justice. This universally implanted instinct leads to the feeling that in awarding justice society is not only discharging its most important social function, but reaching its highest moral elevation. The courtroom is inspiring because it is there that moral power, rather than physical force, is supreme. The judge is revered not because the sovereign has given him great powers — not the less impressive because indeterminate — for the discharge of his duties, but because of the God-like nature of the function which he has been given a mandate to discharge. A judge divorced from justice is a mockery. Without justice, a courthouse can be, at most, but a splendid temple, whose shrine is empty.

**§ 164. Functions of the Judicial Office.**— In the machinery of judicial procedure, to which reference will be more fully made,<sup>1</sup> the law of evidence has an especial place—intervening in operation between the establishment of issues of fact by means of the rules of procedure as to pleading, and the exercise of the reasoning faculty in the act of judging or rendering a verdict upon the facts which it is the province of evidence to supply. But beside having an appropriate field in the procedure of a trial, the admissions and rejections of evidence, the form which it is compelled to assume, the limitations upon its use or effect, are being constantly modified and, in the course of a trial, controlled by rules imported from other branches of procedure. This happens so frequently and is attended by such radical consequences that the practical administration of the rules of evidence and many of the rules themselves are unintelligible without constant reference to certain essential functions of the judicial office. Thus, for example, part of the essential basis of the “rule against hearsay” is the fact that procedural law demands that evidence be given under oath and subject to cross-examination;<sup>2</sup> the judgment or “opinion” of witnesses is excluded, in part at least, because the rules of procedure

1. *Infra*, §§ 165 *et seq.*

2. *See infra*, §§ 2712, 2713.

require that, wherever possible, the function of judging of the effect of evidentiary matter should be exercised by the jury.<sup>3</sup> What a party to a litigation has said is available to his opponent as an "admission"<sup>4</sup> or to the state, in a criminal proceeding, as a confession,<sup>5</sup> largely because a rule of procedure prescribes that such shall be its effect, to a degree and under circumstances bearing slight relation to logical relevancy.

*This blending of the rules of evidence* with those of substantive law or other branches of procedure is rendered easy of occurrence and difficult of disassociation by reason of the fact that knowledge and enforcement of all rules of substantive law, as well as those of procedure, are, together with the task of administration, centered in the same person—the presiding judge.

*A Necessary Arrangement.*—This multiplicity of function on the part of the presiding judge could at no time well be avoided. Even in a modern jury trial where the appeal is to the reasoning faculty, the same function of the judge, exercised by him in cruder forms of trial, to see that all the rules are observed, though somewhat distinguished by the presence and operation of other considerations, still persists. This obligation, which is, in reality, the task of administration,<sup>6</sup> has at all times grown out of an inherent necessity. Procedure, as well as regard for the more far-reaching consequences of judicial administration, requires a continuous tradition, which could not, in the nature of things, reside elsewhere than with the judge.

*A Palpable Confusion.*—It has proved easy for a presiding judge, under the confusing conditions of a *nisi prius* trial to fail to distinguish or, indeed, greatly to concern himself as to what was the particular branch of procedure under which he was exercising a power which he clearly was entitled to use; or whether, indeed, he was dealing with procedure at all, rather than, in reality, announcing or applying a rule of substantive law, or exercising his power of administration. Such a judge has found it especially tempting to put his action in the form of a ruling on the law of evidence by saying that "evidence is not admissible" for a given purpose. This is sufficient for immediate ends. It may, even in itself, be more accurate than any more specific reason likely to be assigned. But it does not specify whether the exclusion is made

3. See *infra*, §§ 1791 *et seq.*

4. See *infra*, §§ 1232 *et seq.*

5. See *infra*, §§ 1472 *et seq.*

6. *Infra*, §§ 174 *et seq.*



because the fact which the evidence tends to prove (a) is not material to the claim or defense relied on, (b) is not relevant under the pleadings, (c) is not a probative or constituent fact, (d) is calculated to mislead or confuse the jury, or unduly protract the trial. In other words, no intimation is given as to whether the ruling is made because the evidence offered is contrary to substantive law, pleading or evidence, or is, on the other hand, made under the administrative powers of the judge. Nor is relief against this ambiguity furnished elsewhere. This phraseology is customarily reversed or sustained on appeal without material alteration of terms. All such rulings appear as part of the law of evidence, and are collated in a most conscientious and painstaking manner by students of the subject. It is, however, essential to an understanding of the province of "evidence" itself, that an attempt be made to consider, in the next few paragraphs, the blended functions exercised by the presiding judge, from the confusion of which this situation results.

For convenience, the functions of the court may be divided into those which are (1) *judicial*, i. e., involve the use of judgment; (2) *administrative*, i. e., imply the use of discretion; (3) those which are *executive*, i. e., require the exercise of what may be called the "police powers" of the court.

**§ 165. (Functions of the Judicial Office); Judicial.—**

The presiding judge has not only the duty of announcing the substantive law of which he is said to have judicial knowledge,<sup>1</sup> and which will be more fully considered later, in connection with that subject; he also is charged with the duty of applying the rules of procedure. It will, therefore, be necessary to inquire somewhat as to the distinction between the two branches into which the general subject of municipal law, as above defined,<sup>2</sup> may be regarded as divided. Mr. Bishop says,<sup>3</sup> "The law is divided into the rules which prescribe the conduct of the people, and those which regulate its own steps in enforcing obedience. The two branches are called sometimes substantive and adjective law; oftener, law and procedure."

**§ 166. (Functions of the Judicial Office; Judicial); Procedure Defined.—**Properly considered, procedure relates, not to the

1. *Infra*, §§ 570 *et seq.*

2. *Supra*, § 66.

3. 1 Cr. Proc. § 1. See also Kring

*v. Missouri*, 107 U. S. 221, 231 (1882).

remedy, but to the process by which the remedy is made available. The law of procedure governs the process of litigation. "It is the law of actions — *jus quod ad actiones pertinet*, using the term action in a wide sense to include all legal proceedings, civil or criminal."<sup>1</sup> The forms of procedure have been conveniently summarized by Mr. Salmond<sup>2</sup>— "The normal elements of judicial procedure are five in number, namely, summons, pleading, proof, judgment and execution."<sup>3</sup> The object of the first is to secure for all parties interested an opportunity of presenting themselves before the court and making their case heard. Pleading formulates for the use of the court and of the parties those questions of fact or law which are in issue. Proof is the process by which the

1. Salmond, Jurisp. (2d ed.) § 172. "All the residue is substantive law, and relates not to the process of litigation, but to its purposes and subject matter. Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which these ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated. Procedural law is concerned with affairs inside the courts of justice; substantive law deals with matters in the world outside." Salmond, Jurisp. (2d ed.), § 172. "The relation between the whole body of the law which gives and defines rights, and that part devoted to the enforcing of such rights, has been well expressed by the statement that the Substantive Law is primary, even, in a sense, creative. It is the law to be administered, as distinguished from the method of administration. Adjective Law, on the other hand, is secondary in its purpose, as its name imports. It exists for the sake of something else — for the sake of the Substantive Law. It operates only when invoked to maintain or redress a particular right given by the Substantive Law." Fiero, "The

Relation of Procedure to the Substantive Law." Law Pamph. Vol. 202. "Of Procedure it has been said:— It comprises the rules for (I) selecting the jurisdiction which has cognizance of the matter in question; (II) ascertaining the Court which is appropriate for the decision of the matter; (III) setting in motion the machinery of the Court so as to procure the decision; and (IV) setting in motion the physical force by which the judgment of the Court is, in the last resort, to be rendered effectual." Holland, Elements of Jurisp. 316. "Procedure deals with the machinery by which legal controversies are settled." Thayer, Prelim. Treat. 198.

**Other definitions:** "It [substantive law] defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, it is 'Substantive Law.' So far as it provides a method of aiding and protecting, it is 'Adjective Law,' or procedure." Holland, Elements of Jurisp., p. 78.

2. Salmond, Jurisp. (2d Ed.) § 172.

3. The Supreme Court of the United States defines procedure to include "Whatever is embraced by the three technical terms, pleading, evidence and practice." *Kring v. Missouri*, 107 U. S. 221, 231.

parties supply the court with the data necessary for the decision of these questions. Judgment is this decision itself, while execution, the last step in the proceeding, is the use of physical force in the maintenance of the judgment, when voluntary submission is withheld.<sup>4</sup>

**§ 167. (*Functions of the Judicial Office; Judicial; Procedure Defined*); Rights and Remedies.**—The suggestion has been made, that the distinction between substantive law and procedure is that between rights and remedies — between *jura* and *remedia* — substantive law prescribing rights and liabilities and procedure determining the methods by which these rights are enforced or a remedy is provided for their violation. Undoubtedly, this definition is a common one; and, for many purposes, it is sufficiently accurate. It is inexact, however, in at least two essential particulars: (1) Many rights are procedural, i. e., relate to procedure; (2) the nature of the remedy is often defined by substantive law.<sup>1</sup>

**§ 168. (*Functions of the Judicial Office; Judicial; Procedure Defined*); (1) Rights Relating to Matters of Procedure.**—The substantive rights of the parties may well extend to the observance of certain methods of procedure. Indeed, the rights to the observance of an established procedure are the most ancient of which we know anything in Teutonic law. Historically, procedure antedated substantive law. In the more formal jurisprudence of early days, procedure was, in itself, the test of truth. Facts were “proved,” not by any appeal to reason, but by carrying through without variation certain established *formulae*, known to the judges — noticing the result and acting accordingly. The right of the party litigant was to the *formulae*, the observance of the rules of the trial — by taking certain steps to have the test or “proof” applied to his matter. Such was the earliest right — to a definite procedure. Other substantive rights grew up; that a thing once done should be done again and so the rule of *law* — the substantive law — was, as it were, evolved from out of the interstices of procedure. As Sir Henry Maine happily puts it:<sup>1</sup>

4. Bishop more shortly divides procedure into pleading, evidence and practice and suggests that the term procedure “denotes whatever the narrower three in combination do, and perhaps nothing more.” Bish. Crim. Proc. § 2.

1. “Substantive law is concerned with the ends which the administration of justice seeks.” Salmond, Jurisp. (2d ed.), p. 444.

1. Sir Henry Maine, Works, p. 429.

"So great is the ascendancy of the law of action in the infancy of courts of justice, that substantive law has at least the look of being gradually secreted in the interstices of procedure, and the early lawyer can only see the law through the envelope of technical forms."<sup>2</sup> From this so intimate connection, between procedure and substantive law a large number of a litigant's rights — actually enforced as substantive law — relate solely to procedure. That this is treated as part of the law of evidence, suffices greatly to broaden the scope of that subject. Thus, the right of a party to give evidence on his own behalf, a right to interrogate the other party, to have reason used in the trial of his cause, to have a jury adjudge on the probative facts, though relating to procedure, are, with a large number of others, in reality, matters of substantive law.

**§ 169. (*Functions of the Judicial Office; Judicial; Procedure Defined*); (2) Substantive Law May Prescribe the Remedy.**

— As the right to the observance of a rule of procedure may be a matter of substantive right, so the remedy itself may be, and frequently is, prescribed by the substantive law. Thus, the punishment for crimes, the damages awarded upon the violation of a right or the infraction of a duty are all clearly part of the remedy. It is equally plain that such remedies are prescribed by the substantive law. Examples of this fact are numerous. Thus, in equity the substantive law determines what contracts will be specifically enforced; and where, on the other hand, the remedy will be confined to damages.

**§ 170. (*Functions of the Judicial Office; Judicial; Procedure Defined*); Verbal Metabolism.**— This verbal metabolism between the phraseology of the substantive law and that of procedure by which the rules of positive law are made to appear as if they were part of the separate and distinct branch of law denominated

2. "A century this side of the Conquest the business of the popular courts was still not so much to try a case through the patient sifting of testimony as to determine what formula a party should follow in order to prove his case. Formalism was the characteristic, the vital spirit of procedure. Little or nothing was left to judicial discretion; the judges were

responsible only for the application of iron rules." Hepburn, *The Development of Code Pleading*, p. 32. "Whenever we trace a leading doctrine of substantive law back far enough, we are likely to find some forgotten circumstance of procedure at its source." *The Common Law*, p. 253, by Judge Holmes.

procedure, takes place, most frequently, in practical judicial administration in three ways:

1. *Exclusive Mode of Proof.*—The first instance of this verbal interchangeability of a rule of substantive law with one of procedural law is furnished where an exclusive mode of proof is, in reality, a component element of the right or liability prescribed by substantive law. Thus, if contracts of a certain nature can, under the rule of substantive law, be proved only by a writing, the evidentiary requirement practically adds an additional condition, under which alone a right to enforce such a contract will arise. In other words, in terms of procedure, the existence of a writing is exclusive evidence of the right. In terms of substantive law, the existence of the same writing is a part of the right itself. In such a case, were oral evidence offered to prove the contract, the ruling asked for and given by the court would probably be to the effect that “parol evidence is not admissible” to prove a written contract; thus using the phraseology of evidence. Yet it seems clear that so far as evidence is a matter of logic, no question in the law of evidence is involved at all. Whether the underlying rule of law is spoken of as procedural or substantive is not important, the controlling factor in the ruling which excludes the oral testimony is a rule of law, that contracts of this nature must be in writing. This fact of a writing being absent, the constituent facts fall short of establishing the right when the rule of law is placed in measurement over them. It should be noticed that the real difficulty is, not that the facts are too short, as a matter of logic, but that the rule is too long, as a matter of law.

2. *Conclusive Presumptions.*—A second paraphrasing or interchangeability of substantive for procedural rules is furnished where a conclusive effect is given to a particular fact in a given connection, irrespective of probative force; e. g., where a certain evidentiary fact is the equivalent of and may be substituted for another. A conclusive presumption, as it is called, states in substance, the equivalence in legal effect between two facts. The form of expression is that of procedural law; the reality is a proposition in substantive law. That of which the existence cannot be questioned may well be said to exist. That which cannot be legally proved may well be said, legally, not to exist. From a logical point of view, i. e., from the standpoint of evidence, a “conclusive presumption” is a contradiction in terms — an intellectual monstrosity. The law of evidence, in itself, acknowledges

no predetermined probative weight for any inference of fact; only a rule of law, substantive or procedural, can do that. Still less does logic tolerate the imposition of an inevitable conclusion. All such statements are mere masqueradings of substantive or procedural law dressed in the garments of evidence. A child under seven is said to be conclusively presumed to be incapable of forming a criminal intent. Of this the only rational meaning can be that the law of persons provides that infants under this age shall not be criminally punished for offenses of which intent is an essential element. So the rule of agency, holding a master responsible for the acts of his servant while carrying on the master's business, is clearly one of substantive law. Yet it is readily turned into the language of procedure by the simple transposition of saying that it is conclusively presumed that acts done by a servant while engaged on his master's business were done by the master's authority, in which garb it seems to be a proposition in procedure. Thus formulated it really appears to have something to do with the law of evidence, which is very far from being the fact. To these results, viewed as legitimate legal growth, no criticism could well be offered.<sup>1</sup> But the concealment of the actual process is an obvious impediment to that clear defining of the field of evidence as distinct from substantive law which is absolutely essential to any clear comprehension of the subject.

3. *Statute of Limitations*.—The limitation on the right to bring an action — a specimen of procedural law — is practically equivalent to the loss or prescription of the right itself by lapse of time. Severing the ligature between right and remedy as in the procedural limitation of actions deals a death-blow to the right itself. It may be said that the removal of the remedy leaves an imperfect right, into which waiver or other act of the other party may instill legal vitality, while in the latter case the right is entirely gone. But the distinction seems metaphysical rather than practically valuable. It in no way affects the truth of the statement that the difference between substantive and procedural law is largely one in form of statement.

**§ 171. (*Functions of the Judicial Office; Judicial; Procedure Defined*); Distinction Not Important.**—It would thus appear that the distinction between substantive and procedural law is one not only of but little consequence; it is one which is principally

1. *Infra*, § —.

based, as, perhaps, the historical evolution of substantive law from forms of rigid procedure<sup>1</sup> might in itself suffice to show, on a mere difference in form of statement. So long as a *rule* exists as to what the judge shall do, it is largely a matter of indifference, so far as the law of evidence is concerned, whether the rule be spoken of as one of substantive law or one of procedure. A mere change of phraseology will usually suffice to transfer a rule of substantive into a proposition of procedural law; and, a similar ease develops in turning a rule of procedural law into one of substantive;—all without materially affecting the meaning of what is said, if correctly understood. The difficulty is that words so contorted do not readily retain normal meanings, and confusion necessarily results. Few causes have more seriously contributed to introduce into certain branches of the law of evidence, as “presumptions,” “burden of proof,” the “parol evidence rule,” and the like, profound, and apparently inextricable confusion, than the facility with which substantive law can thus be made to masquerade as procedural, and *vice versa*.<sup>2</sup> The distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are, legally speaking, part of the right itself. A right without a remedy for its violation is a command without a sanction, a *brutum fulmen*, i. e., no law at all. While it may be convenient to distinguish between the right or liability, the remedy or penalty by which it is enforced, on the one hand, and the machinery by which the remedy is applied to the right, on the other, i. e., between substantive law and procedural law, it should not be forgotten that so far as either is law at all, it is the litigant's right to insist upon it, i. e., it is part of his right. In other words, it is substantive law.

*In reality, the true distinction* for the purpose of the law of evidence, the correct line of radical cleavage, is not between *rules* as announced in substantive law and similar and often interchangeable rules formulated as part of the law of procedure; but, is, on the contrary, between rules of law, substantive or procedural, on

1. *Infra*, § 168.

2. This is bad enough, in all reason, when done unconsciously and by a blundering misuse of terms. It is still more difficult of detection when

the steps of the process are concealed by clear headed judges anxious to change the substantive law and avoid, at the same time, the appearance of judicial legislation.

the one hand, and the principles of rational judicial administration on the other.

**§ 172. (*Functions of the Judicial Office*); Promote Justice.—**

Equally within the judicial function of the court with the enforcement of law, and far transcending it in social importance is the promotion and furtherance of justice. This is the field of judicial administration. The primary mandate to the judge is to promote justice. This is the fundamental duty of organized society, which he is called upon, as its representative, to discharge. But justice is necessarily an individual thing, a question of natural equity under a constantly varying set of circumstances. To be even approximately perfect, the subjective, the mental, the moral elements of a particular set of facts must be regarded. In a primitive state of society, the judge might well seek to exercise so broad and untrammelled a power as the administration of justice unalloyed and in its simplest form.

*But at once into this unfettered exercise* of administrative power a new and constraining element is found to enter. Society is not only interested in the doing of abstract individual justice. It is also essential to the objects which it has in view that rights and duties should be certain that things once done in a given way should continue to be done in that way.<sup>1</sup> The taking of judicial action in a particular way creates, to a certain extent, a right on the part of the litigant and a corresponding obligation on the judge to do the same thing in a similar case. Thus arises a rule, a law. Substantive or procedural is of no consequence. So far as it is a *rule*, it hampers the freedom of the future administration of justice. The law is a fetter on judicial liberty of action. In

1. "Law is a gradual growth from small beginnings. The development of a legal system consists in the progressive substitution of rigid pre-established principles for individual judgment, and to a very large extent these principles grow up spontaneously within the tribunals themselves. That great aggregate of rules which constitutes a developed legal system is not a condition precedent of the administration of justice, but a product of it. Gradually from various sources—precedent, custom, statute—there is collected a body of fixed

principles which the Courts apply to the exclusion of their private judgment. The question at issue in the administration of justice more and more ceases to be, 'What is the right and justice of this case?' and more and more assumes the alternative form, 'What is the general principle already established and accepted as applicable to such a case as this?' Justice becomes increasingly justice according to law, and courts of justice become increasingly courts of law." Salmond, *Jurisp.* (2d ed.) § 7.



many cases, it is more important, as in the case of the law of the road, that there should be some rule on the subject, than that there should be any particular regulation. Nor is this all. The social advantages of the constraint of justice imposed by law extend beyond the benefits gained by having the rules for the conduct of the citizen certain and settled. The influence of inferior motives on the part of judges is greatly minimized. It is important, especially where political considerations enter into the election or appointment of the judiciary, that gratitude for favors rendered to the incumbent of the office should not be exhibited in the convenient form of judicial favors accorded to the benefactor or his clients. So long as the system of complicating the administration of justice by the payment of political debts still obtains, the existence of a general legal uniformity, the interruption of which would at once attract attention to any gross abuse of judicial power, is not without its social value. Finally, the law itself is educative upon its administrators. It is important to remember that, in a sense, "everyone knows more than anyone." The limited mental vision and obstinately held technical viewpoint of a particular judge may, with advantage, be supplemented, at times, by a collective wisdom of the enactment of society in the form of law. "The principles of justice are not always clearly legible by the light of nature. The problems offered for judicial solution are often dark and difficult, and there is great need of guidance from that experience and wisdom of the world at large, of which the law is the record. The law is not always wise, but on the whole and in the long run it is wiser than those who administer it. It expresses the will and reason of the body politic, and claims by that title to overrule the will and reason of judges and magistrates, no less than those of private men."<sup>2</sup>

*For this uniformity*, created by its legal rules, society, however, is forced to pay a heavy price in terms of justice.<sup>3</sup> This is inevitable; but it should be recognized. As the objective and subjective conditions of no two cases are, it may be anticipated, precisely similar, applying a rule from a case to which it was perhaps

2. Salmond, *Jurisp.* (2d ed.) § 9.

3. "However carefully and cunningly a legal rule may be framed, there will in all probability be some special instances in which it will work hardship and injustice, and prove a source of error instead of a guide to

truth. So infinitely various are the affairs of men, that it is impossible to lay down general principles which will be true and just in every case. If we are to have general rules at all, we must be content to pay this price." Salmond, *Jurisp.* (2d ed.) § 10.

ideally accurate to another case can only be done by the disregard of certain of the attendant features of the actual situation in the latter case. The more general the rule, the more rigidly it is enforced, the greater must be the number, variety and importance of the elements present in the situation before him which the judge is forced to disregard. "A general principle of law is the product of a process of abstraction. It results from the elimination and disregard of the less material circumstances in the particular cases falling within its scope, and the concentration of attention upon the more essential elements which these cases have in common. We cannot be sure that in applying a rule so obtained, the elements so disregarded may not be material in the particular instance; and if they are so, and we make no allowance for them, the result is error and injustice."<sup>4</sup>

A further price is paid in terms of popular respect. Truth is usually in advance of public opinion; public opinion is, as a rule, in advance of the law. The standards of what is just and even of what is socially expedient are not only in a state of constant flux but in one of incessant sublimation. Those held by any particular epoch are, as a rule, mentally and morally in advance of those used by that which has preceded it. The law, in proportion as it presents the advantage of fixity and uniformity, tends *pari passu* to exhibit the evils of undue conservatism. Law almost necessarily lingers behind the ethical standards of the age in which it is being applied. It proclaims the views of a previous age. "In the absence of law, the administration of justice would automatically adapt itself to the circumstances and opinions of the time; but fettered by rules of law, courts of justice do the bidding, not of the present, but of the times past in which those rules were fashioned."<sup>5</sup> The natural relief is through legislation. It would, however, be of great practical assistance were the rigidity of law so far relaxed that substantive or procedural law could be made by the judges themselves, as it were, automatically to open so as to include the new legal principles required by changes in social conditions. In other words, it would be of great social advantage if the nervous dread of appearing to legislate which has forced judges to cloak their real action under the misleading and confusing phraseology of evidence<sup>6</sup> should be replaced by a more care-

4. Salmond Jurisp. (2d ed.) § 10.

6. *Infra*, § 267.

5. Salmond, Jurisp. (2d ed.) § 10.

ful consideration as to how such legislation might best be done. No set of persons could so well harmonize the new with the old. "If the law is to be a living organism, and not a mere petrification, it is necessary to adopt and to use with vigilance some effective instrument of legal development, and the quality of any legal system will depend on the efficiency of the means so taken to secure it against a fatal conservatism."<sup>7</sup>

A *more disguised* but still very substantial price is paid by society in the prevalence, in the body of law, of the trivial, the false and the formal, the untrue estimate of real values which is not only in practice detrimental to the cause of justice, but powerfully operates to impair the instinct for justice itself which is the very crown of the judicial office. Formalism dies hard; it is kept alive by technicality of which the essential element is the rigidity of legal requirement. "By this is meant the tendency to attribute undue importance to form as opposed to substance, and to exalt the immaterial to the level of the material."<sup>8</sup> "Whenever the importance of a thing in law is greater than its importance in fact, we have a legal formalism. The formalism of ancient law is too notorious to require illustration, but we are scarcely yet in a position to boast ourselves as above reproach in this matter. Much legal reform is requisite if the maxim *de minimis non curat lex* is to be accounted anything but irony."<sup>9</sup> The feeling that there must be a rule for every judicial act from the greatest to the least, insistence that a certain thing should be done for no better reason than that it has been done before, claiming, as of right, immaterial advantages, for example, the reception of evidence which can have no substantial effect, or should have none, tends in a marked degree to the atrophy of mental and moral powers in the judge and practitioners alike and leads to the discredit of law, the success of fraud, the impunity of crime and all the evils of a successful defiance of the will of society. It creates a machine of rigid precision of action and substitutes it for the true system of legal administration, which, in order to be just, must be *flexible*. It is blind to the leading of reason; and fosters in this mass of trivial details, a breeding-place for technicality and consequent chicane and delay.

*This minute regulation* by rule of law costs society not only in terms of justice, respect for law and speedy dispatch of public

7. Salmond, Jurisp. (2d ed.) § 10.

9. Salmond, Jurisp. (2d ed.) § 10.

8. Salmond, Jurisp. (2d ed.) § 10.

business. It exacts a heavy equivalent in terms of simplicity or intelligibility. This is particularly true and especially disastrous in connection with procedural law. A system of jurisprudence so characterized is necessarily *complex*. A complex civilization can scarcely avoid an intricate system of substantive law. But it need have no complicated system of procedure. Unless the strain is to grow too great for the machinery of administering justice according to law, the growing complexity of the substantive law must be met *pari passu* by a simplification of the administration. So far at least as the law of evidence is concerned, this situation is easily remediable and entirely unnecessary. As Salmond emphatically, but none too strongly puts it:<sup>10</sup> "The gigantic bulk and bewildering difficulties of our own labyrinthine system are far beyond anything that is called for by the necessities of the case." In connection with the law of evidence, the nerve of the octopus can readily be cut. It is the theory that judicial administration must be regulated by rigid rules. This, in turn, carries with it the corollary that each ruling as to the admissibility of evidence, whether it relates to substantive law, procedural law, logical or legal relevancy or pure administration, is appealable. Our reports, digests and encyclopedias are bursting with rulings on what should never have been removed from beyond the arbitrium of the judge presiding at the trial. At a point varying with the subject-matter the advantages of having a fixed and definite legal rule as to it are offset and neutralized by the counterclaims of judicial discretion. In such a balancing between fetter and freedom, further relief for the law of evidence lies in the direction of administration.

**§ 173. (*Functions of the Judicial Office*); Apply Practice.—**

The presiding justice is charged not only with the function of enforcing the rules of law and promoting justice; he has also the duty and function of announcing and applying to matters before him the judicial practice, local or general, which prevails in the jurisdiction of his forum. In connection with the field of "Evidence," "Practice" may be defined as that portion of the field of administration which is covered by a custom or usage. It is not a rule of law to bind the action of the court, or cause the reversal of that action in an appellate court. The judge may go contrary to

10. Jurisp. (2d ed.) § 10.

it, and still act with reason; and so, conclusively on the parties. The existence of a practice, it may be observed, is not, however, without a certain effect. In determining in any given case whether the administrative action of the court is reasonable, the fact that a custom or practice founded upon sound considerations, and requiring different action on his part, was known to the judge may well be considered. The rule of practice, indeed, is not controlling; it is not a rule of law. The usage or rather the reasoning on which it is based is simply one of the considerations to be weighed in determining the reasonableness of the judge's action. Instances of the influence of practice upon matters of administration are frequent and easy of recognition. The *right* of a party, for example, to cross-examine his opponent's witnesses, is a matter of procedural law. The *scope* of such an examination at any particular stage of the trial is largely a matter of administration, controlled and conditioned by the fact that reason must be exercised. The order in which the examination of the adversary's witnesses shall be conducted is controlled, unless the judge actively intervenes, by a custom. In certain jurisdictions the cross-examination extends only to those topics which may fairly be said to have been touched upon by the direct examination of the witness. If the cross-examining counsel desires to prove other facts, he must himself call the adverse witness as his own.<sup>1</sup> This is properly a rule of practice. Its existence, however, would not, under normal circumstances, prevent the court, either *sua sponte* or on request of counsel, from allowing a cross-examining counsel, for good cause shown, to cross-examine a particular witness, or set of witnesses, as to the entire case, or any relevant fact.<sup>2</sup> Should it be claimed that the judge's action was unreasonable, the existence of the practice and any inferences which may arise from the fact as to surprise to the party complaining may receive the attention of an appellate court.

A *rule of court* is improperly spoken of as a rule of *practice*. When passed under authority of law a rule of court is one of procedural law.

#### § 174. (*Functions of the Judicial Office*); Administrative.

—"The judicial office is really one of administration."<sup>1</sup> So far as

1. See, in general, 15 L. R. A. 669  
*et seq.*

2. See, in general, 57 L. R. A. 875  
*et seq.*

1. Thayer, Prelim. Treat., p. 274.

it ceases to be administrative, it ceases to be judicial. It has been noted that, for practical purposes, but slight importance, so far as the law of evidence is concerned, attaches to the difference between the duty or function of the court to enforce substantive and that to apply adjective or procedural law.<sup>2</sup> So far as the action of the presiding judge is concerned in handling questions of evidence, it is of little concern, if he is to be controlled and absolutely guided in his action, whether the rule which brings this about is one of substantive law or procedural. The real distinction is between judicial action controlled by rule and action not so controlled.<sup>3</sup> Sharply to be distinguished from the judge's function to enforce rules, is his duty to administer them. Undoubtedly the supreme function of the judicial office is precisely that of administration. The function of enforcing law is governed by rules; the function of administration is guided and governed by the fundamental nature of the judicial office itself. In other words, administration is that portion of procedure which is not governed by a rule of law. Administration is, as it were, the function of functions, determining in each particular case as it arises how the other powers and duties of the judicial office shall be so performed as best to fulfil the social mandate with which the judiciary is charged. Wherever the question is one of degree, of more or less, as to which of conflicting considerations should receive force and extension, where the situation requires determination as to which of two rules or principles of substantive or procedural law should be, under the special facts of the case, given power and influence, a question of administration is presented. Administration is the atmosphere of a trial. It is the implied term which alone makes much of our law intelligible. Only as its broad and general rules are moulded and specialized by administration is it practically possible that justice should be accomplished under it.<sup>4</sup>

2. *Supra*, § 171.

3. "It must not escape us that a law about 'Actions in general' involves the exercise by our judges of wide discretionary powers. If the rules of procedure take now-a-days a far more general shape than that which they took in the past centuries, this is because we have been persuaded that no rules of procedure can be special enough to do good justice in all

particular cases." Pollock and Maitland, *History of English Law*, vol. II, p. 560.

4. "It is just because we know that such rules as these, particular though they may be, are not particular enough, that we have recourse to an exceedingly general rule, tempered by judicial discretion." Pollock and Maitland, *History of English Law*, vol. II, p. 561.

**§ 175. (Functions of the Judicial Office; Administrative);**

**Field of Administration.**—The general field of administration and the force and effect which shall be wisely accorded it, as contrasted with law, procedural or substantive, is determined in any particular connection by the inherent nature of administration itself. In proportion as the circumstances are fixed and few over which a series of judicial decisions is to pass, is it desirable that a definite rule of law should be prescribed. Indeed, it is only under these circumstances that a satisfactory rule can be formulated and continually applied. Conversely, the larger the number and the greater the variety and importance of the distinguishing circumstances which are likely to arise in making different applications of any definite rule, the less is the social value of having one. An infinite series of minute details, a nice adjustment of a principle to a number of conflicting phenomena requiring the constant exercise of judgment, the choice and selection of means to an end, cannot well be made the subject of a rule of law. This is the distinctive field of administration. In other words, in proportion to the number and variety of the facts which arise for determination, is it desirable that the element of administration should predominate in judicial procedure over that of fixed regulation. In all branches of procedure, therefore, is a large element of procedural law, established rule for doing things; and also an element of administration, power of doing things unbound by rules, as part of the doing of justice, the primary social and legal mandate laid on the court. The procedural codes adopted by many of the American states with their minuteness of specific regulation almost, at times, microscopic, have had the effect of reducing this element of administration in all branches of procedure, to a practically irreducible minimum. In no connection is this phenomenon more striking than in relation to the law of evidence.<sup>1</sup> It would be quite possible and equally true to have paraphrased

1. "No unprejudiced observer can be blind to the excessive credit and importance attached in judicial procedure to the *minutiæ* of the law of evidence. This is one of the last refuges of legal formalism. Nowhere is the contrast more striking between the law's confidence in itself and its distrust of the judicial intelligence. The fault is to be remedied not by the abo-

lition of all rules for the measurement of evidential value, but by their reduction from the position of rigid and peremptory to that of flexible and conditional rules. Most of them have their source in good sense and practical experience, and they are profitable for the guidance of individual discretion, though mischievous as substitutes for it." Salmond, *Jurisp.* (2d ed.), p. 458.

the statement of Maine that substantive law was concealed, as it were, in the interstices of ancient procedure by saying that in modern American jurisprudence, judicial administration is concealed, as it were, in the interstices of positive law, substantive or procedural. But in the nature of things judges cannot well be made *automata*. Nor is it desirable that they should be; for the formalism which trusts to the *machinery* of the legal procedure, rather than to the intellectual appetency for truth is merely the survival of ancient forms for which all justification has long passed.<sup>2</sup> Even under these untoward circumstances, a necessary element of administration remains in any branch of law which is fairly entitled to rank as procedural.<sup>3</sup>

**§ 176. (Functions of the Judicial Office; Administrative); Reason Characteristic of Administration.**—The characteristic feature of that portion of procedure which we shall term administration, is its constant employment of reason and judgment rather than the imposition of a command to do things in a particular way.<sup>1</sup> The test and guide of sound administration is the exercise of the reasoning faculty.<sup>2</sup> In proportion as this element of reasoning enters into the determination of a situation arising in any branch of procedure, the function of the court involved is administrative.

2. "We must learn to think less highly of the wisdom of the law, and less meanly of the understanding and honour of its administrators, and we may anticipate with confidence that in this department at least of judicial practice the change will be in the interests of truth and justice." Salmond, *Jurisp.* (2d ed.), p. 458.

3. "The degree in which the free discretion of a judge in doing right is excluded by predetermined rules of law, is capable of indefinite increase or diminution. The total exclusion of judicial discretion by legal principle is impossible in any system. However great is the encroachment of the law, there must remain some residuum of justice which is not according to law — some activities in respect of which the administration of justice cannot be defined or regarded as the enforce-

ment of the law. Salmond, *Jurisp.* (2d ed.) § 7.

1. It follows that as a rule, the proper test of reversal in an appellate court is as to whether reason has been exercised. "Whatever the law may have been before the Judicature Acts," said Jessel, M. R., "the exercise of discretion is now the subject of appeal. It has been very truly said that a very strong case must be made out before the exercise of discretion can be overruled. The Court of Appeal must be satisfied that it has been wrongly exercised." *Reg. v. Mayor of Maidenhead*, 9 Q. B. D. 494, 503; 51 L. J. Q. B. 448 (1882). See also, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056 (1905).

2. *Supra*, § 63.



**§ 177. (*Functions of the Judicial Office; Administrative*); "Discretion."**— It is commonly said that matters of procedure in which there is no definite rule are those of "judicial discretion." No especial objection exists to the use of the phrase other than that it appears misleading by a suggestion of arbitrary and irresponsible action on the part of the presiding judge. This by no means, in fact, exists. As Lord Mansfield says:<sup>1</sup> "Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague and fanciful, but legal and regular." In reality the judge, as may more fully appear hereafter,<sup>2</sup> is controlled at every turn in the exercise of his administrative powers by the influence of the higher social considerations which have conferred upon him his general mandate for the doing of justice and the enforcement of fair dealing either between party and party or between individuals and the State. That from which he is relieved in connection with his administrative power is not all restraint. He is simply freed from a rule with the force of law — the limiting control of the views which the legislature or the judiciary of the forum for the time being takes of certain broad and general grounds of public policy, which it has sought to reach by the enactment of a rule of law, substantive or procedural. Administration relates to the attainment of individual justice. Law, a rule of any kind binding on the judge, is an attempted enforcement of some thought of general public policy. A trial at law is for the attainment of a conventionalized form of justice. Law, whether substantive or procedural, is part of the convention. The exercise of administrative powers is not.<sup>3</sup> It is a general limitation upon the exercise of administrative powers that, to be sustained on appeal, it must be reasonable.

*This influence of a constant restraint exacting compliance with certain established standards, even while exercising the freer activities of administration, is characteristic of what is called*

1. *R. v. Wilkes*, 4 Burr. 2527, 2539 (1770).

2. *Infra*, §§ 332 *et seq.*

3. **Discretion defined.**— As applied to the administrative functions of the Court discretion is used in this treatise as indicating an exercise of judicial administrative power which is final in that it violates no funda-

mental right of the party. It is not so used as to cover the mere exercise of good judgment or sound intelligence, the act of a discreet person. Under this definition, ordering that the witnesses in a trial be separated would be an act of discretion. A preliminary finding that a witness is qualified would not be.

"judicial discretion." Of discretion in the sense of purely arbitrary power to deal with the rights of litigants it may be truly said that no such right exists in the English law of evidence.<sup>4</sup>

4. *California*.—*People v. Farrell*, 31 Cal. 584 (1867).

*Georgia*.—*Miller v. Wallace*, 76 Ga. 479, 484, 2 Am. St. Rep. 48 (1886).

*Missouri*.—*Cabanne v. Macadaras*, 91 Mo. App. 70 (1901); *State ex rel. Adamson v. Lafayette County Court*, 41 Mo. 221, 222 (1867).

*Montana*.—*Haupt v. Independent Tel. Messenger Co.*, 25 Mont. 122, 63 Pac. 1033 (1900).

*New Jersey*.—*Sea Isle City Imp. Co. v. Assessors of Taxes of Borough of Sea Isle City*, 61 N. J. Law 476, 39 Atl. 1063, 1064 (1898).

*New York*.—*Platt v. Munroe*, 34 Barb. 291, 292 (1861); *People v. Superior Court of City of New York*, 5 Wend. 114, 126 (1830).

*North Carolina*.—*Lovinier v. Pearce*, 70 N. C. 167, 171 (1874); *State v. Caudler*, 3 Hawks 398 (1824).

*South Carolina*.—*Ex parte Mackey*, 15 S. C. 322, 328 (1880).

*Virginia*.—*Harris v. Harris*, 31 Grat. 13, 16 (1878).

*Washington*.—*Sharp v. Greene*, 22 Wash. 677, 62 Pac. 147, 150 (1900).

*Wisconsin*.—*State v. Cunningham*, 83 Wis. 90, 53 N. W. 35, 53, 17 L. R. A. 145, 35 Am. St. Rep. 27 (1892).

*United States*.—*Osborn v. U. S. Bank*, 22 U. S. 738, 866, 6 L. ed. 204 (1824).

*England*.—*Rex v. Wilkes*, 4 Burrows 2527, 2539 (1770).

Discretion in equity is, normally, quite a different matter from the exercise of administrative powers at common law. The jurisdiction of equity was a prerogative one; many of its remedies were not obtainable as of right. Much, in most cases, depended on the extent to which certain facts affected the mind and conscience of a particular judge. The

substantive law relating to equity procedure made the discretionary action of a trial judge reviewable in an appellate chancery tribunal. Absence of the jury, enabling the appellate court in equity to enter the final order which the trial judge should have made, removes the hardship and delay of justice which attend the attempt, undertaken in several jurisdictions, to establish the same rule at law. It follows that judicial discretion, in equity cases, is not arbitrary or capricious dependent upon the mere pleasure of the judge but is a "sound and reasonable discretion which governs itself, as far as it may, by general rules and principles." *Patten v. Stewart*, 24 Ind. 332 (1865) (recession); *Rochester & K. F. Land Co. v. Roe*, 40 N. Y. S. 799, 8 App. Div. 360, 75 N. Y. St. Rep. 179 (1896) (specific performance); *Wheeling & E. G. R. Co. v. Town of Triadelphia*, 58 W. Va. 487, 52 S. E. 495, 4 L. R. A. (N. S.) 321 (1905) (relief from forfeiture); *Jarrett v. Jarrett*, 11 W. Va. 584 (1877) (direct an issue at law); *Abbott v. L'Hommedieu*, 10 W. Va. 677 (1877). See also *In re Huntingdon County Line*, 8 Pa. Super. Ct. 380 (1898) (certiorari); *Rose v. Brown*, 11 W. Va. 122, 123 (1877). Of the soundness of the principles upon which the chancellor has guided his action the appellate court may properly judge. *Stannard v. Graves*, 2 Call. (Va.) 369 (1800). Where, for example, it clearly appears that one applying for an injunction is not entitled to it, the granting of one is deemed error. No discretion authorizes its issuance under these circumstances. *Shilling v. Reagan*, 19 Mont. 508, 48 Pac. 1109, 1110 (1897). In equity, as at law, the burden of showing abuse of dis-

Few things could be more objectionable to sound judicial administration than for the presiding judge to attempt to carry out his personal desires rather than the will of the law.

cretion is on the objecting party. *Holt v. Hillman-Sutherland Co.*, 56 Fla. 801, 47 So. 934 (1909); *Holt v. De Loach-Edwards Co.*, 56 Fla. 902, 48 So. 1039 (1908); *Siegel v. Donovan*, 155 Mich. 459, 15 Detroit Leg. N. 1035, 119 N. W. 645 (1909); *Heinze v. Boston & M. Consol. Copper & Silver Min. Co.*, 20 Mont. 528, 52 Pac. 273 (1898); *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 20 Mont. 528, 52 Pac. 273 (1898); *State v. City of Huron*, (S. D. 1909) 120 N. W. 1008. The manifest tendency, moreover, of appellate courts in equity is not to disturb the action of the trial judge in the absence of this affirmative proof of an unreasonable exercise of discretion.

*Alabama*.—*Sullivan Timber Co. v. Black*, 48 So. 870 (1909).

*California*.—*Miller & Lux v. Madera Canal, etc., Co.*, 155 Cal. 59, 99 Pac. 502 (1909).

*Georgia*.—*City of St. Marys v. Sweat*, 132 Ga. 344, 63 S. E. 1121 (1909).

*Massachusetts*.—*Weiss v. Haight & Freese Co.*, 165 Fed. 432, 91 C. C. A. 382 (1908).

*Michigan*.—*Grand Rapids Electric Ry. Co. v. Calhoun Circuit Judge*, 16 Detroit Leg. N. 123, 120 N. W. 1004 (1909).

*South Carolina*.—*Lawrence v. Lawrence*, 82 S. C. 150, 63 S. E. 690 (1909).

"Discretion, as applied to public functionaries, means the power or right of acting officially according to what appears just and proper under the circumstances." *Rio Grande County Com'rs v. Lewis*, 28 Colo. 378, 65 Pac. 51 (1900) [*citing Murray v. Buell*, 74 Wis. 14, 18, 41 N. W. 1010 (1889)]. The rule is the same in connection with the acts of in-

ferior magistrates and of all others exercising *quasi-judicial powers*. *Taylor v. Robertson*, 16 Utah 330, 52 Pac. 1, 3 (1898).

In itself considered, discretion has been defined, in case of public functionaries, as "a power or right conferred upon them by law of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others." *Farrelly v. Cole*, 60 Kan. 356, 56 Pac. 492, 497, 44 L. R. A. 464 (1899) [*citing Judges of Oneida Common Pleas v. People*, 18 Wend. 79 (1831)]. See also *State v. Hultz*, 106 Mo. 41, 16 S. W. 940, 942 (1891). As applied, more generally, to specific acts of conduct, "the term *discretion* implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of *discretion*, and yet discretion should not be a word for arbitrary will or inconsiderate action. 'Discretion means a decision of what is just and proper in the circumstances.' *Bouvier's Law Dict.* 'Discretion means the liberty or power of acting without other control than one's own judgment.'" *Webster's Dict.* *The Styria v. Munroe*, 186 U. S. 1, 9, 22 Sup. Ct. 731, 734, 46 L. ed. 1027 (1901). See also *Schlaudecker v. Marshall*, 72 Pa. 200, 206 (1872) [*citing Tomlin's Law Dict.*] In case of a document, unless modified by the context, "discretion" means a *legal* one, that is, a discretion to be exercised within the limits which the law fixes in such cases. *Norton v. Kearney*, 10 Wis. 443, 450 (1860) (contract); *Holcomb v. Holcomb's Ex'rs*, 11 N. J. Eq. 281, 290 (1857) (will creating trust). The same general rule of construction obtains in case of a

*Sic volo, sic jubeo; stet pro ratione voluntas* has no proper place in the administration of justice of any English-speaking jurisdiction. Legal reasoning is everything in sound administration; judicial caprice or obstinacy, nothing.<sup>5</sup>

*Action of appellate courts as to matters of discretion.* While it has seemed most convenient to consider the action of appellate courts in relation to matters of administration by the trial judge in connection with the separate topics as they present themselves in the course of the treatise a general statement on the subject at this point may not be inappropriate. It may fairly be observed that the action of many appellate courts in this respect is such as not only to add enormously to their own labors, but also to create a serious congestion of judicial business through repeated new trials and a consequent practical denial of justice. In matters properly of administration or discretion reversal should properly occur only where error in law has been committed. Such an error may be, and most frequently is, caused by a failure of the trial judge to

statute conferring a "discretion" upon municipal officers. *Perry v. Salt Lake City Council*, 7 Utah 143, 25 Pac. 998, 1000, 11 L. R. A. 446 (1891).

5. "And whilst this court is always loath to interfere with discretionary rulings of trial courts, nevertheless such rulings are not conclusive upon this court, and where they are interfered with it is because the ultimate responsibility for every judgment rests upon the court of final resort to which the case is taken, and therefore that court is in duty bound to approve or reject all rulings of lower courts even when made in the exercise of a judicial discretion." *Feurt v. Caster*, 174 Mo. 289, 299, 73 S. W. 576 (1903), per Marshall, J. See also *Merrill v. Sullivan*, 3 Mo. App. 589 (1887), memorandum. "The most odious and dangerous of all laws would be those depending on the discretion of judges. Lord Camden, one of the greatest and purest of English judges, said, 'that the discretion of a judge is the law of tyrants; it is always unknown; it is different in different

men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature can be liable.'" *State v. Cummings*, 36 Mo. 263, 278. Judicial discretion should not be, as Lord Coke pronounced it, "a crooked cord," but rather, as Lord Mansfield defined it, "exercising the best of their judgment upon the occasion that calls for it." *Norris v. Clinkscale*, 47 S. C. 488, 25 S. E. 797, 801 (1896). "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." *Osborn v. The Bank of the United States*, 9 Wheat. 738, 866 (1824).

exercise reason<sup>6</sup> as the law requires.<sup>7</sup> Any other error in law may legally warrant a reversal. A still sounder view would justify such a course only when not only error in law has been established, but it also appears that the complaining party has, without his own fault, been substantially prejudiced.<sup>8</sup>

*Abuse of discretion*, it would thus appear, is its unreasonable<sup>9</sup> or otherwise illegal,<sup>10</sup> use. This is commonly spoken of as

**6. Rules of practice.**—In determining what is a reasonable exercise of discretion in any particular case, the existence of a rule of practice or custom may well receive consideration, by an appellate court. Such a fact does not control judicial administration. A rule of practice is not one of *procedure*. A well established custom or rule of practice is, however, a fact, among others, to be weighed in determining whether the judge's action has been rational. "Whenever a clear and well-defined rule has been adopted, not depending upon circumstances, the court has parted with its discretion as a rule of judgment. Discretion may be, and is, to a very great extent, regulated by usage or by principles, which courts have learned by experience will, when applied to the great majority of cases, best promote the ends of justice, but it is still left to the courts to determine whether a case is exactly like in every color, circumstance and feature to those upon which the usage or principle is founded, or in which it has been applied." *State v. Hultz*, 106 Mo. 41, 51, 16 S. W. 940, 942 (1891).

**7. *Infra*, §§ 385 et seq.**

**8. *California*.**—*Casey v. Richards*, (App. 1909) 101 Pac. 36.

***Illinois*.**—*Peebles v. O'Gara Coal Co.*, 239 Ill. 370, 88 N. E. 166 (1909).

***Iowa*.**—*Carr v. Way*, 119 N. W. 700 (1909); *Bartlett & Kling v. Illinois Surety Co.*, 119 N. W. 729 (1909).

***Kentucky*.**—*McClymond's Assignee*

*v. Gay*, 1 Ky. L. Rep. (abstract) 425 (1880) (matters of practise).

***Michigan*.**—*Davis v. Bush*, 28 Mich. 432 (1874).

***New York*.**—*Richard v. National Distilling Co.*, 95 N. Y. S. 547 (1905); *In re Cutting*, 63 N. Y. Suppl. 246, 49 App. Div. 388 (1900).

***Utah*.**—*United States Smelting Co. v. Parry*, 166 Fed. 407, 92 C. C. A. 159 (1909).

***Washington*.**—*Spencer v. Alki Point Transp. Co.*, 101 Pac. 509 (1909).

**9. *McBride v. McBride***, (Iowa 1909) 120 N. W. 709; *Freasier v. Harrison*, (Mo. App. 1909) 118 S. W. 108.

**10. *Connecticut*.**—*McKone v. Schott*, 82 Conn. 70, 72 Atl. 570 (1909).

***Florida*.**—*Atlantic Coast Line R. Co. v. Dees*, 56 Fla. 127, 48 So. 28 (1908).

***Missouri*.**—*Crawford v. Kansas City Stockyards Co.*, (Mo. 1908) 114 S. W. 1057 (demurrer to evidence).

***South Carolina*.**—*Norris v. Clink-scales*, 47 S. C. 488, 25 S. E. 797 (1896).

***Texas*.**—*Southern Telegraph, etc., Co. v. Evans*, (Civ. App. 1909) 116 S. W. 418.

***Wisconsin*.**—*Oconto Brewing Co. v. Cayouette*, 138 Wis. 664, 120 N. W. 497 (1909).

**The existence of discretion.** Whether a ruling is with regard to a matter of substantive or procedural law, or is, on the other hand, one within the administrative power, the discretion of the court, presents a question of law. *Gottschalk v. Mercantile Trust*

“abuse” of discretion, it being said that the action of the trial judge on a matter within his discretion will not be reversed except in the event of its abuse;<sup>11</sup> — a phrase which does not seem

& Deposit Co., 102 Md. 521, 62 Atl. 810 (1906). In the same way, where a court declines to act on a motion on the ground that it has no discretion to do as requested, the action may be reversed if, as a matter of law, such a discretion exists. *Martin v. Bank of Fayetteville*, 131 N. C. 121, 42 S. E. 558 (1902); *Hernan v. American Bridge Co.*, (Ohio 1909) 167 Fed. 930; *Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321 (1897) [reversing judgment, *Spiro v. Felton*, (C. C. A. 1896) 73 Fed. 91]. Where, however, the trial court in overruling a motion for a new trial, stated that he would not have found the verdict, and that he had power to set it aside; but would not do so, because the jury took a different view of the evidence, the refusal to grant a new trial was not error on the ground that the court erroneously believed he had no power to set aside the verdict. *Wright v. Charleston & W. C. Ry. Co.*, 59 S. C. 268, 37 S. E. 832 (1901).

11. *Alabama*.—*Kelly & Middleton v. Horsley*, 147 Ala. 508, 41 So. 902 (1906) (discharge of an attorney).

*California*.—*Lent v. Tilson*, 72 Cal. 404, 14 Pac. 71, 77 (1887).

*Colorado*.—*Kirkwood v. School Dist. No. 7, etc.*, 101 Pac. 343 (1909); *Woods v. Chellew*, 15 Colo. App. 368, 62 Pac. 230 (1900).

*Florida*.—*Wilson v. Jernigan*, 57 Fla. 277, 49 So. 44 (1909); *Atlantic Coast Line R. Co. v. Dees*, 56 Fla. 127, 48 So. 28 (1908).

*Georgia*.—*Leverett v. Tift*, 6 Ga. App. 90, 64 S. E. 317 (1909).

*Idaho*.—*Rankin v. Caldwell*, 15 Idaho 625, 99 Pac. 108 (1908); *Pease v. Kootenai County*, 7 Idaho 731, 65 Pac. 432 (1901).

*Indiana*.—*Scott v. City of La Porte*, 68 N. E. 278, 281 (1903);

*Mead v. Burk*, 156 Ind. 577, 60 N. E. 338 (1901); *Toledo, St. L. & K. C. R. Co. v. Reeves*, 8 Ind. App. 667, 35 N. E. 199 (1894).

*Iowa*.—*State Security Bank v. Burns*, 120 N. W. 626 (1909).

*Kansas*.—*Hackett v. Turner*, 19 Kan. 527 (1878) (amendments; continuances; costs).

*Kentucky*.—*Crane v. T. J. Congleton & Bro.*, 116 S. W. 341 (1909); *McKinney v. Com.*, 24 Ky. (1 J. J. Marsh.) 319 (1829).

*Louisiana*.—*Fell v. McIlhenny*, 123 La. 364, 48 So. 991 (1909).

*Maine*.—*Goodwin v. Prime*, 92 Me. 355, 42 Atl. 785, 787 (1898) [citing *State v. Wood*, 23 N. J. Law 560 (1850)].

*Massachusetts*.—*Darrow v. Brauman*, 201 Mass. 469, 88 N. E. 5 (1909).

*Missouri*.—*Tarr v. Crump*, 136 Mo. App. 464, 118 S. W. 488 (1909); *Cohn v. Metropolitan St. Ry. Co.*, 182 Mo. 577, 81 S. W. 846 (1904); *Orscheln v. Scott*, 79 Mo. App. 534 (1899).

*Nebraska*.—*Butler v. Secrist*, 84 Neb. 85, 120 N. W. 1109 (1909); *Hinton v. Atchison & N. R. Co.*, 83 Neb. 835, 120 N. W. 431 (1909).

*New York*.—*Loewenthal v. Globe & Rutgers Ins. Co.*, 116 N. Y. Suppl. 454 (1909); *In re Cutting*, 63 N. Y. Suppl. 246, 49 App. Div. 388 (1900); *Bailey v. Stewart*, 2 Redf. Sur. 212 (1876).

*North Carolina*.—*Clark v. Saco-Pettee Mach. Co.*, 150 N. C. 372, 64 S. E. 178 (1909).

*Oklahoma*.—*Kuchler v. Weaver*, 100 Pac. 915 (1909).

*Oregon*.—*Thompson v. Connell*, 31 Or. 231, 65 Am. St. Rep. 818, 48 Pac. 467 (1897).

*Pennsylvania*.—*Philadelphia Lying-in Charity v. Maternity Hospital*, 29

essentially modified in meaning by the addition of adjectives such as "gross,"<sup>12</sup> "wanton" or the like.<sup>13</sup>

*Pa. Super. Ct.* 420 (1905); *Zugsmith v. H. M. Rosenblatt & Co.*, 15 *Pa. Super. Ct.* 296 (1900).

*South Carolina.*—*Tindal v. Sublett*, 82 S. C. 199, 63 S. E. 960 (1909); *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797 (1896).

*Texas.*—*McCormick v. Jester*, (Civ. App. 1909) 115 S. W. 278.

*Utah.*—*Aaron v. Holmes*, 99 *Pac.* 450 (1909); *Benson v. Oregon, etc., R. Co.*, 99 *Pac.* 1072 (1909); *Funk v. Anderson*, 22 *Utah* 238, 61 *Pac.* 1006 (1900).

*Washington.*—*Gerber v. Gerber*, 52 *Wash.* 253, 100 *Pac.* 735 (1909); *Simons v. Cissna*, 52 *Wash.* 115, 100 *Pac.* 200 (1909).

*Wisconsin.*—*Ryan v. Oshkosh Gaslight Co.*, 138 *Wis.* 466, 120 N. W. 264 (1909); *Sibley v. Weinberg*, 116 *Wis.* 1, 92 N. W. 427 (1902).

*United States.*—*Lent v. Tillson*, 140 U. S. 316, 11 *Sup. Ct.* 825, 35 L. ed. 419 (1890).

**Executive boards.**—The same rule is applied to the action of executive boards. *Town of Schaghticoke v. Fitchburg R. Co.*, 169 N. Y. 609, 62 N. E. 1101 (1902) [*order affirmed*, 65 N. Y. Suppl. 498, 53 *App. Div.* 16 (1900)] (railroad commissioners); *In re Borough of Moosic*, 12 *Pa. Super. Ct.* 353 (1900) (quarter sessions); *In re Borough of Old Forge*, 12 *Pa. Super. Ct.* 359 (1900) (quarter sessions); *Com. v. Fogelman*, 3 *Pa. Super. Ct.* 566, 40 W. N. C. 17 (1897) (quarter sessions). "Courts will not interfere with the exercise of such discretionary authority unless it has been abused." *Rio Grande County Com'rs v. Lewis*, 28 *Colo.* 378, 65 *Pac.* 51 (1900) [*citing Smith v. Board*, 10 *Colo.* 17 (1887)].

12. *Murphy v. Southern Pac. Co.*, (Nev. 1909) 101 *Pac.* 322.

13. *Arizona.*—*Zeckendorf v. Steinfeld*, 100 *Pac.* 784 (1909) (manifest).

*California.*—*Kenny v. Kennedy*, 9 *Cal. App.* 350, 99 *Pac.* 384 (1908) (clear).

*Connecticut.*—*McKone v. Schott*, 82 *Conn.* 70, 72 *Atl.* 570 (1909) (manifest).

*Georgia.*—*Leathers v. Leathers*, 132 *Ga.* 211, 63 S. E. 1118 (1909) (manifest abuse).

*Idaho.*—*Ranken v. Caldwell*, 15 *Idaho* 625, 99 *Pac.* 108 (1908) (manifest abuse).

*Louisiana.*—*Fell v. McIlhenny*, 123 *La.* 364, 48 *So.* 991 (1909) (manifest abuse).

*Maryland.*—*Consol. Gas, etc., Co. v. State*, 109 *Md.* 186, 72 *Atl.* 651 (1909) (arbitrary).

*Massachusetts.*—*Jenkins v. Weston*, 200 *Mass.* 488, 86 N. E. 955 (1909) (manifestly unfounded).

*Missouri.*—*Kinlen v. Metropolitan St. Ry. Co.*, 216 *Mo.* 145, 115 S. W. 523 (1909) (clear); *Morris v. Missouri Pac. Ry. Co.*, 136 *Mo. App.* 393, 117 S. W. 687 (1909) (clear); *Wehner v. Kansas City Stockyards Co.*, 215 *Mo.* 394, 114 S. W. 1057 (1908) (clear).

*North Dakota.*—*Soules v. Brotherhood of American Yeomen*, 120 N. W. 760 (1909) (manifest).

*Washington.*—*Anderson v. Shields*, 51 *Wash.* 463, 99 *Pac.* 24 (1909) (plainly abused); *Williams v. Bartz*, 52 *Wash.* 153, 100 *Pac.* 186 (1909) (clear).

*Wisconsin.*—*Ellis v. State*, 138 *Wis.* 513, 119 N. W. 1110, 20 L. R. A. (N. S.) 444 (1909) (clearly wrong); *American States Security Co. v. Milwaukee Northern Ry. Co.*, (Wis. 1909) 120 N. W. 844 (manifestly wrong).

*United States.*—*Turner v. American Sec. & Trust Co.*, 213 U. S. 257, 29 *S. Ct.* 420, 53 L. ed. 788 (1909) [*decree affirmed*, 29 *App. D. C.* 460 (1907)] (clearly erroneous).

It may, of course, be said that the

"*All reasonable intendments* must be made in favor of the acts of officials who are under obligations to perform their duties correctly, so long as they appear to be acting in good faith." <sup>14</sup> It has even been suggested that where the police powers<sup>15</sup> have alone been exercised, by the court, the propriety of the trial judge's action will not be revised.<sup>16</sup>

more unreservedly and absolutely a particular subject of the court's action is one of administration the more flagrant must be the unreasonableness of the judge's action in order that the objecting party may secure a reversal. The proper rule in an appellate court, however, continues to be that unreasonable action attended by prejudice is the sole ground for a reversal. But prejudice does not arise in case of a ruling unquestionably discretionary except in cases of obviously perverse and irrational misconduct. In this way alone is the action of the appellate court in dealing with the matter itself made reasonable. What action is reasonable under a given set of circumstances is determined by all the facts of the case. The discretion, in case of a reversal, must have been exercised on grounds or for reasons clearly untenable, or to an extent obviously unreasonable. *Murray v. Buell*, 74 Wis. 14, 41 N. W. 1010, 1012 (1889).

14. *Rio Grande County Com'rs v. Lewis*, 28 Colo. 378, 65 Pac. 51 (1900) [*citing Smith v. Board*, 10 Colo. 17 (1887)].

The fact of abuse must be affirmatively established by the objecting party. *Waldron v. First Nat. Bank*, 60 Neb. 245, 82 N. W. 856 (1900); *Brenzinger v. American Exch. Bank*, 19 Ohio Cir. Ct. R. 536, 10 O. C. D. 775 (1900).

15. *Supra*, § 164.

16. *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797 (1896).

**Imposition of terms.**—The action of a trial court in imposing terms upon the allowance of a motion will, unless affirmatively shown to have

been unreasonable, not be disturbed. *Nicoll v. Weldon*, 130 Cal. 666, 63 Pac. 63 (1900); *Odin Coal Co. v. Denman*, 84 Ill. App. 190 (1899) [judgment affirmed, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45 (1899)]; *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222 (1902) (granting new trial). It follows that failure to impose costs or other terms in such a connection is not reversible error *Everett v. Everett*, 62 N. Y. Suppl. 1042, 48 App. Div. 475 (1900) (allowance of amendment). *Lashaway v. Young*, 78 N. Y. Suppl. 366, 76 App. Div. 177 (1902) (setting aside verdict).

**Rules of court.**—The construction given by the court to its rules will not be disturbed, unless the ruling is obviously wrong and it affirmatively appear that injustice has been done. *Roberts v. Kuhrt*, 119 Ga. 204, 46 S. E. 856 (1904); *Kuh v. Garvin*, 125 Mo. 547, 28 S. W. 847 (1894); *In re Logan & Mould's Assigned Estate*, 213 Pa. 218, 62 Atl. 843 (1906); *Hartley v. Weideman*, 28 Pa. Super. Ct. 50 (1905); *Shannon v. Castner*, 21 Pa. Super. Ct. 294 (1902). For similar reasons, the action of a trial judge in neglecting to enforce the rules of his own court will not be revised, as a rule, in an appellate court. *Dolan v. Stone*, 63 Kan. 450, 65 Pac. 641 (1901). In the same way, on a matter properly regarded as purely discretionary with the trial court, its action, reasonably in accord with a supreme judicial rule, will not be disturbed to satisfy the necessities of a particular case, though the rule itself be so discountenanced as in effect



**§ 178. (*Functions of the Judicial Office; Administrative*);**

**Range of Application.**—Instances of the application of the administrative function of the court to the practical discharge of judicial business are extremely numerous. In fact, this administrative power may fairly be regarded as the executive branch of the judicial department. Any attempt to divide the powers of government into legislative, executive and judicial can be attended at most with but approximate success. Each of the great departments will undoubtedly have as its principal duty the discharge of the functions appropriately classed under its title. But for the adequate discharge of its directly delegated functions, every department has uniformly exercised some portions of power which have in main been conferred upon an associated department. Thus, the legislative branch must, for the proper discharge of its own duties, exercise judicial and executive powers; the executive may find itself obliged to perform judicial or legislative acts. In like manner, the judicial office may properly discharge both legislative and executive duties. In fact, it might almost be said that in the present division of function between the court and jury the jury exercised the judicial functions, while a presiding judge is largely discharging those of a legislative or executive character. Naturally, where a judge, as in equity causes, sits for the decision of issues of fact, he exercises a distinctively judicial power. But when presiding at a jury trial his judicial powers are exercised principally as preliminary to the doing of an executive act, e. g., where a judge decides that a fact is probative as preliminary to admitting it in evidence. In reality, the chief function of a judge is executive in its nature and this constitutes what has been called

to change it. *Whereatt v. Worth*, 108 Wis. 291, 84 N. W. 441, 81 Am. St. Rep. 899 (1900). Where, however, the construction of a rule of court may fairly be regarded as a matter of law, the supreme court may revise the ruling of an inferior tribunal. *Baker v. Blood*, 128 Mass. 545 (1880); *Wigglesworth v. Atkins*, 59 Mass. (5 Cush.) 212 (1849); *Rathbone v. Rathbone*, 21 Mass. (4 Pick.) 89 (1826). It has, very properly, been held that, in any case, substan-

tial prejudice to the complaining party should be shown to warrant a reversal. *Trescott v. Co-operative Bldg. Bank of New York*, 212 Pa. 47, 61 Atl. 478 (1905).

Where delay and expense would attend the reversal of a non-prejudicial error, the court will be especially reluctant to disturb the rulings. *Hoes v. N. Y., N. H. & H. R. Co.*, 77 N. Y. S. 117, 73 App. Div. 363 (1902) [*reversed*, 173 N. Y. 435, 66 N. E. 119 (1903)].

the function of administration. In other words, it is the duty of the judge to *administer* the conventionalized form of justice established by the government of which he is a part. As has been said, the range of acts which he may properly do in this connection is a very wide one; and, subject to the requirement that his action be reasonable, it will not be disturbed in an appellate court.

**§ 179. (*Functions of the Judicial Office; Administrative; Range of Application*); Absence of Judge from Courtroom.**—

The presiding judge may, in his administrative discretion, leave the bench when so disposed. He will, however, properly regard the effect of his conduct upon the rights of the parties with considerable care. The act may be entirely unattended with serious consequences. A purely temporary absence of the judge from the courtroom will not be deemed error. Thus where, during the argument to the jury the presiding judge retired to his chambers, to look over requested instructions, leaving an open door between him and the courtroom, through which he could hear and see what was going on, only a technical error not prejudicial to the losing party was committed.<sup>1</sup> On the other hand, as much prejudice may be caused to a party by the uncontrolled action of his adversary during a prolonged absence of the judge, reversible error may be committed in leaving the courtroom.<sup>2</sup>

**§ 180. (*Functions of the Judicial Office; Administrative; Range of Application*); Adjournments.**— The court may grant adjournments if justice apparently requires it. This administrative power of the court enables the judge to suspend the examination of a witness for any reasonable purpose by him deemed sufficient;— as to permit a witness, defective in such knowledge, to be instructed as to the nature and obligation of an oath.<sup>1</sup> Under the canon requiring the court to expedite trials<sup>2</sup> a satisfactory administrative reason for an adjournment must be shown. A judge is not required to defer justice to other suitors because, in a case on trial, a party has failed to present such a case as with due diligence he might and should have done. For example, a court

1. *Chicago City Ry. Co. v. Creech*, 207 Ill. 400, 69 N. E. 919 (1904).

2. *Wells v. O'Hare*, 209 Ill. 627, 70 N. E. 1056 (1904). [Judgment reversed, 110 Ill. App. 7 (1903).]

1. *Com. v. Lynes*, 142 Mass. 577 (1886).

2. *Infra*, §§ 544 *et seq.*

is not bound to suspend the trial of a cause to enable a party to procure additional evidence,<sup>3</sup> or to render certain that which he has already submitted.<sup>4</sup> If a party chooses to run the risk that a witness who has promised to attend will do so, instead of making sure that he will attend by serving him with a subpoena, he cannot ask that the judge continue the case until he can procure the evidence.<sup>5</sup> Where surprise<sup>6</sup> on a material point<sup>7</sup> has been caused to a party as by the taking of a sound technical objection which was not fairly to have been anticipated,<sup>8</sup> or an unexpected demand for available proof arises,<sup>9</sup> an adjournment, upon suitable terms,<sup>10</sup> may reasonably be conceded.

An unreasonable refusal to adjourn may be treated as prejudicial error.<sup>11</sup> On the other hand, the court may proceed to trial *ex parte* where a case is reached in its order,<sup>12</sup> and no request for adjournment is made or such a motion has been overruled. He may even proceed *ex parte* where the attorneys of the moving party upon the refusal of their motion to adjourn, immediately withdraw from the case.<sup>13</sup> The judge, however, is under no necessity to adjourn because part of the regular panel has been dismissed; but he may order that talesmen be summoned, and proceed with the trial even against objection.<sup>14</sup>

**§ 181. (Functions of the Judicial Office; Administrative; Range of Application); Course of Trial.**—The general regulation of the course of a trial is under the supervision and direct control of the presiding judge.<sup>1</sup> This is his general administrative power,

3. *Zipperer v. City of Savannah*, 128 Ga. 135, 57 S. E. 311 (1907); *Black v. Sherry*, 87 N. Y. Supp. 160, 43 Misc. Rep. 342 (1904).

4. *Sheedy v. City of Chicago*, 221 Ill. 111, 77 N. E. 539 (1906) (Measure sewer).

5. *Kozlowski v. City of Chicago*, 113 Ill. App. 513 (1904); *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209 (1905).

6. *Infra*, § 527.

7. *Nieberg v. Greenberg*, 91 N. Y. Supp. 83 (1904).

8. *Reiss v. Pfeiffer*, 117 N. Y. App. Div. 880, 103 N. Y. Suppl. 478 (1907).

9. *Heyman v. Singer*, 99 N. Y. Supp. 942, 51 Misc. Rep. 18 (1906).

10. *Poland v. Minshall*, 96 N. Y. Supp. 200 (1905) (judgment of costs).

11. *Heyman v. Singer*, 99 N. Y. S. 942, 51 Misc. Rep. 18 (1906).

12. *Linderman v. Nolan*, 16 Okl. 352, 83 Pac. 796 (1905).

13. *McInnes v. Sutton*, 35 Wash. 384, 77 Pac. 736 (1904).

14. *Rice v. Dewberry*, (Tex. Civ. App. 1906) 93 S. W. 715.

1. *Frech v. Lewis*, 32 Pa. Super. Ct. 279 (1906). Courts of justice exist for the administration of justice, and in the conduct of trials in general much must be left to the discretion of

by virtue of the general mandate which the judicial branch of the government has received from the sovereign of the forum. These great powers he will exercise for the attainment of certain immediate ends connected with the litigation; and under certain canons for social and impersonal purposes, under which all litigation properly takes place and which are to be referred to later in some detail.<sup>2</sup> The only just limitation upon the judge's administrative power in shaping the course of the trial is that his conduct should be *reasonable*, in view, not only of the facts of the case, the existence of any rule of practice, the nature of similar rulings by other judges, but also of the general ends for which, and the canons under which he is acting. No exception, except for unreasonable conduct, should properly be sustained by an appellate court. These administrative acts may be, as has been said, of very varied kinds.

**§ 182. (*Functions of Judicial Office; Administrative; Range of Application*); Exclusion of Persons from the Courtroom.—**

The presiding justice may exclude from the courtroom any persons not directly concerned in the particular trial which is in progress. Public curiosity or love of sensationalism is neither legally entitled to gratification, nor is it the right of a litigant to secure its indulgence on his own account. The right of the litigant is limited to that of confrontation,<sup>1</sup> together with the use of counsel and witnesses. What portion, if any, of the general public shall be admitted to the presence of the court as audience is a question of administration. It is not one for the party to decide.<sup>2</sup>

**§ 183. (*Functions of Judicial Office; Administrative; Range of Application; Exclusion of Persons from Courtroom*);**

**Grounds for Admitting Public.**—As a rule, a portion of the public, suited to the capacity of the courtroom, will be admitted by special or standing order of the judge. For the adopting of such a course the considerations of public policy appealing to the discretion of the judge are neither few nor unimportant. Public attendance at trials is of high social value for the same reasons which, in part, justify the use of the community — as represented by the jury — as portion of the tribunal. A valuable educational

the trial court. *Wilson v. Johnson*, (Fla. 1906) 41 So. 395.

2. *Infra*, §§ 332 *et seq.*

1. *Infra*, § 458.

2. But a public trial was early claimed as of right. *Lilburne's Trial*, 4 How. St. Tr. 1269, 1273 (1649).

influence tending toward interest in and respect for public justice is thereby created. The correction of judicial abuses, loyalty to good administration and general respect for law and its enforcement, are made personal to the citizen,<sup>1</sup> and greatly promoted by examination and discussion.

*The power for good* in this connection, is perhaps most dramatically revealed in the abuses which have, as an almost invariable rule, attended the exercise of judicial administration through tribunals whose proceedings have been held in secret. Not only is publicity in judicial proceedings helpful in making the influence of legal administration powerful and personal through the community; it is an important guarantee for truth, as it is elicited from witnesses, in civil or criminal<sup>2</sup> cases. Nor can it be doubted that the dignity of the proceedings themselves, reacting upon all participants—judge, jury, counsel and witnesses, in a very perceptible elevation of moral tone, is greatly enhanced by the presence of the audience. The consciousness of being observed has, in all connections undoubtedly a strong stimulating effect for reaching the highest attainable level of performance.<sup>3</sup>

Probably this is not only mental but, to a certain extent, physical

1. "Few individuals are gainers by *real* justice; to make its usefulness general, it ought to *appear*, as well as to exist. The root might be in the earth; but no fruit would be produced. Integrity might be in the heart of the judge, while iniquity was written on his brow. How could the public grant the title of *just* to men, by whose mode of proceeding injustice alone can gain, and probity cannot but be a loser?" 40 Edinburgh Review 195 (1824), by Mr. (afterwards Lord Chief Justice) Denman.

2. *Informers*.—Speaking, for example, of the evidence of informers, "state's evidence" or the like, a careful writer says: "Dangerous as they undoubtedly are, despicable as the informer who secretes his name must always be, and much as we doubt whether the balance of inconveniences will not decide against the

resort to this tainted fountain of knowledge, it must be owned that, if anything can divest it of its evil qualities, the remedy is *publicity*. That indeed is the grand redeeming virtue, which must in time correct the vices of every system, and without which the soundest principles, the wisest rules, the most perfect arrangements, will be found, in practise, to permit the existence of all that is wrong, and to afford no security for any thing that is right." 40 Edinburgh Review 195 (1824), by Mr. (afterwards Lord Chief Justice) Denman.

3. "The most tyrannical magistrate becomes moderate, the most daring circumspect, when, exposed to the view of all, he feels that he cannot pronounce a judgment without being judged himself." 40 Edinburgh Review 195 (1824), by Mr. (afterwards Lord Chief Justice) Denman.

or psychological as well. The concentrated attention of a large number of interested people generates the psychic atmosphere in which court proceedings are held. From an administrative point of view, the fact has both its advantages and its dangers. On the one hand, it conduces largely to the histrionic, the dramatic element of judicial administration in which lies much of its most powerful and lasting influence on the popular mind — deepening the tranquillity of truth, and heightening the agitation of conscious guilt or falsehood, nerving the advocate to the highest oratorical ability with which he is endowed, and imposing great responsibility on the presiding judge in directing the course of a trial where the play of all mental faculty shows a marked tendency to intensify. On the other hand, this influence perceptibly tends to aggravate the misleading effects of wit, sarcasm or oratory and to loosen the jury's control of its impulse to that emotionalism which is so marked an injury to sound judicial administration.

**§ 184. (*Functions of Judicial Office; Administrative; Range of Application; Exclusion of Persons from Courtroom*); Persistence of Conditions.**—The existence and nature of the subtle, intangible and yet powerful emotional disturbances which may be called the psychic atmosphere of a trial, are carefully to be considered and dealt with by the wise practitioner. He will bear in mind that such states of feeling are likely to persist; and that, by consequence, the considerations arising in the case or cases immediately preceding his own may have had effects with a very important bearing on the one in which he is concerned. Conditions may have been created which, if favorable, he may utilize; those inimical to his interests, he must seek to dispel or modify. It is no small advantage of the public trial of causes that a practitioner may thus gauge the mental attitude of the tribunal in approaching the consideration of his case and be able to judge as to the precise nature of the task before him. It has even been said that persons interested in subsequent cases “have a right to be present for the purpose of hearing what is going on.”<sup>1</sup> This,

1. *State v. Brooks*, 92 Mo. 542, 573 (1887); *Garnett v. Ferrand*, 6 B. & C. 611, 626 (1827). “The public had a right to be present, as in other courts.” *Collier v. Hicks*, 2 B. & Ad. 663, 668 (1831), per Tenterder, C. J. “We are all of opinion that it is one

of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, provided they do not interrupt the proceedings and

however, may be doubted. The highest at which the claim of the party can well be placed is that there is a practice to that effect. As has been said, the admission of the public is a matter of administration,<sup>2</sup> and only as a circumstance in deciding as to the reasonableness of administrative action is the existence of a rule of practice material to the rights of the parties.<sup>3</sup>

**§ 185. (Functions of Judicial Office; Administrative; Range of Application; Exclusion of Persons from Courtroom); Furnish Proof or Contradiction.**— The presence of the public in the courtroom and, to a still wider and more impressive extent, the publication in the newspaper press of judicial proceedings, is a powerful agency in bringing to the attention of persons having facts in their possession relating to a matter on trial the knowledge that they may be helpful to the cause of justice. This assistance, as valuable as it often is unexpected, may correct error by supplying additional facts, or by contradicting a statement which might otherwise be credited.<sup>1</sup> As was said by Sir John Hawkes, solicitor-general:<sup>2</sup> “The reason that all matters of law are, or ought to be transacted publicly is that any person, unconcerned as well as concerned, may as *amicus curiæ* inform the court better, if he thinks they are in error, that justice may be done; and the reason that all trials are public is that any person may inform in point of fact, though not subpoenaed, that truth may be discovered, in civil as well as in criminal cases. There is an invitation, to all persons who can inform the court concerning the matter to be tried, to come into the court, and they shall be heard.”<sup>3</sup> This

provided there is no specific reason why they should be removed, have a right to be present for the purpose of hearing what is going on.” Daubney v. Cooper, 10 B. & C. 237, 240 (1829).

2. *Supra*, § 182.

3. *Supra*, §§ 173, 177 n. 6.

1. A jeweler, reading in the papers of a perjured testimony as to when he did certain engraving on jewelry, attended and rendered valuable assistance in exposing the deceit. *Smyth v. Smyth*, Woodley's Celebrated Trials, 1, 115, 140, 144 (1853).

2. Cornish's Trial, 11 How. St. Tr. 460 (1690).

3. “This open examination of the witnesses, *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down before an officer or his clerk, in the ecclesiastical courts and all others that have borrowed their practise from the civil law; where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal.” 3 Black. Comm. 373.

augmentation of truth occurs usually in one of two ways; objectively by the procurement of additional evidence or the detection of falsity; subjectively, by placing additional responsibility for truthfulness<sup>4</sup> on the mind of the witness.<sup>5</sup>

**§ 186. (*Functions of Judicial Office; Administrative; Range of Application; Exclusion of Persons from Courtroom*); Grounds for Exclusion.**—In discharging his administrative power in relation to the admission of the public to the courtroom, very different considerations may well be felt to apply to those who are attending on *business* in the courtroom as compared with those whose position is that of mere *spectators*. Judicial proceedings for the discovery of truth with the object of using it as a basis for doing justice or awarding punishment for social offenses is surely as solemn and serious a business as can well engage the attention of human beings. There is little reason to believe that it will gain in dignity, impressiveness or social power by its reduction to the level of an idle spectacle for the benefit of hangers-on and loungers. There is, moreover, always a danger that in times of political or social excitement, the presence of the psychically surcharged atmosphere of the courtroom to which reference has been made,<sup>1</sup> may precipitate a collision between excited partisans, or overpower the judgment of an emotional and, therefore, suggestible jury. More than this, unmoral or immoral cases,

4. "Another advantage of this publicity [by printing the proceedings] . . . is the chance it affords to justice of receiving, from hands individually unknown, ulterior evidence, for the supply of any deficiency or confutation of any falsehood, which inadvertency or mendacity may have left or introduced." Bentham, *Jud. Ev.*, vol. I, bk. II, c. X, § 6.

5. "In many cases, say rather in most, in all except those in which a witness bent upon mendacity can make sure of being apprized with perfect certainty of every person to whom it can by any possibility have happened to be able to give contradiction to any of his proposed statements, the publicity of the examination or deposition operates as a check upon mendacity and incorrectness. However sure he may think himself

of not being contradicted by the deposition of any percipient witnesses, yet if the circumstances of the case have but afforded a single such witness, the prudence or imprudence, the probity or improbity, of that one original witness may have given birth to derivative and extrajudicial testimonies in any number. Environed as he sees himself by a thousand eyes, contradiction should he hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths. Many a known face, and every unknown countenance, presents to him a possible source of detection, from whence the truth he is struggling to suppress may through some unsuspected channel burst forth to his confusion." Bentham, *Jud. Ev.*, vol. I, bk. II, c. X, § 2.

1. *Supra*, § 183.



especially those relating to sexual offenses or perversions, are constantly arising for trial and obviously tend to excite and gratify the morbid sensationalism of the lovers of moral filth at the expense, in all cases, of public morals and social sanity; and, in many cases, of great mental anguish to sensitive witnesses or parties. The judge, as *custos morum*, may reasonably consider that the assemblage over which he directly presides should be rather held for the dispatch of public business than composed of persons met for diversion — innocent or prurient. To those who have business before the court, judges, jurors, parties, counsel, witnesses and others directly interested in a pending case or other cases before the court, public access to the courtroom will be ungrudgingly afforded.<sup>2</sup> In the case of persons having no direct connection with the business before the court, it may frequently seem to a presiding judge that his administrative control of the courtroom will be more rationally exercised by excluding their personal presence from it — all legitimate social interests being amply conserved by fair reports of the newspapers of daily judicial proceedings and temperate editorial comments upon finished cases, the interests of justice being secured in this connection by a correction by the judge of any abuses.

*Fear of Violence.*—Where the judge apprehends danger of disorderly proceedings by the spectators, or, the exercise of undue and improper influence on the jury, he may properly exclude from the courtroom all persons who have no direct connection with the proceedings.<sup>3</sup> Thus, it may be good administration to pass an order permitting in the courtroom only the court officers, reporters and “friends of the defendant and persons necessary for her to have.”<sup>4</sup>

*Protect Public Morals.*—The correct principle of administration regarding the public attendance at trials calculated to impair the public morals is, in part stated by a comparatively recent Michigan statute:<sup>5</sup> “Whenever it shall appear that, upon the trial of any cause, evidence of licentious, lascivious, degrading or peculiarly immoral acts or conduct, will probably be given, the judge presiding at such a trial may, in his discretion, require

2. *People v. Swafford*, 65 Cal. 223, 3 Pac. 809 (1884).

3. *Stone v. People*, 3 Ill. 326, 338 (1840).

4. *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849 (1887).

5. Act 408, § 18 of 1893.

and cause every person, except those necessary in attendance thereon, to retire and absent himself or herself from the courtroom during such trial, or any portion thereof." The supreme court of Michigan, following an earlier case,<sup>6</sup> has felt constrained to declare<sup>7</sup> the act itself invalid as contrary to the provisions of the Michigan constitution.<sup>8</sup> But the statute states, so far as it extends, the true administrative course.

*Declaratory statutes* have been passed in several American states. Colorado, for example, provides<sup>9</sup> that it shall be the duty of the judge to exclude from the courtroom all persons not necessary to the trial of the cause upon a suggestion by counsel that the testimony "will be of such character that unnecessary publicity would operate injuriously on public morals." A code of the state of Georgia enacts<sup>10</sup> that on trials for "seduction or divorce or other case where the evidence is vulgar and obscene, or relates to the improper acts of the sexes, and tends to debauch the morals of the young," the presiding judge may exclude "all or any portion of the audience." The state of Michigan provides that<sup>11</sup> "on the preliminary examination of every person charged with the offense of rape, assault with the intent to commit rape, seduction, adultery, bastardy; or other offense against chastity, morality or decency, it shall be in the discretion of the examining magistrate to exclude from the place where such examination is held, any or all persons, not officers of the court, or persons by law required to be in attendance," and also that "The magistrate, while conducting such examination, may exclude from the place of examination all the witnesses who have not been examined; and he may also, if requested, or if he see cause, direct the witnesses, whether for or against the prisoner, to be kept separate, so that they cannot converse with each other until they shall have been examined. And such magistrate may, in his discretion, also exclude from the place of examination, any or all minors during the examination of such witnesses."<sup>12</sup> The statutes of Utah<sup>13</sup> declare that "In an action for divorce, criminal conversation, seduction, abortion, rape, or assault with intent to commit rape, the court may in its discretion exclude all per-

6. *People v. Murray*, 89 Mich. 276, 50 N. W. 95 (1891).

7. *People v. Yeager*, 113 Mich. 228, 71 N. W. 491 (1897).

8. Const., Art. VI, § 28.

9. Colo. C. C. P. 1891, § 427.

10. Ga. Code, 1895, § 5296.

11. Mich. Comp. L. 1897, § 11873.

12. Mich. Comp. L. 1897, § 11852.

13. Utah Rev. St. 1898, § 696.

sons who are not directly interested therein, except jurors, witnesses, and officers of the court." In the same line the state of Wisconsin<sup>14</sup> prescribes that on preliminary examinations, held under charges of the offenses enumerated in the Utah statute, "or other offense against chastity, morality, or decency, it shall be in the discretion of the magistrate to exclude from the place of trial all bystanders and other persons not officers of the court or otherwise required to be in attendance."

*The English rule* is the broader and more salutary. In the original statute of 1848<sup>15</sup> judges were empowered "in their discretion to order that no person shall have access to or remain in the room or building, if it appear to them that the ends of justice will be best answered by so doing." An interesting incident as to the opinion of Mr. Justice Hawkins as to the practical effect of such a statute is thus stated in an English law publication: "Mr. Mathews, the counsel for the prosecution, informed the magistrate that he had consulted Mr. Justice Hawkins, and that the learned judge had expressed an opinion that, under the 19th section of Jarvis' Act (11 & 12 Vict. c. 42), 'it was plain that the magistrate had the power, if he pleased, and considered such a course advisable, to hear the case with closed doors.'"<sup>16</sup>

**§ 187. (Functions of Judicial Office; Administrative; Range of Application; Exclusion of Persons from Courtroom); Adjournments to Avoid Unwise Publicity, etc.**—An alternative administrative expedient for the purpose of avoiding unwise publicity is to keep the courtroom open for the general dispatch of

14. Wis. Stats. 1898, § 4789.

15. 1848, St. 11 & 12 Vict., s. 42, § 19.

16. 100 Law Times 1896, p. 234.

On a suggestion that Mr. Justice Hawkins was wrong in this connection on the ground that the section in Jarvis' Act relied on by the eminent judge was impliedly repealed by section 20 of the Summary Jurisdiction Act of 1879, a correspondent of the Times offers the following rather interesting comment: "Previous to the year 1879 magistrates were sometimes accustomed to hear and determine cases in their own houses.

Almost every country mansion possessed its 'justice's room.' The two before-mentioned subsections of section 20 of the Summary Jurisdiction Act of that year merely provided that all judicial proceedings before magistrates shall take place within public buildings to which the public shall, under ordinary circumstances, have access without committing a trespass, *e. g.*, by crossing a private park or entering the magistrate's house. To contend that they 'by implication' repeal the very precise enabling words of Jarvis's Act appears absurd." 100 Law Times 1896, p. 234.

public business, while withdrawing a particular case, presenting exceptional circumstances, from idle or morbid curiosity or the other evils to which reference has been made.<sup>1</sup> Accordingly, the judge may adjourn the trial of a particular case, or class of cases, to a place other than the usual courtroom.<sup>2</sup> Such a sitting he may hold in a lawyer's office,<sup>3</sup> or at his own house.<sup>4</sup>

*Other causes for Adjournments.*—Adjournments may be made to places other than the courtroom, for causes entirely apart from protection of the public morals. The adjournment may, for example, be to the house of a sick witness to secure the benefit of his testimony.<sup>5</sup> The same course has been adopted where the illness was that of a party.<sup>6</sup>

**§ 188. (Functions of Judicial Office; Administrative); Separation of Witnesses.**—It is within the administrative function of the presiding justice to order that certain witnesses be excluded from the courtroom until they or other witnesses, whether called by the party proposing the order or by his opponent,<sup>1</sup> shall give their testimony.<sup>2</sup> From excess of caution or other reasons the common-law power is expressly conferred in certain jurisdictions by confirmatory statutes or has been promulgated by rules of court. Little cause, in most instances, exists why the request for such an order should not be granted.

1. *Supra*, § 182.

2. *Reed v. State*, 147 Ind. 41, 46 N. E. 135 (1897); *Le Grange v. Ward*, 11 Ohio 257 (1842).

3. *Mohon v. Harkreader*, 18 Kan. 383 (1877).

4. *Bates v. Sabin*, 64 Vt. 511, 514, 24 Atl. 1013 (1892).

5. *Sutton v. Snohormish*, 11 Wash. 24, 39 Pac. 293 (1895).

6. *Selleck v. Janesville*, 100 Wis. 157, 75 N. W. 975 (1898).

1. *State v. Zellers*, 7 N. J. L. 220, 224 (1824) (defendant's witnesses).

2. *Alabama*.—*McClellan v. State*, 117 Ala. 140, 23 So. 653 (1897); *McLean v. State*, 16 Ala. (N. S.) 672 (1849).

*Arkansas*.—*St. Louis, I. M. & S. Ry. Co. v. Pate*, 90 Ark. 135, 118 S. W. 260 (1909).

*California*.—*People v. McCarty*, 117 Cal. 65, 48 Pac. 984 (1897).

*Georgia*.—*Johnson v. State*, 14 Ga. 55, 62 (1853). See also *City Electric Ry. Co. v. Smith*, 121 Ga. 663, 49 S. E. 724 (1905).

*Illinois*.—*Errissman v. Errissman*, 25 Ill. 136 (1860).

*Indian Territory*.—*Parker v. U. S.*, 1 Ind. Terr. 592, 43 S. W. 858 (1898).

*Indiana*.—*Johnson v. State*, 2 Ind. 652 (1851); *Porter v. State*, 2 Ind. 435 (1850).

*Iowa*.—*State v. Davis*, 110 Iowa 746, 89 N. W. 398 (1900). See also *State v. Pell*, (Iowa 1909) 119 N. W. 154.

*Louisiana*.—*State v. Daniels*, 122 La. 261, 47 So. 599 (1908).

*Massachusetts*.—*Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491 (1830).

*New York*.—*People v. Green*, 1 Park Cr. R. (N. Y.) 11 (1845).

*North Dakota*.—*King v. Hanson*, 99 N. W. 1085 (1904).

**§ 189. (Functions of Judicial Office; Administrative; Separation of Witnesses); Grounds for Making Order.—**

Such an order may go further and direct that one witness be kept apart from the others;<sup>1</sup> or that each witness shall have been kept by himself until after he has testified. When falsehood or bad faith is to be prevented or detected the expedient is of obvious value in that it permits effective inquiry as to subsidiary matters difficult to cover by a previous agreement between the witnesses. It is not, however, essential, in order that a separation should be ordered, that fraudulent collusion should be charged. Separation is further useful at times in preventing a certain unintentional and even unconscious collusion between interested persons who

*Texas.*—*Watts v. Holland*, 56 Tex. 54 (1881). See also *McCullough v. State*, (Tex. Cr. App. 1906) 94 S. W. 1056.

*Washington.*—*State v. Dalton*, 86 Pac. 590 (1906).

*England.*—*Goodere's Trial*, 17 How. St. Tr. 1003, 1015 (1741); *Vaughan's Trial*, 13 How. St. Tr. 485, 494 (1696).

Separation of witnesses may be ordered in criminal cases. *Territory v. Dooley*, 3 Ariz. 60, 78 Pac. 138 (1889); *State v. Worthen*, (Iowa 1904) 100 N. W. 330. Neither side has, however, in the absence of statute, a right to such an order. *Coolman v. State*, (Ind. 1904) 72 N. E. 568. Such an order applied to the witnesses of accused does not violate a constitutional right to a public trial. *State v. Worthen*, (Iowa 1904) 100 N. W. 330 [*citing* *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849 (1887); *People v. Swafford*, 65 Cal. 223, 3 Pac. 809 (1884)].

The action of a trial judge will not be revised unless prejudice to the objecting party is affirmatively shown. *Hughes v. State*, 128 Ga. 19, 57 S. E. 236 (1907); *State v. Quirk*, 101 Minn. 334, 112 N. W. 409 (1907); *Lowrie v. State*, (Tex. Cr. App. 1906) 98 S. W. 838; *Green v. State* (Tex. Cr. App. 1906), 98 S. W. 1059;

*State v. Mann*, 39 Wash. 144, 81 Pac. 561 (1905). Still, it is error to exclude from the stand a person the necessity for whose testimony did not appear until another witness had been heard. *Sessions v. State*, (Tex. Cr. App. 1906) 98 S. W. 243. In like manner, refusing to permit a witness to testify on rebuttal because he has disobeyed the rule for the exclusion and separation of witnesses, while permitting his testimony in chief to be contradicted, is error. *Illinois R. Co. v. Ely*, (Miss. 1904) 35 So. 873.

Calling a witness from the custody of an officer in connection with the examination of another witness is fully within the administrative power of the court. The rule applies even to a party. *Seaboard Air Line Ry. v. Scarborough*, (Fla. 1906) 42 So. 706. Whether the witnesses should be instructed not to converse with each other, and should be allowed after examination to return to the room where the others are waiting, is a matter within the discretion of the court. *Kelly v. State*, 118 Ga. 329, 45 S. E. 413 (1903); *Loose v. State*, (Wis. 1903) 97 N. W. 526.

1. It is a sufficient separation where the first witness examined was, after giving his evidence, separated from the others. *State v. McElmurray*, 3 Strobb. (S. C. ) 33 (1848).

hear each other's story when testifying.<sup>2</sup> It is at times exceedingly dangerous to the cause of justice that one witness should be permitted to refresh his memory by the testimony of another. Persons testifying to the same transaction almost invariably, and without active bad faith, seek to harmonize their story. It apparently seems to them to strengthen it and give to each the moral support of all. An element of pride is apt to enter and induce the witness who believes that a certain thing could not have occurred and he fail to notice it, to imagine that he *did* notice a fact to which one of his associates testifies.<sup>3</sup> In evidence as to matters which are in the nature of estimates, such as time, distance and the like, where the average witness feels weakness and uncertainty, this grasping at the mental and moral support of the evidence of others is particularly marked.

*It is also of importance* that a material and friendly witness should not have been prepared and his testimony colored by knowledge of what he is to meet in the evidence of the other side.<sup>4</sup> The expedient of separation is one which readily suggests itself and has been a common feature of trials by witnesses from earliest times.<sup>5</sup> Separation is a test of truth. If it prevents successful perjury, conscious or unconscious collusion between witnesses on the same side or undue advantage in antagonizing witnesses on the other side, the small loss of time or trifling incidental inconvenience are well repaid. It may be the only hope of a person falsely and plausibly accused of crime.

**§ 190. (Functions of Judicial Office; Administrative; Separation of Witnesses); Order Not Matter of Right.—**

It follows, for obvious reasons, that the request is usually granted, as a matter of course.<sup>1</sup> This, however, is quite different from saying that the judge, whatever his view of the actual situation,

2. Louisville, etc., Ry. Co. v. York, 128 Ala. 305, 30 So. 676 (1900); State v. Zellers, 7 N. J. L. 220, 226 (1824); Rainwater v. Elmore, 1 Heisk. (Tenn.) 363, 365 (1870); Fortesque, De Landibus Legum Angliæ, c. 26 (1470). "The rule is provided merely to prevent the testimony of one witness from influencing the testimony of another." Cook v. State, 30 Tex. App. 607 (1892).

3. Rainwater v. Elmore, 1 Heisk. (Tenn.) 363 (1870).

4. Louisville, etc., Ry. Co. v. York, 128 Ala. 305, 30 So. 676 (1900); Rainwater v. Elmore, 1 Heisk. (Tenn.) 363 (1870); Wisener v. Maupin, 2 Baxt. (Tenn.) 342, 357 (1872).

5. History of Susanna, Apocryphal Scriptures; Pollock & Maitland, Hist. Eng. Law, II, 635, 637 (1895); Britton, bk. III, c. 10, § 9 (1290); Thayer, Prelim. Treatise on Evidence, 20, 22 (*secta*), 98, 99.

1. Alabama.—McClellan v. State, 117 Ala. 140, 23 So. 653 (1897); Barnes v. State, 88 Ala. 204, 16 Am.

is required to make the order, as has been at times decided,<sup>2</sup> or intimated.<sup>3</sup>

*The Right to Demand a Separation May be Conferred by Statute.*<sup>4</sup>—In trials before Houses of Parliament the practice of granting an order seems to have been invariable.<sup>5</sup>

St. 48 (1889); *Wilson v. State*, 52 Ala. 299 (1875).

*California*.—*People v. McCarty*, 117 Cal. 65, 48 Pac. 984 (1897).

*Georgia*.—*May v. State*, 94 Ga. 76 (1894); *Hanvey v. State*, 68 Ga. 612 (1882).

*Illinois*.—*Errissman v. Errissman*, 25 Ill. 136 (1860).

*Indian Territory*.—*Parke v. United States*, 1 Ind. Ter. 592, 43 S. W. 858 (1898).

*Indiana*.—*Johnson v. State*, 2 Ind. 652 (1851).

*Iowa*.—*Hubbell v. Ream*, 31 Iowa 289, 290 (1871).

*Kansas*.—*State v. Davis*, 48 Kan. 1 (1892).

*Kentucky*.—*Baker v. Com.*, 50 S. W. 54 (1899); *Kentucky Lumber Co. v. Abney*, 31 S. W. 279 (1895); *Johnson v. Clem*, 82 Ky. 84 (1884).

*Louisiana*.—*State v. Forbes*, 111 La. 473, 35 So. 710 (1903).

*Massachusetts*.—*Com. v. Thompson*, 159 Mass. 56, 58, 38 N. E. 1111 (1893); *Com. v. Follanslee*, 155 Mass. 274, 29 N. E. 471 (1892).

*Michigan*.—*Johnston v. Ins. Co.*, 106 Mich. 96, 64 N. W. 5 (1895); *People v. Considine*, 105 Mich. 149, 63 N. W. 196 (1895).

*Mississippi*.—*Sartorius v. State*, 24 Miss. 602 (1852).

*Missouri*.—*State v. Duffey*, 128 Mo. 549, 31 S. W. 98 (1895).

*Nebraska*.—*Chicago, B. & Q. R. Co. v. Kellogg*, 54 Nebr. 138, 74 N. W. 403 (1898); *Murphey v. State*, 43 Nebr. 34 (1894).

*North Carolina*.—*Purnell v. Purnell*, 89 N. C. 42 (1883); *State v. Sparrow*, 3 Murph. 487 (1819).

*Ohio*.—*McLaughlin v. Stevens*, 18 Ohio 94, 99, 51 Am. Dec. 444 (1849).

*Texas*.—*De Lucenay v. State*, 68 S. W. 796 (1902); *Powell v. State*, 13 Tex. App. 244 (1882).

*Utah*.—*People v. O'Loughlin*, 3 Utah 133, 144, 1 Pac. 655 (1881).

*Wisconsin*.—*Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778 (1892); *Benaway v. Coyne*, 3 Chandl. 214, 219 (1851).

*Wyoming*.—*Haynes v. Terr.*, 3 Wyo. 166 (1887).

*England*.—*Rex v. Goodere*, 17 How. St. Tr. 1003, 1015 (1741); *Reg. v. Murphy*, 8 Car. & P. 297 (1837).

2. *Georgia*.—*Shaw v. State*, 102 Ga. 660, 29 S. E. 477 (1897).

*Kentucky*.—*Salisbury v. Com.*, 79 Ky. 425, 432 (1881).

*New Jersey*.—*State v. Zellers*, 7 N. J. L. 220, 224 (1824).

*Tennessee*.—*Rainwater v. Elmore*, 1 Heisk. 363 (1870).

*Texas*.—*Watts v. Holland*, 56 Tex. 54 (1881).

*West Virginia*.—*Gregg v. State*, 3 W. Va. 705 (1869).

*England*.—*R. v. Newman*, 3 C. & K. 252, 260 (1852) (rule applied to the prosecutor himself); *Southey v. Nash*, 7 Car. & P. 632 (1837). "I can perceive no safe medium between receiving it as a right, or abolishing it altogether." *State v. Sparrow*, 3 Murph. (N. C.) 487 (1819).

3. *Wilson v. State*, 52 Ala. 299, 303 (1875) ("rarely if ever" withheld); *Cook v. State*, 11 Ga. 55, 62 (1852) (the prosecution may claim as of right); *Walker v. Com.*, 8 Bush (Ky.) 86, 89, 96 (1871); *R. v. Murphy*, 8 C. & P. 307 (1837) (almost a right).

4. *Nelson v. State*, 2 Swan (Tenn.) 237, 257 (1852).

5. *Taylor v. Lawson*, 3 C. & P. 543 (1828); *Berkeley Peerage Trial*, *Sherwood's Abstract*, 151 (1811).

*Action not Reversed.*—In the absence of evidence that reason has not been employed or that there has been a violation of some fundamental right of the party, or, as it is commonly said, unless the judge's discretion has been abused, the propriety of the exercise of this power to order a separation of witnesses will not be reversed in an appellate court.<sup>6</sup>

**§ 191. (Functions of Judicial Office; Administrative; Separation of Witnesses); What Constitutes Violation of the Order.**—A reasonable construction should be applied to such an order. As the object is to prevent giving of information to the witnesses, a hypothetical question which gives no information is not objectionable.<sup>1</sup> A counsel is at liberty, unless otherwise ordered, to consult with one of his own witnesses, and tell him while the latter is under the rule, what one of those called by his opponent has stated in the course of his testimony,<sup>2</sup> though it has been required that the consultation take place in the presence of the court<sup>3</sup> or of one of its officers,<sup>4</sup> or be expressly permitted, in the court's discretion.<sup>5</sup> The rule is the same as to a party;<sup>6</sup> whether this privilege applies to other agents assisting in the trial of the cause is more doubtful.<sup>7</sup> Information as to the trial conveyed by the daily journals does not violate such an order.<sup>8</sup>

**§ 192. (Functions of Judicial Office; Administrative; Separation of Witnesses); Time of Motion for Order.**—The order may properly be requested at any time<sup>1</sup> after the reading of the pleadings<sup>2</sup> and the opening address of counsel,<sup>3</sup> and

6. *May v. State*, 94 Ga. 76 (1894); *Nelson v. State*, 2 Swan (Tenn.) 237 (1852); *Powell v. State*, 13 Tex. App. 244 (1882); *Haines v. Terr.*, 3 Wyo. 168 (1887) ("gross abuse").

1. *State v. Taylor*, 56 S. C. 360, 34 S. E. 939 (1899) ("if your husband says so" is it true?).

2. *Horne v. Williams*, 12 Ind. 324 (1859); *Allen v. State*, 61 Miss. 627, 629 (1884); *White v. State*, 52 Miss. 216, 224 (1876); *Williams v. State*, 35 Tex. 355 (1872) ("in a proper manner").

3. *Jones v. State*, 3 Tex. Cr. App. 150, 153 (1877).

4. *Brown v. State*, 3 Tex. Cr. App. 294, 310 (1877).

5. *Kennedy v. State*, 19 Tex. Cr. App. 618, 631 (1885).

6. *Shaw v. State*, 79 Miss. 21, 30 So. 42 (1901); *Holt v. State*, 9 Tex. Cr. App. 571, 580 (1880) (discretionary with court).

7. *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 814, 12 S. E. 18 (1890).

8. *Com. v. Hersey*, 2 Allen (Mass.) 173 (1861).

1. *Southey v. Nash*, 7 C. & P. 632 (1837).

The separation may be ordered at the request of a party whose own witnesses have been already examined. *Southey v. Nash*, 7 C. & P. 632 (1837).

2. *Wilson v. State*, 52 Ala. 299 (1875); *Roberts v. Com.*, 94 Ky. 499 (1893).

3. *Benaway v. Conyne*, 3 Chand. (Wis.) 214, 219 (1851).



before the close of all the evidence; though it has been held inappropriate to make a motion for a separation while affidavits are being read.<sup>4</sup>

**§ 193. (Functions of Judicial Office; Administrative; Separation of Witnesses); By Whom Motion is Made.**—The motion may be made by either<sup>1</sup> or both<sup>2</sup> parties; the jury may request it;<sup>3</sup> or the judge may make the order, *sua sponte*.<sup>4</sup>

**§ 194. (Functions of Judicial Office; Administrative; Separation of Witnesses); To Whom the Order Applies.**—The administrative power of the court extends not only to the making of the order, and the details of its enforcement, but as to whom it shall cover.<sup>1</sup> Not only do attorneys (in the American sense)<sup>2</sup>

Little doubt exists that in most jurisdictions, if reasonably requested, separation would be ordered before the opening. *Rex v. Murphy*, 8 Car. & P. 297 (1837). It may, under certain circumstances, be highly important that the witnesses be not influenced by suggestions conveyed to them by counsel at this stage. It has been held, however, that it is beyond the court's power to separate the witnesses during the opening address. *Benaway v. Conyne*, 3 Chand. (Wis.) 214 (1851).

4. *Penniman v. Hill*, 24 Wkly. Rep. 245 (1876) (Hall, V. C.).

1. *Holder v. U. S.*, 150 U. S. 91 (1893).

2. *State v. Sparrow*, 3 Murph. (N. C.) 487 (1819).

3. *Earl of Shaftesbury's Trial*, 8 How. St. Tr. 759, 778 (1681).

4. *Ryan v. Couch*, 66 Ala. 244, 248 (1880); *Wilson v. State*, 52 Ala. 299 (1875).

1. *Alabama*.—*Webb v. State*, 100 Ala. 47, 52 (1893). See also *Strickland v. State*, (Ala. 1907) 44 So. 90.

*California*.—*People v. Oliver*, (App. 1908) 95 Pac. 172.

*Georgia*.—*City Electric Ry. Co. v. Smith*, 121 Ga. 663, 49 S. E. 724 (1905); *Cent. R. Co. v. Phillips*, 91 Ga. 526 (1893); *City Bank v. Kent*, 57 Ga. 285 (1876).

*Indiana*.—*Xenia, etc., Co. v. Macy*, 147 Ind. 568, 47 N. E. 147 (1896).

*Missouri*.—*State v. Whitworth*, 126 Mo. 573, post 800 (1894).

*Texas*.—*Johnican v. State*, 48 S. W. 181 (1898).

*Virginia*.—*Jackson v. Com.*, 96 Va. 107, 30 S. E. 452 (1898).

2. *State v. Brookshire*, 2 Ala. 303 (1841); *Wisener v. Maupin*, 2 Baxt. (Tenn.) 342, 357 (1872); *Powell v. State*, 13 Tex. App. 244 (1882); *State v. Ward*, 61 Vt. 153, 179, 17 Atl. 483 (1888) (not employed on case). This has been said to be a matter of discretion and not as of right. *Powell v. State*, 13 Tex. App. 244, 252 (1882). An attorney appearing simply as a witness may be granted a similar privilege of remaining, although the other witnesses have been placed under the rule. *Mitchell v. State*, (Tex. Cr. App. 1908) 114 S. W. 830.

No express exception need be made in the case of an attorney or counsel. It will be implied. *Powell v. State*, 13 Tex. App. 244 (1882); *Gregg v. State*, 3 W. Va. 705 (1869). See also to the same effect, *Bischoff v. Com.*, 29 Ky. Law Rep. 770, 96 S. W. 538 (1906).

The English attorney, having no relation to the trial as an officer of the court, stands in the same position as other persons, in respect to an

and counsel,<sup>3</sup> form, as a rule, an exception to the operation of the order, but the party<sup>4</sup> and other persons necessary to protect his interest in the management of the trial,<sup>5</sup> also are permitted to remain in the courtroom.<sup>6</sup>

*Corporations as parties* come under the same administrative indulgence. Its officers, e. g., a president,<sup>7</sup> so far as, in the opinion of the judge,<sup>8</sup> their presence shall be reasonably necessary to protect the interest of the company, will be allowed to remain.

order of separation. Though intending to testify, he may however be, in many cases excepted from an order for separation, as a person necessary to the conduct of the trial. *Pomeroy v. Baddeley*, R. & M. 430 (1826); *Everett v. Lowdham*, 5 C. & P. 91 (1831).

3. *Boatmeyer v. State*, 31 Tex. Cr. 473, 20 S. W. 1102 (1893); *Powell v. State*, 13 Tex. App. 244 (1882); *Pomeroy v. Baddeley*, R. & M. 430 (1826); *Everett v. Lowdham*, 5 Carr. & P. 91 (1831). The rule is not modified by the fact that the accused is ably represented by other counsel. *Jackson v. State*, (Tex. Cr. App. 1908), 115 S. W. 262.

4. *Seaboard Air-Line Ry. v. Scarborough*, (Fla. 1906) 42 So. 706. The rule allowing parties to remain extends to a case where there are several parties who may hear the testimony of each other. *Georgia R. & Banking Co. v. Tice*, 124 Ga. 459, 52 S. E. 916 (1905).

5. *Ryan v. Couch*, 66 Ala. 244, 248 (1880) (father of absent plaintiff); *Central R. Co. v. Phillips*, 91 Ga. 526, 527, 17 S. E. 952 (1893); *Betts v. State*, 66 Ga. 508 (1881); *Indianapolis Cabinet Co. v. Herrmann*, 7 Ind. App. 462 (1893). See also:

*Indiana*.—*Xenia, etc., Co. v. Macy*, 147 Ind. 568, 577, 47 N. E. 147 (1896).

*Kentucky*.—*Matthews' Adm'r v. Louisville & N. R. Co.*, 113 S. W. 459 (1908).

*Michigan*.—*People v. Machen*, 101 Mich. 400, 59 N. W. 664 (1894) (officer during evidence of another officer).

*Texas*.—*Jacobs v. State*, 59 S. W. 1111 (1900) (interpreter).

*United States*.—*The Bark Havre*, 1 Ben. 295, 308 (1867) (master of vessel, owner's agent).

*England*.—*R. v. O'Brien*, 7 State Tr. (U. S.) 1, 45 (1848) (witness reporting the evidence for the prosecution); *Pomeroy v. Baddeley*, R. & M. 430 (1826) (English attorney).

6. Thus the judge may properly permit a brother of a person accused of crime to remain in the court room and assist in the defense. *May v. State*, 94 Ga. 76 (1894). So also of the wife and daughter of one accused of crime. *State v. Pell*, (Iowa 1909) 119 N. W. 154. On the other hand, if an accused person says that he may need to use his wife as a witness, she may properly be placed under the rule of exclusion from the court-room. *Bowmer v. State*, (Tex. Cr. App. 1909) 116 S. W. 798.

7. *Warden v. Madisonville, H. & E. R. Co.*, 101 S. W. 914, 31 Ky. L. Rep. 234 (1907).

8. *Trotter v. Town of Stayton*, (Ore. 1904) 77 Pac. 395. As between its president and vice-president the corporation may properly be called upon to elect whom it would prefer. *Atlanta Terra Cotta Co. v. Georgia, Ry. & Electric Co.*, 132 Ga. 537, 64 S. E. 563 (1909). A municipal corporation occupies a similar position. Thus, a city recorder may be excluded although it is asked that he be permitted to remain to assist counsel. *Trotter v. Town of Stayton*, (Or. 1904) 77 Pac. 395.

*Court officers*,<sup>9</sup> *jurors*,<sup>10</sup> and *parties*,<sup>11</sup> are equally privileged to remain.

9. *Johnican v. State*, (Tex. Cr.) 48 S. W. 181 (1898) (clerk of court); *State v. Lockwood*, 58 Vt. 378, 3 Atl. 539 (1886) (deputy sheriff); *State v. Hopkins*, 50 Vt. 316, 322 (1877) (sheriff). See also *People v. Oliver*, (Cal. App. 1908) 95 Pac. 172 (officer assisting prosecution).

10. *State v. Vari*, 35 S. C. 175, 14 S. E. 892 (1891).

11. *Alabama*.—*Ryan v. Couch*, 66 Ala. 244, 248 (1880).

*California*.—*Chester v. Bower*, 55 Cal. 46, 48 (1880).

*Indiana*.—*Cottrell v. Cottrell*, 81 Ind. 87 (1881) (guardian suing in representative capacity).

*Kentucky*.—*Kentucky Lumber Co. v. Abney*, 31 S. W. 279 (1895).

*Michigan*.—*McIntosh v. McIntosh*, 79 Mich. 198, 203, 44 N. W. 592 (1890).

*Mississippi*.—*Garman v. State*, 66 Miss. 196 (1888); *French v. Sale*, 63 Miss. 386 (1885).

*North Carolina*.—*State v. Kelly*, 97 N. C. 404 (1887).

*Oregon*.—*Schneider v. Haas*, 14 Oreg. 174, 58 Am. Rep. 296 (1886).

*Tennessee*.—*Richards v. State*, 91 Tenn. 723, 20 S. W. 533 (1892).

*England*.—*Selfe v. Isaacson*, 1 F. & F. 194 (1858); *Constance v. Brain*, 2 Jur. N. S. 1145 (1856).

*Canada*.—*Bird v. Veith*, 7 Brit. Col. 31 (1899); *Sivewright v. Sivewright*, 8 Ont. Pr. 81 (1879). The officer of a corporation which is a party does not thereby himself acquire the rights of a party. *Kentucky Lumber Co. v. Abney*, 31 S. W. 279 (1895). But the rule is otherwise where the presence of the officer is necessary to the proper conduct of the trial and he has been delegated by the corporation to look after its interest. *Lenoir Car Co. v. Smith*, 100 Tenn. 127, 42 S. W. 879 (1897). A principal beneficiary under a will is a party, within the meaning of this rule. *Heaton v.*

*Dennis*, 103 Tenn. 155, 52 S. W. 175 (1899).

**Parties in interest are within the equity of the exception.** They will be allowed to remain, first, strictly speaking as parties, at least as persons in charge, as *domini litis*, whose presence is necessary to an adequate presentation of the case. *Ryan v. Couch*, 66 Ala. 244 (1880); *Chester v. Bower*, 55 Cal. 46 (1880); *Shew v. Hews*, 126 Ind. 474, 26 N. E. 483 (1890); *Larue v. Russell*, 26 Ind. 386 (1866).

**The marked degree to which parties are exposed to the temptations to perjury and general falsity in testimony which separation seeks to minimize, has not, however, escaped attention.** *Salisbury v. Com.*, 79 Ky. 425, 432 (1881); *Wisener v. Maupin*, 2 Baxt. (Tenn.) 342, 357 (1872). In pursuance of this line of thought it has been held that parties stand on the same position as other witnesses and should be equally subject to exclusion.

*Arkansas*.—*Randolph v. McCain*, 34 Ark. 696 (1879).

*Georgia*.—*Tift v. Jones*, 52 Ga. 538, 540, 542 (1874).

*Kentucky*.—*Salisbury v. Com.*, 79 Ky. 425, 432 (1881).

*Tennessee*.—*Wisener v. Maupin*, 2 Baxt. 342, 356 (1872).

*England*.—*Penniman v. Hill*, 24 W. R. 245 (1876). In other jurisdictions, special facts are held to justify an order excluding a party. *Cullverwell v. Birney*, 10 Ont. Pr. 575 (1885). On the other hand, the presence of a party is frequently essential to enable his counsel to conduct the trial intelligently and it is the client's right to protect his own interests when involved in litigation. *Charnock v. Dewings*, 3 C. & K. 378 (1853). This, as stated in the text, has shown itself to be the approved line of reasoning. As a method of reconciling the party's right to direct the manage-

*In criminal cases*, the exemption from the order of separation applies also to prosecutors<sup>12</sup> and defendants.<sup>13</sup> Public officers,<sup>14</sup> medical<sup>15</sup> or other experts, and, indeed, any witness<sup>16</sup> or class of witnesses may be excepted from the order by express action of the

ment of his case with the desire to minimize the influence of improper motive, the valuable suggestion has been offered that the party remain but testify first of all the witnesses on his side. *Tift v. Jones*, 52 Ga. 538, 542 (1874).

It has even been held that the exclusion of a party violates a fundamental right and is therefore ground for a new trial. *McIntosh v. McIntosh*, 79 Mich. 198, 44 N. W. 592 (1890); *Garman v. State*, 66 Misc. 196 (1888); *Schneider v. Haas*, 14 Oreg. 174 (1886).

12. *Coolman v. State*, (Ind. 1904) 72 N. E. 568; *State v. Whitworth*, 196 Mo. 573, 29 S. W. 595 (1894) (father of prosecutrix in rape); *Haines v. Terr.*, 3 Wyo. 167 (1887). But see to the contrary, *Salisbury v. Com.*, 79 Ky. 425, 432 (1881). The court, while giving the prosecuting attorney the benefit of the assistance to be rendered by the prosecutor, may properly require the latter to testify as the first witness. *Smartt v. State*, (Tenn. 1904) 80 S. W. 586.

13. Of two persons jointly charged with crime, each proposing to testify for himself, neither can be excluded during the examination of the other. *Richards v. State*, 91 Tenn. 723, 30 Am. St. 907 (1892).

14. *Webb v. State*, 100 Ala. 47, 52, 14 So. 865 (1893) (sheriff); *People v. Garnett*, 29 Cal. 622 (1866) (chief of police. See also *People v. Nunley*, 142 Cal. 441, 76 Pac. 45 (1904) (sheriff); *Asken v. State*, 3 Ga. App. 79, 59 S. E. 311 (1907); (sheriff); *Powell v. State*, (Tex. Cr. App. 1907) 99 S. W. 1005 (court officers); *Sax v. State*, (Tex. Cr. App. 1903) 79 S. W. 578 (deputy sheriff). Though the form of the order of separation is, as a rule, discretionary, the action of a trial judge may be

reversed in case of abuse. *Smith v. State*, (Tex. Cr. App. 1907), 105 S. W. 501 (city marshal).

15. *Vance v. State*, 56 Ark. 402, 19 S. W. 1066 (1892) (insanity); *State v. Baptiste*, 26 La. Ann. 134, 136 (1874); *Johnson v. State*, 10 Tex. App. 571, 577 (1881). But see also *Vance v. State*, 56 Ark. 402, 19 S. W. 1066 (1892); *Central R. R. & B. Co. v. Phillips*, 91 Ga. 526, 17 S. E. 952 (1893); *Leache v. State*, 22 Tex. App. 279 (1886).

On the other hand, the court may, in its discretion, place a medical witness, under the rule, even where he desires to hear the evidence of a particular witness, and to testify in regard to it. *Atlantic & B. Ry. Co. v. Johnson*, 127 Ga. 392, 56 S. E. 482 (1907).

16. *May v. State*, 94 Ga. 76 (1894); *Hinkle v. State*, 94 Ga. 595 (1894); *State v. Whitworth*, (Mo. 1895) 29 S. W. 595; *Cook v. State*, 30 Tex. App. 607 (1892). See also:

*Alabama*.—*Brooks v. State*, 41 So. 156 (1906).

*Florida*.—*Sylvester v. State*, 35 So. 142 (1903) (detective).

*Kentucky*.—*Joseph v. Com.*, 30 Ky. L. Rep. 638, 99 S. W. 311 (1907).

*Louisiana*.—*State v. Hogan*, 117 La. 863, 42 So. 352 (1906); *State v. Forbes*, 111 La. 473, 35 So. 710 (1903) (expert).

*Nebraska*.—*Maynard v. State*, 116 N. W. 53 (1908).

The judge may allow a witness to remain for the purpose of assisting the prosecuting attorney. *Greer v. Com.*, 85 S. W. 166, 27 Ky. L. Rep. 333 (1905). Deputy sheriffs may be excused from an order to enable them to wait on the court. *Kennon v. State*, (Tex. Cr. App. 1904) 82 S. W. 518.

court or agreement of parties.<sup>17</sup> If persons reasonably necessary to the orderly conduct of the case are<sup>18</sup> not expressly excluded from the scope of the order, but nevertheless remain in court contrary to its terms, the presiding judge may ratify and sanction their action, in this respect, thus placing them in a position equivalent for administrative purposes to a previous exemption.

*Such exemption is matter of administration.* A party has no right to insist that his expert<sup>19</sup> or other special witnesses, or even the members of his immediate family,<sup>20</sup> be allowed to remain.

**§ 195. (Functions of Judicial Office; Administrative; Separation of Witnesses); Enforcement of the Order.**—A witness “under the rule” is not, unless specially permitted, at liberty to remain in the courtroom after giving his testimony.<sup>1</sup> It may be necessary to require his evidence again as a witness at a later stage of the trial; to permit him to hear the testimony of others whom he may be asked to refute is, therefore, within the mischief which separation seeks to prevent. The judge’s order is at times, especially in cases of magnitude, enforced by the sheriff.<sup>2</sup> The parties may furnish the latter with a list of the witnesses to enable him to see that they withdraw from the courtroom.<sup>3</sup> But a party is not under obligation to do so.<sup>4</sup> Where the list is not furnished, or in case of witnesses who for any reason have not been placed on it, it is the duty of each party to see that the witnesses whom he proposes to have sworn do not enter the courtroom before they are

17. *Alabama*.—Hall v. State, 137 Ala. 44, 34 So. 681 (1902).

*California*.—People v. Sam Lung, 70 Cal. 515, 11 Pac. 673 (1886).

*Georgia*.—Kelly v. State, 45 S. E. 413 (1903); Keller v. State, 102 Ga. 506, 31 S. E. 92 (1897); Carson v. State, 80 Ga. 170 (1887).

*Hawaii*.—Republic v. Tsunikichi, 11 Haw. 341, 344 (1898).

*Indiana*.—Johnson v. State, 2 Ind. 652 (1851).

*Louisiana*.—State v. Ford, 37 La. An. 443, 463 (1885).

*Missouri*.—State v. Hughes, 71 Mo. 633, 636 (1880).

*Texas*.—Buchanan v. State, 52 S. W. 769 (1899).

*Utah*.—People v. O’Loughlin, 3 Utah 133, 1 Pac. 653 (1881).

*Vermont*.—State v. Hopkins, 50 Vt. 316, 322, 332 (1877).

*Virginia*.—Jackson v. Com., 96 Va. 107, 30 S. E. 452 (1898).

18. *Shaw v. State*, 102, Ga. 660, 29 S. E. 477 (1897) (two witnesses assisting in the prosecution).

19. *Roberts v. State*, 122 Ala. 47, 25 So. 238 (1898); *Atlantic & B. Ry. Co. v. Johnson*, 127 Ga. 392, 56 S. E. 482 (1907). *State v. Forbes*, 111 La. 473, 35 So. 710 (1903).

20. *McGuff v. State*, 88 Ala. 147, 150, 7 So. 35 (1889); *May v. State*, 94 Ga. 76 (1894) (brother); *Hinkle v. State*, 94 Ga. 595, 21 S. E. 595 (1894); *Bond v. State*, 20 Tex. App. 437 (1886).

1. *Roach v. State*, 41 Tex. 261, 263 (1874).

2. *Hey v. Com.*, 32 Gratt. (Va.) 946, 34 Am. R. 799 (1879).

3. *Anon.*, 1 Hill (S. C.) 251 (1833)

4. *Anon.*, 1 Hill (S. C.) 251 (1833).

called to testify.<sup>5</sup> A more usual course is to require counsel to state to the judge the names of the witnesses to be affected in the order and for the judge to direct the sheriff as to the time at which their appearance will be required in court for the purpose of testifying, and as to the other particulars of the order.<sup>6</sup>

*Administrative Details.*—In details much must be decided as a question of administration.<sup>7</sup> The particulars of the order are within the administrative function of the presiding judge even in jurisdictions where the separation itself is demandable as of right.<sup>8</sup> Variations in the practice are naturally to be expected.<sup>9</sup> Thus, in West Virginia, the application must be accompanied by an affidavit in support.

*A common practice is for the judge* merely to announce from the bench that certain witnesses are directed to withdraw. The effect of their failure to do so, or of their returning to the courtroom before being called for the purpose of testifying,<sup>10</sup> or of their conversing or consulting with other witnesses or third persons, either while the trial is actually going on or during adjournment,<sup>11</sup> may be, and usually are also stated to them. It is within the administrative powers of the court to decline to allow

5. *Anon.*, 1 Hill (S. C.) 251, 254 (1833).

6. *Golden v. State*, 19 Ark. 590 598 (1858).

7. *Com. v. Hersey*, 2 Allen (Mass.) 173, 176 (1861) (whether witnesses should be permitted to read the daily papers); *Nelson v. State*, 2 Swan (Tenn.) 237, 256 (1852) (whether witnesses should be locked up or merely kept out of the courthouse; whether they could separate for meals). The judge may properly permit a witness placed under the rule to return to the court-room. *State v. High*, 122 La. 521, 47 So. 878 (1908).

8. *Nelson v. State*, 2 Swan (Tenn.) 237, 257 (1852).

9. *Gregg v. State*, 3 W. Va. 707, 709 (1869); *Cook's Trial*, 13 How. St. Tr. 311, 348 (1696).

10. *Golden v. State*, 10 Ark. 590, 598 (1858).

11. *Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 389 (1895).

12. *Alabama*.—*Sloss-Sheffield Steel*

& *Iron Co. v. Smith*, 40 So. 91 (1905); *Jarvis v. State*, 138 Ala. 17, 34 So. 1025 (1902).

*Arkansas*.—*Pleasant v. State*, 15 Ark. 624 (1855).

*California*.—*People v. Sam Lung*, 70 Cal. 515 (1886).

*Georgia*.—*Pergason v. Etcherson*, 91 Ga. 785, 787, 18 S. E. 29 (1893); *Grant v. State*, 89 Ga. 393, 12 S. E. 1065 (1892).

*Illinois*.—*Goon Bow v. People*, 160 Ill. 438, 43 N. E. 593 (1896); *Bullinger v. People*, 95 Ill. 394 (1880).

*Indiana*.—*Jackson v. State*, 14 Ind. 327 (1860); *Porter v. State*, 2 Ind. 435 (1851).

*Kentucky*.—*Crenshaw v. Gardner*, 25 Ky. Law Rep. 506, 76 S. W. 26 (1903); *Gilbert v. Com.*, 111 Ky. 793, 64 S. W. 846 (1901).

*Louisiana*.—*State v. Jones*, 47 La. Ann. 1524, 18 So. 515 (1895); *State v. Hagan*, 45 La. Ann. 839 (1893); *State v. Hagan*, 45 La. Ann. 839 (1893).

the offending witness to testify,<sup>12</sup> though it is also within his power to receive the evidence.<sup>13</sup>

**§ 196. (Functions of Judicial Office; Administrative; Separation of Witnesses); Consequences of Disobedience.—**

Where an express order of separation has been made<sup>1</sup> and a witness, though aware of its terms and that it applies to himself,<sup>2</sup> will—

*Mississippi.*—Taylor v. State, 30 So. 657 (1901).

*Missouri.*—State v. David, 131 Mo. 380, 33 S. W. 23 (1895); State v. Fitzsimmons, 30 Mo. 236 (1860).

*New Mexico.*—Trujillo v. Terr., 30 Pac. 870 (1892).

*Ohio.*—Laughlin v. State, 18 Oh. 99 (1849).

*Texas.*—King v. State, 29 S. W. 1086 (1895); Hill v. State, 22 Tex. App. 579, 3 S. W. 764 (1886).

*Virginia.*—Hey v. Com. 32 Gratt. 946 (1879).

*United States.*—Holder v. U. S., 150 U. S. 91, 14 Sup. 10 (1893).

*England.*—Young v. Young, 1 P. E. Isl. 69 (1854) (party); Thomas v. David, 7 C. & P. 350 (1836); Parker v. Williams, 4 M. & P. 480, 6 Bing. 683, C. P. (1830); R. v. Colley, M. & M. 329 (1829).

*Canada.*—Winter v. Mixer, 10 U. C. Q. B. 110 (1852). "Whether his evidence should be excluded or not, must depend upon circumstances." Bell v. State, 44 Ala. 393 (1870).

Unless fundamental rights are disregarded the exercise of the court's power will not be reversed; i. e., the discretion, as is said, has not been abused.

*Alabama.*—Webb v. State, 100 Ala. 47 (1893); Wilson v. State, 52 Ala. 299 (1875).

*California.*—People v. Boscovitch, 20 Cal. 436 (1862).

*Georgia.*—Lassiter v. State, 67 Ga. 739 (1881).

*Illinois.*—Errissman v. Errissman, 25 Ill. 136 (1860).

*Indiana.*—Jackson v. State, 14 Ind. 327 (1860).

*Kansas.*—Davenport v. Ogg, 15 Kan. 363 (1875).

*Kentucky.*—Carlton v. Com. 18 S. W. 535 (1892).

*Nebraska.*—Murphey v. State, 43 Neb. 34 (1894).

*Texas.*—Cook v. State, 30 Tex. App. 607 (1892).

*Wyoming.*—Haines v. Terr., 3 Wyo. 168 (1887) (reviewable in case of gross abuse). It follows that, in order to obtain reversal, the evidence excluded must be shown to have been material. Trujillo v. Terr., (N. M.) 30 Pac. 870 (1892). Whether the exercise of this administrative power is judicious will not be considered. Errissman v. Errissman, 25 Ill. 136 (1860). It has even been held that the appellate court has no power to revise the action. Wilson v. State, 52 Ala. 299 (1875); Jackson v. State, 14 Ind. 327 (1860).

13. Sharpton v. Augusta & A. Ry. Co., 72 S. C. 162, 51 S. E. 553 (1905).

1. R. v. Fursey, 3 State Tr. (N. S.) 543, 564 (1833).

2. A bystander unexpectedly called upon to testify after the making of an order is not excluded from the witness stand by reason of his previous presence in the court room. Laughlin v. State, 18 Oh. 99 (1849); Smith v. State, 4 Lea (Tenn.) 428 (1880). See also Parker v. Com., (Ky.) 51 S. W. 573 (1899) (codefendant); Rummel v. State, 22 Tex. App. 558 (1886). The same practice has been applied to a newspaper reporter. State v. Benjamin, (R. I. 1908) 71 Atl. 65.

The primary obligation being on the party asking for a separation to see that notice is given the witnesses, a failure to provide that such notice should be given may excuse a violation on the part of a witness summoned by his opponent.

fully<sup>3</sup> violates it, by listening to the evidence of the other witnesses as given in court, either before he has testified or after<sup>4</sup> he has himself testified; or mingling with persons who have heard the other witnesses,<sup>5</sup> he is in contempt of court and ready to be dealt with by the presiding judge as seems just and proper under the particular circumstances of the case.

**§ 197. (Functions of Judicial Office; Administrative; Separation of Witnesses); Party's Relation to Violation.**—How the court will exercise its power of excluding an offending witness depends largely on the relation which the party himself sustains to the act of his witness. If the disobedience is not only wilful on the part of the witness, but is aided and abetted by a party<sup>1</sup> or

In case, however, of one of his own witnesses, the burden has been laid on the party, if he desires the testimony of the witness, to show either (1) some reason or excuse for not having complied with the order of the court placing the witness under the rule; or, (2) that the testimony of the witness is highly material to his side of the case. *Trujillo v. Terr.*, (N. M. 1892) 30 Pac. 870.

This result of disobedience should, however, have been stated to the witnesses when the order was made, if the violation is to be deemed wilful. *Bird v. State*, 50 Ga. 585 (1874).

**3. An inadvertent violation without connivance by the party is not ground for exclusion.** *State v. Sumpter*, 153 Mo. 436, 55 S. W. 76 (1899); *Clemmons v. Clemmons*, (Nebr.) 96 N. W. 404 (1901); *Pile v. State*, 107 Tenn. 532, 64 S. W. 476 (1901). The rule is the same when, at the time the order is made, the party did not know of the existence of the particular witness (*Smith v. State*, 4 Lea 428, 430 [1880]) or where, for some other reason, the witness was not placed on the list. *State v. Sparrow*, 3 Murph. (N. C.) 487 (1819). See also *Taylor v. State*, 132 Ga. 235, 63 S. E. 1116 (1909).

**4. Sartorius v. State**, 24 Miss. 602 (1852).

**5. Porter v. State**, 2 Ind. 435 (1851).

**1. California.**—*People v. Boscovitch* 20 Cal. 436 (1862).

**Georgia.**—*Cunningham v. State*, 97 Ga. 214, 22 S. E. 954 (1895).

**Iowa.**—*Grimes v. Martin*, 10 Iowa 347, 349 (1860).

**Kansas.**—*Davenport v. Ogg*, 15 Kan. 363 (1875).

**Kentucky.**—*Crenshaw v. Gardner*, 76 S. W. 26 (1903).

**Maryland.**—*Parker v. State*, 67 Md. 329, 331, 10 Atl. 219 (1887).

**Mississippi.**—*Ferguson v. Brown*, 75 Miss. 214, 21 So. 603 (1897).

**Missouri.**—*State v. Gesell*, 124 Mo. 531, 536, 27 S. W. 1101 (1894).

**Nebraska.**—*Mangold v. Oft*, 63 Nebr. 397, 88 N. W. 507 (1901).

**Nevada.**—*State v. Salge*, 2 Nev. 321, 326 (1866).

**North Carolina.**—*State v. Sparrow*, 3 Murph. 487 (1819).

**Tennessee.**—*Woods v. McPherran*, Peck 371 (1824).

**Virginia.**—*Com. v. Brown*, 90 Va. 671, 675, 19 S. E. 447 (1894).

**West Virginia.**—*Gregg v. State*, 3 W. Va. 705 (1869). "In some cases, to do so (exclude the evidence) would be the just deserts of the party calling him." *Bell v. State*, 44 Ala. 393 (1870).

The burden of showing the collusion lies on the party seeking to exclude the evidence. *Davenport v. Ogg*, 15 Kan. 363 (1875).



his counsel,<sup>2</sup> the right and propriety<sup>3</sup> of refusing to hear the evidence of the witness is undoubted, and would in many instances be exercised.<sup>4</sup> Where the party is himself without fault in the matter, to exclude a guilty witness is in reality to punish an innocent person,<sup>5</sup> or enable one of his witnesses to do so; and, at the same time, avoid the possibly unwelcome or irksome task of testifying at all.<sup>6</sup> Under the practical conditions of a trial, a party can usually exercise but little control over the movements of his

2. *Bird v. State*, 50 Ga. 585, 589 (1874); *Com. v. Crowley*, 168 Mass. 121, 46 N. E. 415 (1897).

A fine is not a sufficient penalty in all cases to compensate a party who has been wilfully deprived of the advantage of the separation of his antagonist's witnesses. *Bird v. State*, 50 Ga. 585 (1874).

3. *Dyer v. Morris*, 4 Mo. 214 (1835); *Trujillo v. Terr.*, (N. M. 1892), 30 Pac. 870.

As a matter of legal principle, however, it would seem that the court should not exclude an essential witness, unless the circumstances attending the offense are such that the court is justified in saying that the necessary inferences arising from them prevent the jury in point of reason from finding in the party's favor. Any other rule makes a contempt of court deprive a party of his fundamental right to a trial of his cause in due form of law. *Infra*, §§ 333 *et seq.* "It might well be questioned (in case of an inflexible rule to exclude in cases of violation of the order) whether it would not be sounder policy to sacrifice the practice altogether, rather than endanger more vital principles." *Keith v. Wilson*, 6 Mo. 435, 441 (1840); *State v. Gesell*, 124 Mo. 531 (1894).

4. An important consideration in determining the action of the trial court should be that of mentally determining how far the violation of the order may be assumed to have affected the outcome of the trial.

If the witnesses in question testify

as to a point on which the cause does not turn but little harm may be apprehended from their misconduct. *State v. Fitzsimmons*, 30 Mo. 236 (1860). The result is the same where the point covered by their testimony is upon a matter capable of being placed beyond doubt by the testimony of other witnesses. *State v. Fitzsimmons*, 30 Mo. 236 (1860). A still stronger situation is presented against exclusion where the witnesses do not testify as to the same matters as do those whose evidence they have improperly heard. *Cook v. State*, 30 Tex. App. 607, 612 (1892). The rule of exclusion has, however, been applied to a witness testifying as to character. *Trujillo v. Terr.*, (N. M. 1892) 30 Pac. 870.

5. *Alabama*.—*Bell v. State*, 44 Ala. 393 (1870).

*Missouri*.—*Keith v. Wilson*, 6 Mo. 435 (1840).

*North Carolina*.—*State v. Sparrow*, 3 Murph. 487 (1819).

*Oregon*.—*Hubbard v. Hubbard*, 7 Oreg. 42 (1879).

*Washington*.—*State v. Lee Doon*, 7 Wash. 308 (1893).

6. *Keith v. Wilson*, 6 Mo. 435, 441 (1840). "A hostile witness should not have the power, by violating an order of the court, to deprive an innocent party of his testimony. Nor should the ignorance, mistake, misapprehension, or inadvertence on the part of the witness, have the effect to deprive an innocent party of his testimony." *Davenport v. Ogg*, 15 Kan. 363 (1875).

witnesses.<sup>7</sup> Unless, therefore, the witnesses are placed under the charge of a court officer, which is, as a rule, done only in causes of magnitude, instances of violation of the court's order may well occur without connivance of the party.<sup>8</sup> Under the fundamental administrative principle that a party should have preserved to him a fair opportunity of proving his case in the best way practically open to him,<sup>9</sup> a litigant should not, under the circumstances, be deprived of evidence necessary to his side.<sup>10</sup> It is, therefore, the practice, i. e., a customary exercise of judicial administration, to receive the testimony of the offending witness, in the absence of facts from which the inference of connivance by the party or his counsel in the misconduct of the witness<sup>11</sup> can reasonably be

7. *Laughlin v. Scott*, 18 Oh. 99 (1849).

8. "When we consider the little control that a party can have over his witnesses; the little attention he is likely to be able to give to their movements; the crowds and the confusion that generally exist during exciting trials, rendering it impossible, to note who are present; the questions that may arise on the trial, that could not be anticipated, and which may require bystanders to be called in as witnesses, who have been present and heard the other witnesses testify,—these and other considerations which might be presented, render it difficult, and we think impossible to establish any general rule of exclusion that would not in many cases deprive parties of important and necessary testimony, for the fair presentation of their cause. Nor do we find that any such rule has been established in the United States." *Laughlin v. State*, 18 Oh. 99 (1849).

The reasoning may be still more cogent, where as in a criminal case, the defendant, whose witnesses violate the order, is in custody. *People v. Boscovitch*, 20 Cal. 436 (1862); *State v. Salge*, 2 Nev. 321 (1866).

9. *Infra*, §§ 334 *et seq.*

10. *Rooks v. State*, 65 Ga. 330 (1880); *Laughlin v. State*, 18 Ohio 99 (1849); *International & G. N. R. Co. v. Hugen*, (Tex. Civ. App. 1907) 100 S. W. 1000 (deaf witness); *Black v. Besse*, 12 Ont. 522 (1886).

A new trial may, however, be granted in the court's discretion. It is not demandable as of right. *State v. Brookshire*, 2 Ala. 303 (1841); *Bullinger v. People*, 95 Ill. 394 (1880); *Sartorius v. State*, 24 Miss. 602 (1852); *State v. Fitsimmons*, 30 Mo. 236 (1860); *Laughlin v. State*, 18 Ohio, 99, 51 Am. Dec. 444 (1849).

11. *Alabama*.—*Bell v. State*, 44 Ala. 393 (1870). See also *Degg v. State*, (Ala. 1907), 43 So. 484; *Braham v. State*, (Ala. 1905) 38 So. 919. *Arkansas*.—*Pleasant v. State*, 15 Ark. 624 (1855).

*California*.—*People v. Boscovitch*, 20 Cal. 436 (1862).

*Colorado*.—*Vickers v. People*, 31 Colo. 421, 73 Pac. 845 (1903).

*Georgia*.—*McWhorter v. State*, 44 S. E. 873 (1903); *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49 (1892); *Lyman v. State*, 69 Ga. 404 (1882). See also *Green v. State*, 125 Ga. 742, 54 S. E. 724 (1906); *Davis v. State*, 120 Ga. 843, 48 S. E. 305 (1904); *Phillips v. State*, 121 Ga. 358, 49 S. E. 290 (1904).

*Illinois*.—*Bullinger v. People*, 95 Ill. 394 (1880).

*Indiana*.—*Taylor v. State*, 130 Ind. 66, 29 N. E. 415 (1891); *State v. Thomas*, 111 Ind. 515, 13 N. E. 35 (1887).

*Iowa*.—*State v. Kissock*, 111 Iowa 690, 83 N. W. 724 (1900). See also *State v. Pell*, (Iowa 1909) 119 N. W. 154; *State v. Pray*, (Iowa 1904) 99 N. W. 1065.

drawn. The weight of authority is said by the United States Supreme Court<sup>12</sup> to be to that effect.<sup>13</sup>

*Kansas*.—*State v. Flack*, 48 Kan. 146, 29 Pac. 1023 (1892).

*Louisiana*.—*State v. Goodson*, 116 La. 388, 40 So. 771 (1906).

*Michigan*.—*People v. Piper*, 112 Mich. 644, 71 N. W. 175 (1897).

*Mississippi*.—*Illinois C. R. Co. v. Ely*, 35 So. 873 (1904).

*Missouri*.—*State v. Fannon*, 158 Mo. 149, 59 S. W. 75 (1900); *O'Bryan v. Allen*, 95 Mo. 68 (1888). See also *State v. Welch*, 191 Mo. 179, 89 S. W. 945 (1905).

*Nebraska*.—*Fouse v. State*, 83 Neb. 258, 119 N. W. 478 (1909).

*Nevada*.—*State v. Salge*, 2 Nev. 321 (1866).

*North Carolina*.—*State v. Sparrow*, 3 Murph. (N. C.) 487 (1819).

*Oklahoma*.—*Price v. U. S.*, (Cr. App. 1908) 97 Pac. 1056.

*Oregon*.—*Hubbard v. Hubbard*, 7 Oreg. 42, 47 (1879).

*South Carolina*.—*Anon.*, 1 Hill (S. C.) 254, 256 (1833). See also *Sharpton v. Augusta & A. Ry. Co.*, 72 S. C. 162, 51 S. E. 553 (1905).

*Texas*.—*Caviness v. State*, 42 Tex. Cr. 420, 60 S. W. 555 (1901). See also *Conley v. State*, (Cr. App. 1909) 116 S. W. 806; *International & G. N. R. Co. v. Hugen*, (Tex. Civ. App. 1907), 100 S. W. 1000.

*Utah*.—*People v. O'Laughlin*, 3 Utah 133 (1881).

*Virginia*.—*Hopper v. Com.*, 6 Gratt. (Va.) 684 (1849).

*West Virginia*.—*Gregg v. State*, 3 W. Va. 705 (1869). See also *State v. Stewart*, (W. Va. 1908) 60 S. E. 591.

*Washington*.—*State v. Lee Doon*, 7 Wash. 308, 34 Pac. 1103 (1893). See also *Hendelman v. Kahan*, 50 Wash. 247, 97 Pac. 109 (1908); *State v. Ilomaki*, 40 Wash. 629, 82 Pac. 873 (1905).

*Wisconsin*.—*Loose v. State*, 97 N. W. 526 (1903).

*England*.—*Chandler v. Horne*, 2 M. & Rob. 423 (1842); *Cook v. Nethercote*, 6 C. & P. 741 (1835); *Doe v. Cox*, Cliff. El. C. 114 (1790).

*Canada*.—*Mahoney v. Macdonnel*, 9 Ont. 137 (1885) (coparty); *Strachan v. Jones*, 3 U. C. C. P. 253 (1853); *McFarlane v. Martin*, 3 U. C. C. P. 64 (1852).

The matter, however, is one within the administrative power of the presiding judge. *Boyd v. State*, (Ala. 1908) 45 So. 591; *Talley v. State*, 2 Ga. App. 395, 58 S. E. 667 (1907); *Crenshaw v. Gardner*, 76 S. W. 26, 25 Ky. L. Rep. 506 (1903); *Watters v. State*, (Tex. Cr. App. 1906) 94 S. W. 1038. Unless this discretion is "manifestly" abused, the action will not be reversed in an appellate court. *Talley v. State*, 2 Ga. App. 395, 58 S. E. 667 (1907). It has even been held that it is not a reasonable exercise of discretion on the part of the trial judge to deprive a party of a witness who has heard testimony in violation of the excluding order, unless such party or his attorney is in some way responsible for such violation, or has connived at it, or has knowingly permitted it without objection. *Palmer v. People*, 112 Ill. App. 527 (1904). See also, to the same effect, *Vickers v. People*, 31 Colo. 491, 73 Pac. 845 (1903). The objecting party will take nothing by his objection if he has been aware of the violation of the court's order while it might have been prevented or stopped and has failed to call the judge's attention to it. *Palmer v. People*, 112 Ill. App. 527 (1904).

In *Louisiana* it is said that the right of exclusion, though well established, "is seldom exercised in America." *Hagan v. State*, 45 La. Ann. 839 (1893).

12. *Holder v. U. S.* 150 U. S. 91 (1893).

13. There is authority to the effect

*Per contra*, even where connivance is not affirmatively shown, it may well be claimed that it is clearly not the fault of the other side that the witness should have offended and exclusion has been deemed, in certain cases, fairer than that a party who had no possible right to interfere should be deprived, *pro tanto*, of an important preventive of collusion, an expedient in which may lie his sole hope. It may well be considered, further, that connivance is extremely difficult to establish in most cases; and that it is precisely in the case where collusion is most to be apprehended and most carefully concealed that the separation itself is of greatest value. For these and similar reasons the disobedient witness has been, in the court's discretion, excluded even if no connivance of the party be shown.<sup>14</sup>

that the witness must be admitted in the absence of connivance.

*California*.—People v. Boscovitch, 20 Cal. 436 (1862).

*Colorado*.—Behrman v. Terry, 31 Colo. 155, 71 Pac. 1118 (1903).

*Indiana*.—Taylor v. State, 130 Ind. 66 (1891).

*Maryland*.—Parker v. State, 67 Md. 329 (1887).

*Nevada*.—State v. Salge, 2 Nev. 321 (1866).

*New Mexico*.—Trujillo v. Terr., 30 Pac. 870 (1892).

*Oregon*.—Hubbard v. Hubbard, 7 Oreg. 42 (1879).

*Virginia*.—Com. v. Brown, 90 Va. 671 (1894).

*Washington*.—State v. Lee Doon, 7 Wash. 308 (1893).

*England*.—Chandler v. Horne, 2 Moo. & Rob. 423 (1842); R. v. Boyle, 1 Lew. Cr. C. 325 (1829); Cobbett v. Hudson, 1 E. & B. 11 (1852). And also to the effect that, though the right of exclusion is established, it should be rarely exercised. Golden v. State, 19 Ark. 590, 597 (1858). The position seems a strong one where the excluded evidence is of a crucial nature. The "inferences against the credibility of the evidence could seldom destroy it so completely as to authorize the court to refuse to allow the jury to act upon it. To ex-

clude the evidence is a violation of the party's fundamental right. *Infra*, §§ 334 *et seq.* "It would be very strange if he should forfeit this most precious privilege by the misbehaviour of a witness." Parker v. State, 67 Md. 329 (1887). This is especially true in criminal cases.

*California*.—People v. Boscovitch, 20 Cal. 436 (1862).

*Nevada*.—State v. Salge, 2 Nev. 321 (1866).

*New Mexico*.—Trujillo v. Terr., 30 Pac. 870 (1892).

*Virginia*.—Com. v. Brown, 90 Va. 671 (1894).

*Washington*.—State v. Lee Doon, 7 Wash. 303 (1893). "If the evidence of such a witness would show the innocence of a prisoner on trial for his life, then the discretion of the judge to admit or reject the testimony amounts to a discretion to take the prisoner's life or to spare it." Parker v. State, 67 Md. 329 (1887).

14. Cardigan Case, 3 Doug. El. C., 2d ed., 174, 229 (1775). See also Martin v. Com., 30 Ky. L. Rep. 1196, 100 S. W. 872 (1907). The question, however, is in reality one entirely of administration. Benjamin v. State, (Ala. 1906) 41 So. 739; Sloss-Sheffield Steel & Iron Co. v. Smith, (Ala. 1905) 40 So. 91; McCullough v. State, (Tex. Cr. App. 1906) 94 S. W. 1056.

**§ 198. (Functions of Judicial Office; Administrative; Separation of Witnesses); Proceedings against offending Witness.**—The witness, in any event, may himself be dealt with by the court, as for a contempt.<sup>1</sup>

*Direct Punishment of Conniving Party.*—If a party has aided and abetted the offense, he may be treated in like manner,<sup>2</sup> whether deprived of the evidence of his witness or not, and, however innocent, must lose in the almost necessary diminution in probative weight of the testimony of the witness.<sup>3</sup>

*Comment by counsel* upon the circumstance is entirely proper.<sup>4</sup>

The rule of exclusion has been said to be inflexible. Attorney-General v. Bulpit, 9 Price 4 (1821) (sacred and inflexible rule). It is conceded that such is the rule in the English exchequer. Parker v. McWilliams, 4 M. & P. 480, 6 Bing. C. P. 683 (1830).

1. *Alabama.*—Bell v. State, 44 Ala. 393, 395 (1870).

*Arkansas.*—Pleasant v. State, 15 Ark. 624 (1855).

*California.*—People v. Boscovitch, 20 Cal. 436 (1862).

*Georgia.*—Metropolitan St. R. Co. v. Johnson, 90 Ga. 500 (1892).

*Illinois.*—Bullinger v. People, 95 Ill. 394 (1880).

*Indiana.*—State v. Thomas, 111 Ind. 515 (1887).

*Iowa.*—Grimes v. Martin, 10 Iowa, 347 (1860).

*Kansas.*—State v. Falk, 46 Kan. 498 (1891).

*Louisiana.*—Hagan v. State, 45 La. Ann. 839 (1893).

*Mississippi.*—Sartorius v. State, 24 Miss. 602 (1852).

*Nevada.*—State v. Salge, 2 Nev. 321 (1866).

*North Carolina.*—State v. Sparrow, 3 Murph. (N. C.) 487 (1819).

*Ohio.*—Laughlin v. State, 18 Ohio 99 (1849).

*Oregon.*—Hubbard v. Hubbard, 7 Oreg. 42 (1879).

*Tennessee.*—Woods v. McPheran, Peck (Tenn.) 371 (1824).

*Virginia.*—Com. v. Brown, 90 Va. 671 (1894); Hopper v. Com., 6 Gratt. (Va.) 684 (1849).

*United States.*—Holder v. U. S. 150 U. S. 91 (1893). "The better course (where a party is innocent) would be to punish him for contempt and admit his evidence." Bell v. State, 44 Ala. 393 (1870).

Fine and imprisonment may be imposed. Davenport v. Ogg, 15 Kan. 363 (1875). A reprimand from the judge may also properly be given. Trujillo v. Terr., (N. M. 1892) 30 Pac. 870.

2. Davenport v. Ogg, 15 Kan. 363 (1875).

Any person who procures or abets such violation is guilty of contempt of court. Davenport v. Ogg, 15 Kan. 363 (1875).

"The guilt of the party punished must either come under the personal and judicial cognizance of the court, or it must be proved to the satisfaction of the Court by evidence." Davenport v. Ogg, 15 Kan. 363 (1875).

3. Taylor v. State, 130 Ind. 66 (1891).

4. *Alabama.*—State v. Brookshire, 2 Ala. 303 (1841).

*Arkansas.*—Pleasant v. State, 15 Ark. 624 (1855).

*Georgia.*—Betts v. State, 66 Ga. 508 (1881).

*Indiana.*—Taylor v. State, 130 Ind. 66, 70, 29 N. E. 415 (1891), citing State ex rel. v. Thomas, 111 Ind. 515 (1887); Burk v. Andis, 98 Ind. 59 (1884); Davis v. Byrd, 94 Ind. 525 (1883).

*Iowa.*—Grimes v. Martin 10 Iowa 347 (1860).

The inference of bad faith is still more cogent in case of a party,<sup>5</sup> and the jury may be asked to consider his conduct in weighing the evidence.<sup>6</sup>

**§ 199. (Functions of Judicial Office; Administrative); Swearing of Witnesses.**—*General Rule.*—Where not regulated by statute the administration of the oaths imposed upon interpreters and other witnesses takes place under the direction of the court. As the sanction of truthfulness which the imposition of an oath seeks to attain, consists in “laying hold of the conscience of the witness and appealing to his sense of accountability,”<sup>1</sup> it must be, so far as possible, imposed in a form binding upon his conscience, or such as to arouse his fear of punishment.<sup>2</sup> The duty of ascertain-

*Kansas.*—*State v. Falk*, 46 Kan. 498, 26 Pac. 1023 (1891); *Davenport v. Ogg*, 15 Kan. 363 (1875).

*Missouri.*—*Keith v. Wilson*, 6 Mo. 435 (1840).

*Nevada.*—*State v. Salge*, 2 Nev. 321 (1866).

*North Carolina.*—*State v. Sparrow*, 3 Murph. 487 (1819).

*Ohio.*—*McHugh v. State*, 42 Ohio St. 154, 158 (1884); *Laughlin v. State*, 18 Ohio 99 (1849).

*Oregon.*—*Hubbard v. Hubbard*, 7 Oreg. 42 (1879).

*Vermont.*—*State v. Lockwood*, 58 Vt. 378 (1886).

*Virginia.*—*Com. v. Brown*, 90 Va. 671 (1894).

*Washington.*—*State v. Lee Doon*, 7 Wash. 308 (1893).

*West Virginia.*—*Gregg v. State*, 3 W. Va. 705, 713 (1869).

*United States.*—*Holder v. U. S.* 150 U. S. 91 (1893).

*England.*—*Chandler v. Horne*, 2 M. & Rob. 423 (1842).

5. *Laughlin v. State*, 18 Oh. 99 (1849).

6. *Davenport v. Ogg*, 15 Kan. 363 (1875).

1. *Clinton v. State*, 33 Oh. St. 27 (per Ashburn J.) (1877).

2. *Connecticut.*—*Curtiss v. Strong*, 4 Day 55 (1809).

*Illinois.*—*Gill v. Caldwell*, 1 Ill. 53 (1822).

*Massachusetts.*—*Com. v. Buzzell*, 16 Pick. 153 (1834).

*Tennessee.*—*Odle v. State*, 6 Bax. 159 (1873); *Doss v. Birks*, 11 Humph. 431 (1850).

*Vermont.*—*Arnold v. Arnold*, 13 Vt. 362 (1841).

*England.*—*R. v. Moore*, 17 Cox C. C. 458, 61 L. J. Mag. Cas 80 (1892); *Omychund v. Barker*, 1 Atk. 21 (1744). “It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking.” *Omychund v. Barker*, 1 Atk. 50 (per Hardwicke L. C.) (1744).

The modern purpose of the oath is to call the attention of the witness to God. *Blackburn v. State*, 71 Ala. 319 (1882); *Curtiss v. Strong*, 4 Day (Conn.) 51, 56 (1809); *Clinton v. State*, 33 Ohio, 27, 33 (1877). Its ancient object was rather to direct the attention of God to the witness.

Perjury may be committed by a witness who has been sworn with a form of oath not binding on his conscience. *State v. Whisenhurst*, 2 Hawkes (N. C.) 458 (1823); *Sells v. Hoare*, 1 Bing. 401 (1824). Physical inability, by reason of deafness, to hear the words of an oath is not a disqualification. *Texas, etc., R. Co. v. Reid* (Tex. Civ. App. 1903) 74 S. W. 99.

A notary public, at common law,

ing the nature of such an oath devolves upon the judge, as a preliminary finding of fact, on *voir dire*; though he may delegate to a party the duty of eliciting any facts necessary to his contention;<sup>3</sup> and, in any event, counsel have the right to bring out by examination conducted by themselves, facts of advantage to their position; the burden of proof being on the party objecting to the competency of the witness.<sup>4</sup>

**§ 200. (Functions of Judicial Office; Administrative; Swearing of Witnesses); Subjective Qualifications.**—It has been deemed necessary, however, at the common law, to require that the proposed witness should “believe in God and future rewards and punishments in the other world,”<sup>1</sup> though it has been regarded as

had no authority, it is said, to administer an oath. *Midland Steel Co. v. Citizens’ Nat. Bank*, (Ind. App. 1904) 72 N. E. 290. A foreign notary has no authority to administer the pauper’s oath to a person desirous of suing *in forma pauperis*. *Fawcett v. Chicago, St. L. & N. O. Ry. Co.*, (Tenn. 1904) 81 S. W. 839.

3. *Com. v. Smith*, 2 Gray (Mass.) 516 (1854); *Gray v. Macallum*, 2 Brit. Col. 104 (1892).

4. *Smith v. Coffin*, 18 Me. 157 (1841); *Donnelly v. State*, 26 N. J. L. 463, 601 (1857); *Den v. Vancleve*, 5 N. J. L. 589 (1819); *Attorney-Gen. v. Bradlaugh*, 14 Q. B. Div. 667 (1885).

The burden is discharged and a *prima facie* case established by proof of a suitable mental state on the part of the witness even at an interval of considerable length. The religious attitude being one of permanence, it will be inferred that it continues, in the absence of circumstances suggesting change. *State v. Stinson*, 17 Me. 154 (1840). But see *Brock v. Milligan*, 10 Oh. 121 (1840) where this view is apparently questioned. The fact of change in opinion may be shown. *Atwood v. Welton*, 7 Conn. 66 (1828); *Scott v. Hooper*, 14 Vt. 535 (1842).

1. *Omychund v. Barker*, 1 Atk. 21 (1744) (per Willes L. C. J.) See also, to same effect:

*Louisiana*.—*State v. Washington*, 49 La. Ann. 1602, 22 So. 841 (1897).

*New York*.—*People v. Matteson*, 2 Cowen 433 (1823); *Jackson v. Gridley*, 18 Johns. 98 (1820).

*Ohio*.—*Brock v. Milligan*, 10 Oh. 121 (1840).

*Vermont*.—*Arnold v. Arnold*, 13 Vt. 362 (1841).

*England*.—*Miller v. Solomon*, 7 Exch. 475 (1852).

Atheists were therefore incompetent as witnesses at the common law.

*Maine*.—*Smith v. Coffin*, 18 Me. 157 (1841).

*Connecticut*.—*Atwood v. Welton*, 7 Conn. 66 (1828).

*Massachusetts*.—*Thurston v. Whitney*, 2 Cush. (Mass.) 104 (1848).

*New Hampshire*.—*Norton v. Ladd*, 4 N. H. 444 (1828).

*New York*.—*Jackson v. Gridley*, 18 Johns. (N. Y.) 98 (1820).

*Vermont*.—*Arnold v. Arnold*, 13 Vt. 363 (1841).

*United States*.—*Wakefield v. Ross*, 5 Mason (U. S.) 16 (1827). See also *Com. v. Hills*, 10 Cush. (Mass.) 530 (1852); *Hale v. Everett*, 53 N. H. 9 (1868); *Gibson v. Mut. L. Ins. Co.*, 37 N. Y. 580 (1868).

It is not essential, on legal principles that the punishment should be in a future world or state of existence. If the witness believes that he will be punished in this world it should be

sufficient that such a witness should have a religion<sup>2</sup>—that is, should believe in a Supreme Being,<sup>3</sup> who would, as a necessary result of His perfect nature, punish false swearing.<sup>4</sup> The particular conception which the witness has formed of deity is not a matter of concern to the court. It has even been decided to be a sufficient qualification if the witness apprehends consequences

sufficient. The decisions or *dicta* of many courts of last resort are to this effect.

*Alabama*.—Beeson v. Moore, 132 Ala. 391, 31 So. 456 (1901); Blocker v. Burness, 2 Ala. 354 (1841).

*Connecticut*.—Atwood v. Welton, 7 Conn. 66 (1828).

*Illinois*.—Central, etc., Ry. Co. v. Rockefeller, 17 Ill. 553 (1856); Noble v. People, 1 Ill. 54 (1822).

*Iowa*.—Searcy v. Miller, 57 Iowa 613, 10 N. W. 912 (1881).

*Kentucky*.—Bush v. Com., 80 Ky. 248, 250 (1882).

*Massachusetts*.—Hanscom v. Hanscom, 15 Mass. 184 (1818).

*New Hampshire*.—Free v. Buckingham, 59 N. H. 219 (1879).

*New York*.—People v. Mathewson, 2 Cow. 433 (1823). But see Jackson v. Gridley, 18 Johns. 103 (1820).

*North Carolina*.—Shaw v. Moore, 4 Jones L. 26 (1856) ("Both are based upon the sense of religion").

*Ohio*.—Clinton v. State, 33 Oh. St. 27 (1877).

*Pennsylvania*.—Blair v. Seaver, 26 Pa. St. 274 (1856).

*South Carolina*.—Jones v. Harris, 1 Strob. L. 160 (1846).

*Tennessee*.—Bennett v. State, 1 Swan 411 (1852); State v. Cooper, 2 Overt. 96, 5 Am. Dec. 656 (1807).

*Vermont*.—Arnold v. Arnold, 13 Vt. 362 (1841).

*England*.—Atty.-Gen. v. Bradlaugh, 14 Q. B. D. (1885). The Judges of Louisiana have failed to adopt any definite position. State v. Washington, 49 La. Ann. 1602, 22 So. 841 (1897).

The contrary view—that a belief

in a future state of existence affected by reward or punishment according to conduct in this world is essential to the sanction of the oath—is announced, with varying degrees of definiteness, by tribunals of authority. Atwood v. Melton, 7 Conn. 66 (1828); Anderson v. Maberry, 2 Heisk. (Tenn.) 653 (1871); McClure v. Tennessee, 1 Yerg. (Tenn.) 206 (1829). But see Bennett v. State, 1 Swan (Tenn.) 411 (1852); Wakefield v. Ross, 5 Mason (U. S.) 16 (1827); Bell v. Bell, 34 New Bruns. 615, 624 (1899). In Omychund v. Barker, (1 Atk. 45, Willes, 538) the distinction is taken that, as a matter of weight, belief on the part of the witness in a future state, gives an element of superiority so great as compared with the infidel who believes in God but not in a future state as to bring the relation within the scope of the broad (and now abandoned) "best evidence rule."

2. Atty.-Gen. v. Bradlaugh, L. R. 14 Q. B. D. 667 (1885); Omychund v. Barker, 1 Atk. 21 (per Lee, L. C. J.) (1714).

3. Odell v. Koppee, 5 Heisk. (Tenn.) 88 (1871); Omychund v. Barker, 1 Atk. 45 (1744) (per Hardwicke, L. J.).

Atheism is a ground for refusing to administer an oath which could not exert the desired restraint upon the conscience of the witness. Scott v. Hooper, 14 Vt. 538 (1842).

4. That the witness is a "Christian" has been considered to connote the essential requisites of belief. R. v. Serva. 2 C. & K. 53 (1845).



from the making of a perjured statement "beyond such penalties as human laws may inflict."<sup>5</sup>

§ 201. (*Functions of Judicial Office; Administrative; Swearing of Witnesses*); *Method of Inquiry*.—The subject of inquiry, being as to the existence of a particular mental state, belief or fear, may logically be proved by any of the methods employed in proof of mental states. The natural and frequently the only source of information on these particulars is the person himself. His mental attitude may be gathered, (1) directly from his answers as a witness upon *voir dire*, or (2) indirectly from evidence of his declarations as narrated by others.

(1) *Direct Examination*.—Direct examination of the witness as to his theological views regarding the existence of a Supreme Being who is certain to punish false swearing is customary in English practice,<sup>1</sup> though the answers of a witness are not conclusive.<sup>2</sup> Moreover, the proceeding has been severely criticised;<sup>3</sup> for the logical difficulty in which it places the court—of either (a) rejecting as incredible, because of theological views, the evidence of an honest man who is willing even to disqualify himself as a witness rather than tell a lie; or (b) accepting the witness on the faith of a statement as to religious belief which, if false, is itself legally incredible as the act of a dishonest man—has not escaped judicial attention.<sup>4</sup>

*The presiding justice may instruct a witness otherwise competent in the necessary theological knowledge,*<sup>5</sup> or permit it to be done by others;—<sup>6</sup> an adjournment, if required for the purpose, being permitted.<sup>7</sup>

*In America* direct interrogation of the proffered witness has

5. *Odell v. Koppee*, 5 Heisk. (Tenn.) 88 (1871).

1. *Maden v. Catanach*, 7 H. & N. 360 (1861); *Acheson v. Everitt*, Comp. 389 (1776).

2. *Queen's Case*, 2 B. & B. 284 (1820).

3. *R. v. Williams*, 7 C. & P. 320 (1835) (per Patterson J.).

4. *Perry v. Com.* 3 Gratt. (Va.) 632, 642 (1846); *Maden v. Catanach*, 7 H. & N. 360 (1861).

5. *Alabama*.—*Carter v. State*, 63 Ala. 53 (1879).

*Massachusetts*.—*Com. v. Lynes*, 142 Mass. 578, 8 N. E. 408 (1886).

*New Hampshire*.—*Day v. Day*, 56 N. H. 316 (1876).

*New York*.—*People v. McNair*, 21 Wend. 608 (1839).

*North Carolina*.—*State v. Edwards*, 79 N. C. 648, 650 (1878).

*England*.—*Anon.*, 1 Leach Cr. L., 4th ed., 430 (1786); *R. v. Baylis*, 4 Cox Cr. 23 (1849).

6. *State v. Todd*, 110 Ia. 631, 82 N. W. 322 (1900) (county attorney).

7. *Day v. Day*, 56 N. H. 316 (1876); *R. v. Nicholas*, 2 Cox Cr. 136, 2 C. & K. 246 (1846); *Anon.*, 1 Leach Cr. L., 4th ed., 430 (1786).

been rejected by the earlier cases — on the ground that the subject was one on which the witness was entitled to keep silent;<sup>8</sup> or that it was improper to allow a witness to testify at all until the question of his credibility was first settled,<sup>9</sup> or for these or other reasons in combination.<sup>10</sup> Later American decisions, though with some hesitancy, receive the direct evidence of the witness.<sup>11</sup>

(2) *Circumstantial Proof*.—The mental state of the witness may also be proved, circumstantially, by evidence of his statements.<sup>12</sup> While such statements may properly be received cautiously in view of the common experience, that public utterances on matters of personal belief in religious matters are not always a faithful indication of the exact fact,<sup>13</sup> it is perhaps equally important that some test of the truth of the statements made on *voir dire* should be available. The witness to whose belief in the binding nature of an oath objection has been made has the right to elect to prove his belief by evidence *aliunde*.<sup>14</sup>

**§ 202. (Functions of Judicial Office; Administrative; Swearing of Witnesses); Children as Witnesses.**—The examination of children as to a belief in future punishment sufficient to make the oath, when administered, of binding effect, is usually conducted by the judge himself,<sup>1</sup> whose finding will not, as a rule, be re-

8. *Com. Batchelder, Thacher's Cr. C. (Mass.)* 197 (1829); *Com. v. Smith*, 2 *Gray* 516 (1854); *Free v. Buckingham*, 59 *N. H.* 219, 225 (1859); 1 *Law Reporter, Boston*, 347.

9. *Curtiss v. Strong*, 4 *Day* 51, 55 (1809); *Smith v. Coffin*, 18 *Me.* 159 (1841); *Com. v. Wyman, Thacher's Cr. C.* 432, 436 (1836); *Jackson v. Gridley*, 18 *Johns. (N. Y.)* 98 (1820); *Cubbison v. McCreary*, 2 *W. & S. (Pa.)* 263 (1841).

10. *Stewart v. Melton*, 7 *Com.* 66, 70 (1828); *Searcy v. Miller*, 57 *Iowa* 613, 10 *N. W.* 912 (1881); *Den v. Van Cleve*, 2 *South. (N. J.)* 589, 653 (1819). "The better practice" forbids interrogating the witness. *Hronek v. People*, 134 *Ill.* 139, 150, 24 *N. E.* 861 (1890).

11. *Central, etc., Ry. Co. v. Rockafellow*, 17 *Ill.* 541, 553 (1856); *Arnd v. Amling*, 53 *Md.* 192, 197 (1879);

*Odell v. Koppee*, 5 *Heisk. (Tenn.)* 88 (1871).

12. *Beardsly v. Foot*, 2 *Root (Conn.)* 399 (1796); *Smith v. Coffin*, 18 *Me.* 157 (1841); *Thurston v. Whitney*, 2 *Cush.* 104 (1848); *Anderson v. Maberry*, 2 *Heisk. (Tenn.)* 653 (1871).

13. *Thurston v. Whitney*, 2 *Cush. (Mass.)* 104 (1848).

14. *Commonwealth v. Burke*, 16 *Gray (Mass.)* 33 (1860); *Odell v. Koppee*, 5 *Heisk. (Tenn.)* 88 (1871); But see *Harrel v. State*, 1 *Head (Tenn.)* 125 (1858).

There is authority to the contrary. *Arnd v. Amling*, 53 *Md.* 192 (1879).

1. *Alabama*.—*Williams v. State*, 109 *Ala.* 64, 19 *So.* 530 (1895); *Grimes v. State*, 105 *Ala.* 86, 17 *So.* 184 (1894).

*District of Columbia*.—*Williams v. U. S.*, 3 *App. D. C.* 335, 340 (1894).

vised.<sup>2</sup> It has even been held that he must make the examination personally and cannot leave it to counsel;<sup>3</sup> though a ruling which forbids the judge to make his examination in private<sup>4</sup> seems hardly in accordance with the requirements of the situation.<sup>5</sup> The question of effective belief is entirely one of fact. No arbitrary age limit having been established under which the witness is automatically rejected.<sup>6</sup> While four has seemed too young for a child to possess sufficient intelligence either to testify<sup>7</sup> or make a relevant statement not under oath,<sup>8</sup> children of seven,<sup>9</sup> or even five<sup>10</sup> years of age, have been accepted.<sup>11</sup> It has been sagaciously

*Georgia.*— *McMath v. State*, 55 Ga. 303, 307 (1875).

*Illinois.*— *Draper v. Draper*, 68 Ill. 17 (1873).

*Indiana.*— *Weldon v. State*, 32 Ind. 82 (1869).

*New Jersey.*— *State v. Crocker*, 65 N. J. L. 410, 47 Atl. 643 (1900).

*New York.*— *People v. McNair*, 21 Wend. 608 (1839).

*South Carolina.*— *State v. Belton*, 24 S. C. 185 (1885).

*Tennessee.*— *Vincent v. State*, 3 Heisk. 121 (1871).

*Texas.*— *Davidson v. State*, 39 Tex. 129 (1873).

*West Virginia.*— *State v. Michael*, 37 W. Va., 565, 568, 16 S. E. 803 (1893).

*England.*— *R. v. Holmes*, 2 F. & F. 788 (1861); *R. v. Brazier*, 1 East P. C. 443 (1779); *Braddon's Case*, 9 How. St. Tr. 1127, 1148 (1684).

2. *Alabama.*— *Wade v. State*, 50 Ala. 164 (1874).

*Massachusetts.*— *Com. v. Lynes*, 142 Mass. 577, 580 (1886).

*New Hampshire.*— *Day v. Day*, 56 N. H. 316 (1876).

*North Carolina.*— *State v. Edwards*, 79 N. C. 648, 650 (1878).

*South Dakota.*— *State v. Reddington*, 7 S. D. 368, 64 N. W. 170 (1895).

3. *Hughes v. Ry Co.*, 65 Mich. 10, 31 N. W. 603 (1887).

4. *State v. Morea*, 2 Ala. 275, 278 (1841).

5. *McGuire v. People*, 44 Mich. 286, 6 N. W. 669 (1880).

6. *Alabama.*— *McGuff v. State*, 88 Ala. 147, 150, 7 So. 35 (1889).

*Arkansas.*— *Flanagin v. State*, 25 Ark. 447 (1869).

*California.*— *People v. Bernal*, 10 Cal. 66 (1858).

*Illinois.*— *Featherstone v. People*, 194 Ill. 325, 62 N. E. 684 (1902).

*Iowa.*— *State v. Severson*, 78 Iowa 653, 43 N. W. 533 (1889).

*Louisiana.*— *State v. Richie*, 28 La. Ann. 327 (1876).

*Nebraska.*— *Davis v. State*, 31 Neb. 247, 47 N. W. 855 (1891).

*England.*— *R. v. Perkins*, 9 C. & P., 395, 399, 2 Moo. Cr. C. 139 (1840); *R. v. Brasier*, 1 East P. C. 443 (1779).

7. *People v. McNair*, 21 Wend. (N. Y.) 608 (1839); *R. v. Pike*, 3 C. & P. 598 (1829).

8. *Smith v. State*, 41 Tex. 352 (1874); *R. v. Brasier*, 1 East P. C. 443 (1779).

9. *State v. Whittier*, 8 Shepl. (Me.) 341 (1842); *Com. v. Hutchinson*, 10 Mass. 225 (1813).

10. *R. v. Brasier*, 1 Leach 199, Bull. N. P. 293, 1 East P. C. 443 (1779).

11. To demand of a child, possibly of tender years, accurate theological knowledge as to precise conditions of punishment after death about which the adult community are in great uncertainty and disagreement, as furnishing a test of credibility, seems a travesty on common sense. The al-

suggested that it would be a desirable improvement upon present methods if the statement of a child were simply taken, without the formality of an oath, and given such weight as it should appear entitled to receive. As the learned judge who offers the suggestion says, "This seems to be a sensible proceeding and is probably quite as efficacious as our present system and less likely to abuse."<sup>12</sup> Such a step, however, would more appropriately be part of a larger movement—the substitution of relevancy for more formal tests of admissibility in case of any statement whatever. As is said in the second report (1853) of the very distinguished English Common Law Practice Commissioners (at p. 10): "Plain sense and reason would obviously suggest that any living witness should be heard to state what he knows, subject always to such observations as may arise as to his means of knowledge or his disposition to tell the truth."<sup>13</sup>

*Feeble-Minded and Insane Persons.*—Feeble-minded and insane persons should be examined as to their understanding of the nature and obligation of an oath in the same manner as is done in case of children.<sup>14</sup> It has been doubted whether a difficulty of so permanent a nature might reasonably be overcome by instruction during an adjournment.<sup>15</sup>

**§ 203. (Functions of Judicial Office; Administrative; Swearing of Witnesses); Form of Oath.**—No particular form of oath is essential<sup>1</sup> unless one is prescribed by the religion of the wit-

most universal statutory changes in this connection have prescribed intelligence rather than theological belief as test of a child's competency as a witness.

*Georgia.*—*Johnson v. State*, 61 Ga. 35, 36 (1878).

*Illinois.*—*Hronek v. People*, 134 Ill. 139, 152, 24 N. E. 861 (1890); *Ewing v. Bailey*, 36 Ill. App. 191, 193 (1889).

*Indiana.*—*Snyder v. Nations*, 5 Blackf. 295 (1840).

*Iowa.*—*State v. King*, 117 Iowa 484, 91 N. W. 768 (1902).

*Kansas.*—*Lee v. Missouri Pac. Ry. Co.*, 73 Pac. 110 (1903).

*Kentucky.*—*White v. Com.*, 96 Ky. 180, 28 S. W. 340 (1894).

*Louisiana.*—*State v. Williams*, 111 La. 179, 35 So. 505 (1903).

*South Dakota.*—*State v. Reddington*, 7 S. D. 368, 64 N. W. 170 (1895).

*Virginia.*—*Perry v. Com.*, 3 Gratt. 632, 641 (1846).

<sup>12.</sup> *Hughes v. Ry. Co.*, 65 Mich. 10, 31 N. W. 605 (1887), per Campbell, C. J.

<sup>13.</sup> See also Bentham, *Rationale of Jud. Evid.*, bk. IX, pt. III, c. VI (Works, VII, 427).

<sup>14.</sup> *Holcomb v. Holcomb*, 28 Conn. 179 (1859); *R. v. Whitehead*, L. R. 1 C. C. 33, 38 (1866); *R. v. Hill*, 2 Den. C. C. 254 (1851).

<sup>15.</sup> *R. v. Whitehead*, L. R. 1 C. C. R. 33 (1866) (idiot).

<sup>1.</sup> *Miller v. Salomons*, 7 Exch. 475 (1852); *Atcheson v. Everitt*, Cowp. 382 (1776); *Omychund v. Barker*, 1 Atk. 21 (1744). "A Jew is to be sworn on the Book of the Law and with his

ness.<sup>2</sup> In accordance with this broad rule of administration, Chinaman,<sup>3</sup> Jew,<sup>4</sup> Mahometan,<sup>5</sup> Roman Catholic,<sup>6</sup> Scotch Presbyterian,<sup>7</sup> may be sworn according to the tenets of his religion.

*The oath may be administered* by uplifting the hand,<sup>8</sup> by the use of the Old Testament, bound into a separate volume,<sup>9</sup> by employing the Holy Evangelists alone,<sup>10</sup> or, as in common practice, by making use of the Bible as a whole, comprising both the Old and New Testaments. In any of these formularies the oath may be accompanied by kissing the volume,<sup>11</sup> placing the hand thereon or otherwise referring the testimony to it. National<sup>12</sup> and even individual<sup>13</sup> variations in the matter may be followed.

*Telephone administration.*—Although the officer administering an oath may be familiar with the voice of the person swearing,

head covered, a Brahmin by the mode prescribed by his peculiar faith, a Chinese by his special ceremonies, and the like." *Miller v. Salomons*, 7 Exch. 535, 558 (per Alderson, B.).

2. *R. v. Pah-Mah-Gay*, 20 Q. B. U. C. 195 (1860).

3. *State v. Gen Pon*, 16 Wash. 425, 47 Pac. 961 (1897) (extinguishing a candle, accompanied with an invocation that, in case of false swearing, the like may happen to the witness); *R. v. Entrehman, C. & M.* 248 (1842).

4. *Newman v. Newman*, 7 N. J. Eq. 26 (1847).

5. *R. v. Morgan*, 1 Leach 54 (1764); *Fachiner v. Sabine*, 2 Stra. 1104 (1738).

6. *Can. v. Buzzell*, 16 Pick. (Mass.) 156 (1834).

7. *Walker's Case*, 1 Leach 498 (1788).

8. *McKinney v. People*, 7 Ill. 540 (1845); *Gill v. Caldwell*, 1 Ill. 53 (1822); *Doss v. Birks*, 11 Humph. (Tenn.) 431 (1850); *Mildrone's Case*, 1 Leach 412 (1786); *Queen Caroline's Case*, 2 Hans. Parl. Deb., 2d Ser., 611, 911 (1820).

9. *Edmonds v. Rowe*, R. & M. 77 (1824); *Mee v. Reid*, Peake N. P. Cas. 23 (1790); *Walker's Case*, 1 Leach Cr. L. 498 (1788).

10. *Com. v. Buzzell*, 16 Pick. 156 (1834).

11. 31 Central Law Jour. 93.

12. *Vail v. Nickerson*, 6 Mass. 262 (1810) (French)..

13. *Alabama*.—*Birmingham, etc., Co. v. Mason*, 34 So. 207 (1903).

*California*.—*People v. Green*, 34 Pac. Rep. 231 (1893).

*Maine*.—*State v. Welch*, 79 Me. 99 (1887).

*Missouri*.—*State v. Chyo Chiazk*, 92 Mo. 395 (1887).

*England*.—*Edmonds v. Rowe*, R. & M. 77 (1824); *Queen Caroline's Case*, 2 Hans. Parl. Deb., 2d Ser., 611, 911 (1820).

In Massachusetts a witness is not allowed to affirm merely because he prefers to do so. The privilege is strictly limited to Quakers. *United States v. Coolidge*, 2 Gall. (U. S.) 364 (1815).

In New Jersey a much more lenient rule prevails; a witness not being permitted to affirm except in case of conscientious scruples against the taking of an oath. *Williamson v. Carroll*, 16 N. J. L. 217 (1837).

Whether the witness deems another form of oath more binding has, however, been rejected as an irrelevant inquiry. *Queen's Case*, 2 B. & B. 302 (1820).

the administration of an oath over the telephone is not valid for the purpose.<sup>14</sup>

§ 204. (*Functions of Judicial Office*); *Executive*.—Inherent in the judicial office are certain powers conferred upon the presiding judge and designed to enable him to preserve order, maintain the dignity of his office, to compel and preserve popular respect for the public administration of justice. Such powers may, with apparent propriety, be designated the *executive* or “police” powers of a presiding judge; although it may fairly be objected that the difference between these and the administrative function of the court is but slight. In any broad allotment of governmental duties, each great department has not only the powers directly given but all such incidental or ancillary functions as are reasonably necessary or convenient for carrying into full effect the powers directly conferred. Thus, the judicial branch of the government established by the sovereign, being commissioned and empowered to administer justice according to law, has *ex officio* all incidental powers required to carry this important mandate into complete effect. Inherently, therefore, without statutory enactment, simply *qua* judge, the justice presiding at a trial is clothed with a large number of executive as well as judicial powers implicit in his office, which, though unenumerated, and most frequently considered when an act is alleged to have been done in contravention of them, i. e., in terms of “contempt,”<sup>1</sup> are none the less an impressive adjunct of his office. As the representative of law, the judge naturally speaks and acts with authority. His action may be reversed by judges of a higher jurisdiction; but for trial purposes, all that can properly be done in opposition to his will is to perfect the steps which may secure such a revision.

*Over all persons in the courtroom the presiding judge is entitled to impose silence, respectful conduct, and the observance of quiet and dignified order. He may exclude, subject to certain restrictions, all persons from the trial.*<sup>2</sup> As against everyone connected with proceedings pending before him, such as jurors, counsel or witnesses, whether within or without the courtroom, the presiding judge is entitled to make and enforce such orders as are, in his opinion, necessary for the dignity of his office, the furtherance of justice, or the purity of justice itself.

14. *Sullivan v. First Nat. Bank*, (Tex. Civ. App. 1904) 83 S. W. 421.

**§ 205. (Functions of Judicial Office; Executive); Require Order and Decorum.**—Conspicuous among what may be called the administrative powers of the presiding justice are those necessary to enable him to enforce that orderly and quiet conduct of judicial business just mentioned. No disturbance of the peace should be permitted in the courtroom. All loud or disturbing noises should cease. Unnecessary conversation should be suspended in the presence of the judge. In such an atmosphere of calm and respectful quiet can the high functions of the judicial office alone be properly discharged. The observance of all this is essential to the dignity of the court, and typical of the deep reverence in which the doing of justice is held by the community at large. The power of the judge to enforce, by summary proceedings,<sup>1</sup> compliance with any order for securing calm deliberation and orderly quiet in the courtroom<sup>2</sup> is undoubted,<sup>3</sup> subject to the limitation imposed by constitutional or statutory provisions.<sup>4</sup>

*Federal Courts.*—The power to punish for contempt is an inherent attribute of the federal courts, vested in them by Const. U. S. art. 3, § 1, granting to them the judicial power of the nation.<sup>5</sup>

1. Criminal contempts embrace all acts committed against the majesty of the law, and the primary purpose of their punishment is the vindication of public authority. *Ex parte Clark*, 208 Mo. 121, 106 S. W. 990 (1907).

2. *Supra*, §§ 182 *et seq.*

3. Only a breach of order and decorum in the presence of the court in actual session and within its view and hearing can be properly dealt with without notice to show cause. *Reymert v. Smith*, (Cal. App. 1907) 90 Pac. 470; *State ex rel. Stewart v. Reid*, 118 La. 827, 43 So. 455 (1907).

2. A summary proceeding, in this connection may mean one where the party offending is not given a trial by jury. *Yoder v. Com.*, (Va. 1907) 57 S. E. 581.

3. *Ormond v. Ball*, 120 Ga. 916, 48 S. E. 383 (1904); *State v. Rose*, (Kan. 1906) 85 Pac. 803; *Back v. State*, (Nebr. 1906) 106 N. W. 787. The primary purpose of such pun-

ishment is the vindication of public authority. *Powers v. People*, 114 Ill. App. 323 (1904).

4. *Arkansas*.—*Ford v. State*, 69 Ark. 550, 64 S. W. 879 (1901).

*Illinois*.—*O'Neil v. People*, 113 Ill. App. 195 (1904).

*Indiana*.—*Mahoney v. State*, 72 N. E. 151 (1904).

*Iowa*.—*Drady v. Dist. Court of Polk County*, 102 N. W. 115 (1905).

*North Carolina*.—*In re Gorham*, 129 N. C. 481, 40 S. E. 311 (1901). While courts do not derive their power to punish for contempt from any statute, it is their duty to conform to a statute which does not abridge this power, but simply points out the manner in which it shall be exercised. *Ex parte Morris*, 28 Ohio Cir. Ct. R. 611 (1906).

5. *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622 (1902). Courts of the District of Columbia are "courts of the United States" within the provisions of the federal statutes

*Protected by Constitution.*—The right to prevent the commission of breaches of order in the presence of the judge while sitting at a trial is protected by a judicial power, in the proper exercise of which, the entire community is deeply interested and concerned. Any attempt on the part of the legislature to abridge this right is invalid, as tending to alter the constitutional distribution of power between different branches of government.<sup>6</sup>

**§ 206. (Functions of Judicial Office; Executive; Require Order and Decorum); Abusive Language to Judge.**—Addressing insulting language to the judge is entirely reprehensible; and it constitutes no justification or excuse that the speaker is telling the facts with accuracy.<sup>1</sup> Nor will an insulting reference to the court as a whole be excused by reason of a disclaimer of intention<sup>2</sup> or the making of an apology.<sup>3</sup> Still, *volenti non fit injuria*. The judge cannot make a direct insult out of an extrajudicial statement by bringing the declarant into court and causing him to repeat the alleged abusive statement in his presence.<sup>4</sup>

*No special immunity*, in this connection, attaches to the office of district attorney.<sup>5</sup>

**§ 207. (Functions of Judicial Office; Executive; Preserve Order and Decorum); Cursing the Judge.**—Cursing the judge in open court, as “You may fine and be damned,”<sup>1</sup> constitutes an offense which staggers belief, except in rude and uncivilized com-

regulating contempt. *Moss v. U. S.* 23 App. Cas. (D. C.) 475 (1904). A United States commissioner, by the weight of federal authority, has no power to punish for contempt but the power is in the court itself. *United States v. Beavers*, (N. Y. 1903) 125 Fed. 778.

6. *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903).

1. *State ex rel. Stewart v. Reid*, 118 La. 827, 43 So. 455 (1907).

2. *In re Chartz*, (Nev. 1905) 85 Pac. 352.

3. In a case where defendant, an attorney of the Supreme Court of Nevada, in a petition for rehearing of a cause in which the Supreme Court had held a statute limiting the hours of labor constitutional, stated that in his opinion the decisions favoring the

power of the state to limit the hours of labor on the ground of the police power of the state were all wrong, were written by men who have never performed manual labor, and by politicians and for politics, and that they did not know what they wrote about. Such a statement was regarded as constituting a contempt of the Supreme Court, which was not purged by defendant's disavowal of any intent to commit a contempt and by his apology. *In re Chartz* (Nev. 1905) 85 Pac. 352.

4. *Davies v. State*, (Ark. 1905) 84 S. W. 633.

5. *State ex rel. Stewart v. Reid*, 118 La. 827, 43 So. 455 (1907).

1. *Hill v. Crandall*, 52 Ill. 70 (1869).



munities. So of obscene, contemptuous and insulting language addressed to the judge.<sup>2</sup>

**§ 208. (Functions of Judicial Office; Executive; Preserve Order and Decorum); Disorderly Conduct.**—Disorderly conduct in the courtroom,<sup>1</sup> such as carrying concealed weapons,<sup>2</sup> presenting oneself in a condition of intoxication,<sup>3</sup> indulging in loud, boisterous, threatening and otherwise objectionable language, will be severely noticed by a judge as contrary to established decorum,<sup>4</sup> and may be summarily punished, even in case of an attorney.<sup>5</sup> But an attorney, legitimately commenting on the evidence, or otherwise acting in discharge of his official duty, is not liable for any violent outbreak on the part of witnesses<sup>6</sup> or others who feel aggrieved at his remarks — though the decorum of the courtroom is thereby disturbed.

**§ 209. (Functions of Judicial Office; Executive; Preserve Order and Decorum); Insults in Papers.**—Insults in papers submitted to the inspection of the court,<sup>1</sup> or placed on its files,<sup>2</sup> may

2. The words must be directly, it is said, addressed to the presiding justice. *Yoder v. Com.* (Va. 1907) 57 S. E. 581.

1. *Holman v. State*, 105 Ind. 513, 5 N. E. 556 (1885); *U. S. v. Patterson*, 26 Fed. 509 (1886).

2. *Sharon v. Hill*, 24 Fed. 726 (1885) (attorney).

3. *Marcum v. Hargis*, 31 Ky. Law. Rep. 1117, 104 S. W. 693 (1907); *Com. v. Clark*, 13 Pa. Co. Ct. 439 (1893).

4. *Indiana*.—*Dodge v. State*, 140 Ind. 284, 39 N. E. 745 (1894).

*Iowa*.—*Russell v. French*, 67 Iowa 102, 24 N. W. 741 (1885).

*Louisiana*.—*State v. Garland*, 25 La. Ann. 532 (1873).

*North Dakota*.—*State v. Crum*, 7 N. D. 299, 74 N. W. 992 (1898).

*Pennsylvania*.—*In re Heverin*, 32 Leg. Int. 188 (1875).

*Vermont*.—*In re Cooper*, 32 Vt. 258 (1859).

*Virginia*.—*Com. v. Dandridge*, 2 Va. Cas. 408 (1824).

*England*.—*Reg. v. Jordan*, 36 Wkly. Rep. 589 (1888).

5. *Mahoney v. State*, (Ind. App. 1904) 72 N. E. 151; *Ex parte Davis* 112 Fed. 139 (1901).

6. *Ex parte Snodgrass*, (Tex. Cr. App. (1901) 65 S. W. 1061.

1. *Lamberson v. Superior Court of Tulare County*, (Cal. 1907) 91 Pac. 100; *McCormick v. Sheridan*, (Cal. 1888) 20 Pac. 24; *Ex p. Smith*, 28 Ind. 47 (1857) (docket); *In re Woolley*, 11 Bush 95 (1875); *State v. Grailhe*, 1 La. Ann. 183 (1846); *State v. Soule*, 8 Rob. (La. 1844) 500; *State v. Keene*, 11 La. 596 (1837).

2. *Lamberson v. Superior Court of Tulare County*, (Cal. 1907) 91 Pac. 100; *Sommers v. Torrey*, 5 Paige 54, 28 Am. Dec. 411 (1835); *Hernon v. Campbell*, 86 Tex. 168, 23 S. W. 980 (1893) [*reversing* (Tex. Civ. App. 1893) 23 S. W. 558]; *U. S. v. Church*, 6 Utah 9, 21 Pac. 503, 524 (1889). Where the papers are filed in the ordinary course of the proceedings, it will not be assumed that the attorney filing them acted in bad faith. *Tracy v. State*, 28 Ohio Cir. Ct. R. 453 (1906) (motions).

constitute an act in presence of the court derogatory to its dignity. Thus, a litigant cannot properly allege in a motion, as ground for a new trial, that he has not had a fair and impartial one; where such a fact would not, if true, constitute ground for a new trial.<sup>3</sup> Similarly, a statement that a judge is prejudiced against one who moves for a change of venue may be a voluntary and gratuitous insult to the court where the fact, though exactly stated, would not be a ground for allowing the motion;<sup>4</sup> while, on the contrary, it would be a perfectly justified allegation where such prejudice would constitute a basis for the order asked.<sup>5</sup>

**§ 210. (Functions of Judicial Office; Executive; Preserve Order and Decorum); Insults on Appeal.**—Abuse of a trial judge in an appellate court may justly be deemed contrary to the due administration of justice;—<sup>1</sup> whereas mere discussion of such abuse is not.<sup>2</sup> Bitter written assaults on subordinate court officers, such as a register,<sup>3</sup> are objectionable upon similar grounds.

**§ 211. (Functions of Judicial Office; Executive; Preserve Order and Decorum); Using Force to Prevent Orderly Administration.**—Using force to prevent the orderly administration of justice though not done in the immediate presence of the judge, seems to fall within the same category. A person cannot, for example, with impunity, lock the door of the courtroom and so prevent the judge and court officers from entering.<sup>1</sup> Nor can he break into the desk of a court official to get at its contents.<sup>2</sup>

*Property cannot be forcibly seized in open court without serious consequences to the actor.*<sup>3</sup> So the power of a court to punish any

3. *Harrison v. State*, 35 Ark. 458 (1880).

4. *In re Jones*, 103 Cal. 397, 37 Pac. 385 (1894). So where on an application for change of judges the petitioners allege wilful corruption on the part of the trial judge. *Lamberson v. Superior Court of Tulare County*, (Cal. 1907) 91 Pac. 100.

5. *Ex p. Curtis*, 3 Minn. 274 (1859); *Hunt v. State*, 27 Ohio Cir. Ct. R. 16 (1904). See also *Works v. San Diego Co. Super. Ct.*, 130 Cal. 304, 62 Pac. 507 (1900); *Mullin v. People*, 15 Colo. 437, 24 Pac. 880, 22 Am. St. Rep. 414, 9 L. R. A. 566 (1890); *Le Hane v. State*, 48 Nebr. 105, 66 N. W. 1017 (1896).

1. *Sears v. Starbird*, 75 Cal. 91, 16 Pac. 531, 7 Am. St. Rep. 123 (1888).

2. *In re Thompson*, 46 Kan. 254, 26 Pac. 674 (1891); *In re Dalton*, 46 Kan. 253, 26 Pac. 673 (1891).

3. *In re Breck*, 4 Fed. Cas. No. 1,823 (1876).

1. *Dahnkek v. People*, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197 (1897) [*affirming* 57 Ill. App. 619 (1895)].

2. *Ex p. Burrows*, 8 Ves. Jr. 535 (1803) (register).

3. *Com. v. Wilson*, 1 Phila. 80, 7 Leg. Int. 146 (1850). A defendant in an action on a written contract which has been laid by plaintiff's counsel on his table cannot seize, secrete and refuse to produce it, without suffering

person who shall remove attached property <sup>4</sup> or the subject of pending proceedings <sup>5</sup> from its jurisdiction is inherent.

**§ 212. (Functions of Judicial Office; Executive; Preserve Order and Decorum); Writing Letters.**—Writing letters to the judges has been a course frequently adopted by over-zealous or disappointed suitors. So far as designing to influence the judge's action in pending litigation,<sup>1</sup> or to upbraid or vituperate him for past conduct, the writer may properly be punished.<sup>2</sup> That an offense should be committed, it is essential that the conduct, if unrebuked, would unfavorably affect the administration of justice. Merely personal feelings are not the essential consideration. Thus, for a party to write to an opposing attorney to whom he is paying a judgment which he regards as iniquitous to express his opinion with considerable freedom is not an offense against the court.<sup>3</sup>

**§ 213. (Functions of Judicial Office; Executive); Compel Obedience to Directions; Administrative Orders.**—The directions of a presiding judge, regarding any matter pertaining to the administration of justice or the use of the judicial machinery by which it is sought to attain it, are to be promptly and unreservedly obeyed. In the event of a refusal, it is within the power and it may become the duty of the judge to enforce his order.<sup>1</sup>

*Enforcement of Rights.*—Closely analogous to this requirement of obedience to an order of the court relating to the administration of justice, is that which arises where an order is made in favor of one of the parties against the other in vindication of a

at the hands of the court. *In re Teitelbaum*, 82 N. Y. S. 887, 84 App. Div. 351 (1903).

4. *Lowenthal v. Hodge*, 120 N. Y. App. Div. 304, 105 N. Y. Suppl. 120 (1907).

5. *In re Grant*, 26 Wash. 412, 67 Pac. 73 (1901).

1. *State v. Johnson*, (Ohio 1908) 83 N. E. 702.

2. *State v. Waugh*, 53 Kan. 688, 37 Pac. 165 (1894); *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747 (1877); *Matter of Wallace*, 4 Moore P. C. N. S. 140, L. R. 1 P. C. 283, 36 L. J. P. C. 9, 15 Wkly. Rep. 533, 16 Eng. Reprint 269 (1866); *Matter of Ludlow*

*Charities*, 2 Myl. & C. 316, 14 Eng. Ch. 316 (1836). But see *In re Griffin*, 1 N. Y. Suppl. 7 (1888).

3. *Fellman v. Mercantile Fire & Marine Ins. Co.*, 116 La. 723, 41 So. 49 (1906).

1. *Powers v. People*, 114 Ill. App. 323 (1904); *Ashby v. Ashby*, (N. J. Ch. 1901) 50 Atl. 473. A litigant who might have appealed and has failed to do so cannot set up, on proceedings to compel obedience to the order, matter which he might have relied upon in support of his appeal. *Lawson v. Tyler*, 98 N. Y. App. Div. 10, 90 N. Y. Suppl. 188 (1904).

right previously ascertained to exist;—or provisionally assumed for administrative purposes, as where a preliminary order is made, by way of injunction or otherwise. The important difference, however, is to be observed that the social interest in the enforcement of such an order as is essential to popular respect for the judicial office is greatly lessened in the latter case where the concern is more largely personal to the litigants; and proceedings for contempt are not designed for the protection of the dignity of the court so much as to make effective the individual rights of one of the parties. The distinction between enforcing administrative orders for the carrying on of the proper work of the courts and those designed to vindicate private rights is clearly observed in legislation and judicial decision.

*Civil and Criminal Contempts.*—This distinction, in regard to the matter of compelling compliance with judicial orders between those which are administrative in their nature and those made for the enforcement of litigated or adjudicated rights, frequently is practically carried into effect by the legislature as a distinction between civil and criminal contempts; violation of an administrative order being treated as a criminal contempt; refusal to obey an order made in connection with a private right being punished civilly. The difference between the two classes is correlated to that between the private and the public interest in litigation to which reference is elsewhere made.<sup>2</sup> While it cannot be said that, in all cases, the statutory enactments relating to the subject have been careful to observe the distinction, a general tendency to do so is, as has just been said, plainly observable.<sup>3</sup>

*Civil Contempts.*—Where the order is made in connection with relief granted a party, as part of a right established by him, as where a defendant is ordered to comply specifically with the terms of a contract which he is found to have made, a failure to obey such an order is a civil contempt. In other words, a person who fails or refuses to do something which he has been ordered to do, or does something that he has been ordered not to do, for the benefit of the opposite party to a cause, is guilty of a civil contempt, and the object of the punishment is to coerce the performance of an act remedial in its nature.<sup>4</sup>

2. *Infra*, § 303.

3. See *Vilter Mfg. Co. v. Humphrey*, 132 Wis. 587, 112 N. W. 1095, 13 L. R. A. (N. S.) 591 (1907).

4. *Ex parte Clark*, 208 Mo. 121, 106 S. W. 990 (1907).

*Criminal Contempts.*—Should it happen, however, that the act which a person is ordered to do is one which affects the due and orderly administration of justice, rather than applies to the rights of the parties, the dignity of the court itself is involved and an entirely different situation, viewed from a moral or social standpoint, is developed. The interests of society demand that such an order should be enforced in its own behalf, i. e., by punishment. Such a contempt is a criminal one. In all cases where such an offense is claimed, an element of wilful intent may well be required.

*Advice of Counsel.*—Advice of counsel is no defense to a proceeding for contempt of court; although where the party said to be in contempt is a layman and not an officer charged with the enforcement of the law the fact may be considered in mitigation.<sup>5</sup>

*Notice Necessary.*—In either case the person to be affected by proceedings in contempt must have had notice of the issuance of the order.<sup>6</sup>

*Impossibility of performance,* not caused by the fault of the person in question is an excuse.<sup>7</sup>

*Jurisdiction.*—In all proceedings for the enforcement of a judicial order, the fact that the court making the order had jurisdiction is an important preliminary fact to be affirmatively shown.<sup>8</sup> If the court has jurisdiction, the order must be obeyed though it may have been improvidently or erroneously granted.<sup>9</sup> Any person

5. *Coffin v. Burstein*, 74 N. Y. S. 274, 68 App. Div. 22 (1902); *Royal Trust Co. v. Washburn, etc., Ry. Co.*, (Wis. 1902) 113 Fed 531.

6. *State v. McGahey*, (N. D. 1903) 97 N. W. 865. It has even been held that where disobedience to a decree is not wilful, and does not clearly appear to have arisen from an intent to set at naught or bid defiance thereto, the power to punish for contempt cannot be properly exercised. *Kahlbon v. People*, 101 Ill. App. 567 (1902). A contempt must be wilful, and cannot arise from mere inability. *Moseley v. People*, 101 Ill. App. 564 (1902). If a person has actual knowledge of an order of court, he is liable for the consequences of violating it, although he has not been formally

served with it. *In re Wilk* (N. Y. 1907) 155 Fed. 943.

*Personal service* has, however, been required. *Grant v. Greene*, 106 N. Y. S. 532, 121 App. Div. 756 (1907).

7. *McHenry v. State*, (Miss. 1907) 44 South. 831.

8. *Early v. People*, 117 Ill. App. 608 (1905).

9. *Meeks v. State*, 80 Ark 579, 98 S. W. 378 (1906); *Butler v. Champlin*, 124 Ill. App. 29 (1907); *Swedish-American Telephone Co. v. Fidelity & Casualty Co. of New York*, 208 Ill. 562, 70 N. E. 768 (1904); *Elmstedt v. People*, 102 Ill. App. 231, (1902); *Lytle v. Galveston, H. & S. A. Ry. Co.*, (Tex. Civ App. 1905) 90 S. W. 316; *Pike v. Frost*, (Wis. 1905) 139 Fed 865. See also *Russell v. Lumber Co.*, 102 Ga. 563, 29 S. E. 271 (1897);

proceeds at his peril,<sup>10</sup> though he were the judge of the court whose action is under review. Where an order is made without jurisdiction, there can be no punishment.<sup>11</sup> In case of an administrative order,<sup>12</sup> however, the question of jurisdiction is rather one as to the inherent powers of the court under the law, *qua* court, than as to whether the tribunal could properly decide the case on its merits.

*Jurisdiction to Ascertain Jurisdiction.*—Thus, a court of general powers may lawfully take jurisdiction of a cause for the purpose of ascertaining whether it will finally admit the cause to its docket for further action as having full jurisdiction of it. Such a court may make a valid order suspending all proceedings until it can determine this preliminary question. Such order is an administrative one and its validity is irrespective of whether the court ought to decide that it will or will not take jurisdiction of the case itself. All of which it has, in dealing with the preliminary matter, taken jurisdiction is the application. No person has an option to obey an order of a court staying all proceedings until it can determine whether it has jurisdiction or not. A court of general jurisdiction has, certainly, lawful authority to that extent in any case before it and such an order will be disobeyed by any one at his peril.<sup>13</sup>

**§ 214. (Functions of Judicial Office; Executive; Compel Obedience to Directions); Attorneys.**—Prominent among officers of the court who, as ministers of justice, give obedience to the

State *ex rel.* Thatcher v. Horner, 16 Mo. App. 191 (1884); Jenkins v. State, 59 Neb. 68, 80 N. W. 263 (1899); Forrest v. Price, 52 N. J. Eq. 16, 29 Atl 215 (1893); Shults v. Andrews, 54 How. Prac. 378 (1877); People *ex rel.* Post v. Grant, 13 Civ. Proc. R. 305 (1888); State v. Nathans, 49 S. C. 199, 27 S. E. 52 (1896); Vanvabry v. Staton, 88 Tenn. 334, 12 S. W. 786 (1890). Want of jurisdiction is not waived by pleading to the merits. State v. Newton, (N. D. 1907) 112 N. W. 52.

10. *In re Noyes*, 121 Fed. 209, 57 C. C. A. 445 (1902).

11. *District of Columbia*.—Drew v. Hogan, 26 App. Cas. (D. C.) 55 (1905).

New York.—People v. Feenaughty, 51 Misc. 468, 101 N. Y. Suppl. 700 (1906).

North Dakota.—State v. McGahey, 97 N. W. 865 (1903); Forman v. Healey, 93 N. W. 866 (1903).

Mississippi.—McHenry v. State, 44 South. 831 (1907).

South Carolina.—State v. Scarborough, 70 S. C. 288, 49 S. E. 860 (1904); State v. Rice, 67 S. C. 236, 45 S. E. 153 (1903). *Citing* State v. Nathans, 49 S. C. 199, 27 S. E. 52 (1896); James v. Smith, 2 S. C. 183 (1870).

12. *Supra*, § 213.

13. Ruprecht v. Henrici, 127 Ill. App. 350 (1906); U. S. v. Shipp, 203 U. S. 563, 27 S. Ct. 165, 51 L. ed. 319

judge as the chief ministrant upon justice, are the attorneys practicing at the bar, as is the American phrase.<sup>1</sup> A practitioner who counsels and advises the commission of an act contrary to the dignity of the court is deservedly deemed guilty of the same offense, as he who follows his advice.<sup>2</sup> Counsel must at once desist from speaking for a client when ordered by the court to do so.<sup>3</sup> An officer of the court is no more at liberty to assist in violating one of its orders than he would be to disobey it. It is not essential for purposes of punishment that the attorney offending should be a member of the bar of that particular court; one who practices by leave or the courtesy of the court is obligated to be equally mindful of its dignity with one who appears as of right.<sup>4</sup> Counsel should, however, at the time of doing the act to which objection is made have been acting in his official capacity.<sup>5</sup> It has very reasonably been held that clients are not liable to the displeasure of the court for acts done by their attorneys to which they have given no assent.<sup>6</sup>

*Advice given in good faith* does not, however, subject the attorney to punishment. A lawyer has the right to advise his client as to the validity of an order of court, or of a writ issued under its authority, so far as this affects the client's interests; and his advice to the effect that such order or writ is illegal and void, if

(1906). See also *Pike v. Frost*, (Wis. 1905) 139 Fed. 865.

1. *Michigan*.—*Nichols v. Grand Rapids Super. Ct.*, 89 N. W. 691 (1902)

*New Mexico*.—*Territory v. Clancy*, 7 N. M. 580, 37 Pac. 1108 (1894).

*New York*.—*Nuccio v. Porto*, 72 N. Y. App. Div. 88, 76 N. Y. Suppl. 96 (1902); *Reynolds v. Parkes*, 2 Dem. Surr. 399 (1884).

*Texas*.—*Dillon v. State*, 6 Tex. 55 (1851); *Smith v. Brown*, 3 Tex. 360, 49 Am. Dec. 748 (1848).

*United States*.—*Ex p. Davis*, (Fla.) 112 Fed. 139 (1901); *Anderson v. Comptois*, 109 Fed. 971, 48 C. C. A. 1, 111 Fed. 998, 50 C. C. A. 76 (1901).

*England*.—*In re Freston*, 11 Q. B. D. 545, 52 L. J. Q. B. 545, 49 L. T. Rep. N. S. 290, 31 Wkly. Rep. 804, (1883); *Matter of Ludlow Charities*,

2 Myl. & C. 316, 14 Eng. Ch. 316 (1836).

*Canada*.—*Nicholls v. McDonald*, 4 U. C. L. J. 259 (1858).

2. *People v. Tenth Judicial Dist. Ct.*, 29 Colo. 182, 68 Pac. 242 (1901); *Lowenthal v. Hodge*, 120 N. Y. App. Div. 304, 105 N. Y. Suppl. 120 (1907). See *Territory v. Clancy*, 7 N. M. 580, 37 Pac. 1108 (1894).

3. *Ex parte Shortridge*, (Cal. App. 1907) 90 Pac. 478.

4. *Chafee v. Quidnick Co.*, 13 R. I. 442 (1881).

5. *State v. Parsons*, 48 W. Va. 275, 37 S. E. 548 (1900); *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791 (1897).

6. *Satterlee v. De Corneau*, 7 Rob. 666 (1868); *Harris v. Clark*, 10 How. Pr. 415 (1854); *In re Feehan's Estate*, 73 N. Y. S. 1126, 36 Misc. Rep. 614 (1902).

given in good faith, will not render him liable for contempt, because of an error in judgment. But he is guilty of contempt if he goes beyond the right to advise in matter of law and, actuated by a spirit of resistance, counsels or conspires with his client or others to disobey an order of court and obstruct its enforcement.<sup>7</sup>

*Mere nonfeasance by one not connected with pending litigation* will not usually be deemed punishable. Thus, an attorney who gains possession, under a lawful process, of the records of another court does not become guilty of an offense by declining to return them on demand under an order of that court.<sup>8</sup>

**§ 215. (Functions of Judicial Office; Executive; Compel Obedience to Directions); Corporations.**—Corporations are constrained to obey the orders of the court, equally with individuals or partnerships. Its officers, agents and attorneys are required to discharge the obligation of the corporation<sup>1</sup> according to their degree of authority: e. g., the manager will be regarded as the officer to be held if his authority to comply with the order is complete.<sup>2</sup> Where action is *forbidden* the offending officer who has acted is alone regarded by the court, provided his associates neither previously assented or subsequently approved.<sup>3</sup> Any other member of the corporation, however, who joins in the unlawful act may be held liable to the same penalties.<sup>4</sup> Officers disobeying, in the name of the corporation, an order of the court are dealt with as

7. *Anderson v. Comptois*, 109 Fed. 971, 48 C. C. A. 1 (1901); *In re Dubose*, 109 Fed. 971, 48 C. C. A. 1 (1901). [Judgment affirmed on rehearing 111 Fed. 998, 50 C. C. A. 76]. See also *Wells v. Com.*, 21 Grat. 500, 508 (1871).

8. *In re Leaken*, (U. S. C. C. Ga. 1905) 137 Fed. 680.

1. *Illinois*.—*Franklin Union, No. 4 v. People*, 220 Ill. 355, 77 N. E. 176 (1906).

*Iowa*.—*Bloomington Church v. Muscatine*, 2 Iowa 69 (1855).

*New Jersey*.—*West Jersey Traction Co. v. Board of Public Works*, 58 N. J. L. 536, 37 Atl. 578 (1896).

*New York*.—*People v. Albany, etc.*,

*R. Co.*, 12 Abb. Pr. 171, 20 How. Pr. 358 (1860).

*Vermont*.—*In re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790 (1907) [affirmed in 207 U. S. 541, 28 S. Ct. 178].

*United States*.—*U. S. v. Memphis, etc., R. Co.*, (Tenn.) 6 Fed. 237 (1881).

*England*.—*In re Hooley*, 79 L. T. Rep. (N. S.) 706, 6 Mansion 404 (1899).

2. *Sercomb v. Catlin*, 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147 (1889).

3. *Una v. Dodd*, 39 N. J. Eq. 173 (1884).

4. *Davis v. New York*, 2 Duer 451 (1853).



offenders against justice.<sup>5</sup> Where, on the contrary, action by the corporation is *required* by the order, the officers can act only as authorized by the constitution and by-laws of the corporation. An officer, therefore, is not liable for failure to act alone where the joint action of others is required by the constitution or by-laws of the corporation.<sup>6</sup>

*Municipal Corporations.*—The municipal corporation whose officers have failed to obey the orders of a court may be dealt with as an offender against justice.<sup>7</sup>

*Unincorporated Associations.*—Where an order of a court is directed to an unincorporated association and the precept has been disobeyed, any officers or members prominent and active in its management may be punished for the default of the association. This rule has been applied to labor organizations.<sup>8</sup>

**§ 216. (Functions of Judicial Office; Executive; Compel Obedience to Directions); Court Officers.**—The judge, in pursuance of his judicial and administrative functions may exact obedience from court officers of all grades and relation to the administration of justice. A federal court may enforce obedience to its mandates by a state officer discharging a duty to a federal court.<sup>1</sup> The legal tribunal may enforce obedience not only to its direct but to its implied commands: e. g., it may punish an officer for violating its implied direction not to reveal to persons against whom its process has issued the fact of such issuance.<sup>2</sup>

**§ 217. (Functions of Judicial Office; Executive; Compel Obedience to Directions; Court Officers); Clerks, Attendants, Etc.**—Clerks of court are constrained to obey the orders of the judge when the latter is acting within the scope of his administrative powers.<sup>1</sup> A clerk designated to receive deposits<sup>2</sup> and all other

5. *Simon v. Aldine Pub. Co.*, 12 N. Y. Civ. Proc. 290 (1887) [*affirmed* in 14 Daly 279, 8 N. Y. St. 377 (1887)]. See also *People v. Dwyer*, 1 N. Y. Civ. Proc. 484 (1882).

6. *Demorest v. Midland R. Co.*, 10 Ont. Pr. 82 (1883). See also *Hughson v. People*, 91 Ill. App. 396 (1899).

7. *Marson v. City of Rochester*, 185 N. Y. 602, 78 N. E. 1106 (1906) [*affirming* 97 N. Y. Suppl. 881]; *Marson v. City of Rochester*, 112 N. Y. App. Div. 51, 97 N. Y. Suppl. 881 (1906).

8. *Patterson v. Wyoming Valley Dist. Council*, 31 Pa. Super. Ct. 112 (1906).

1. *In re Birdsong*, 39 Fed. 599, 4 L. R. A. 628 (1889).

2. *State v. O'Brien*, 87 Minn. 161, 91 N. W. 297 (1902).

1. *State v. Simmons*, 1 Ark. 265 (1839); *In re Contempt by Two Clerks*, 91 Ga. 113, 18 S. E. 976 (1893); *Ex p. Thatcher*, 7 Ill. 167 (1845); *Territory v. Clancey*, 7 N. M. 580, 37 Pac. 1108 (1894).

persons, like receivers,<sup>3</sup> who assume financial obligations under the direction of the judge are held, for obvious reasons, with exceptional strictness to the performance of their fiduciary tasks. Court attendants who are placed in charge of witnesses whose separation has been ordered<sup>4</sup> are, as it were, part of the arm of the court and are necessarily responsive to the judge's will.

**§ 218. (Functions of Judicial Office; Executive; Compel Obedience to Directions; Court Officers); Sheriffs, Constables, Etc.**—Obedience is due from the sheriff,<sup>1</sup> his deputies and all inferior officers, to the judge of a court while the latter is acting in his official capacity. But where a sheriff is placed in a position of difficulty in deciding between conflicting mandates of the court he cannot be held for the consequences of an honest error in judgment.<sup>2</sup> He will be equally excused for declining to obey a writ issued without jurisdiction.<sup>3</sup> In like manner, a jailer who in good faith acts on the orders of the judge of his own county in declining to obey the orders of a judge of another county is not guilty of an offense against justice.<sup>4</sup>

**§ 219. (Functions of Judicial Office; Executive; Compel Obedience to Directions); Jurors.**—The jury, while acting on

2. *In re Western Mar., etc., Ins. Co.*, 38 Ill. 289 (1865); *Southern Development Co. v. Houston, etc., R. Co.*, 27 Fed. 344 (1886).

3. *Tindall v. Wescott*, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225 (1901); *Ex p. Haley*, 99 Mo. 150, 12 S. W. 667 (1889).

4. *Cross v. State*, 11 Tex. App. 84 (1881).

1. *Arkansas*.—*In re Lawson*, 3 Ark. 363 (1840).

*Georgia*.—*Hunter v. Phillips*, 56 Ga. 634 (1876).

*New York*.—*In re Leggat*, 162 N. Y. 437, 56 N. E. 1009, 31 N. Y. Civ. Proc. 6 (1900); *People v. Stone*, 10 Paige 606 (1844).

*South Carolina*.—*Rice v. McClintock*, *Dudley* 354 (1838); *Thomas v. Aitken*, *Dudley* 292 (1838).

*Texas*.—*Sparks v. State*, 60 S. W. 246 (1900).

*Wisconsin*.—*State v. Brophy*, 38 Wis. 413 (1875).

2. *Greene v. Carpenter*, (Can. 1902) *Rap. Jud. Que.* 22 C. S. 104. "Misbehavior in office, willful neglect of duty and disobedience to a lawful mandate of the court, all imply bad faith, and not a simple mistake or error of judgment. If a party to an action is injured by a mistake of the sheriff in the discharge of an official duty, he can hold him and his sureties liable in damages, but cannot proceed against him as for a contempt. An inexperienced officer, before he has been in office a month, should not be fined or imprisoned because he did not correctly decide difficult and important questions of law, in relation to which learned counsel differ, and over which the court may well hesitate." *Oswego Second Nat. Bank v. Dunn*, 63 How. Pr. 434 (1882).

3. *Lindsay v. Allen*, (Tenn. 1904) 82 S. W. 648.

4. *Boone v. Riddle*, 86 S. W. 978, 27 Ky. Law Rep. 828 (1905).

judicial business, whether within or without the courtroom, must obey the orders of the presiding justice regarding any conduct pertinent to the trial. In this connection, it is the duty of the jury to obey, and within the administrative power and duty of the judge to enforce obedience to his orders. Thus, if the presiding justice requests the members of a grand<sup>1</sup> or petty jury to keep their deliberations secret, he may well punish any member of the jury who disobeys the order. Where the jurors are ordered not to express an opinion regarding the merits of a pending matter,<sup>2</sup> they must refrain from doing so. If they are ordered by the judge not to separate from each other,<sup>3</sup> he who acts in contravention of the order comes within the executive power of the court.

**§ 220. (Functions of Judicial Office; Executive; Compel Obedience to Directions); Magistrates and Inferior Tribunals.—**

The power of a presiding judge extends to requiring persons to be sworn before magistrates or inferior tribunals acting according to law and to testify in accordance with their oath. He may order anyone having relevant information to appear and testify before a grand jury.<sup>1</sup> The rule is the same for commissioners. In like manner, a witness may be ordered to testify before a notary public. But the simple order of the notary is not in itself sufficient; the compulsory order is that of the court.<sup>2</sup>

*Boards of Health.*—The order to which obedience is demanded

1. *In re Summerhayes*, 70 Fed. 769 (1895).

2. *Georgia*.—*State v. Helvenston*, R. M. Charl't. 48 (1820).

*Indiana*.—*Murphy v. Wilson*, 46 Ind. 537 (1874).

*New Jersey*.—*Crane v. Sayre*, 6 N. J. L. 110 (1822).

*New York*.—*Ex p. Hill*, 3 Cow. 355 (1824).

*United States*.—*Offutt v. Parrott*, 18 Fed. Cas. No. 10,453, 1 Cranch C. C. 154 (1803).

3. *Howe v. Welch*, 11 N. Y. Civ. Proc. 444 (1887); *Reynolds v. Parkes*, 2 Dem. Surr. 399 (1884).

1. *Alabama*.—*Newsum v. State*, 78 Ala. 407 (1885).

*California*.—*In re Rogers*, 129 Cal. 468, 62 Pac. 47 (1900).

*Massachusetts*.—*Heard v. Pierce*, 8 Cush. 338, 54 Am. Dec. 757 (1851).

*New York*.—*In re Hackley*, 24 N. Y. 74, 24 How. Pr. 369 (1861); *Matter of Taylor*, 60 N. Y. St. 136, 28 N. Y. Supp. 500, 8 Misc. 159 (1894).

*Utah*.—*Ex p. Harris*, 4 Utah 5, 5 Pac. 129 (1884).

*United States*.—*U. S. v. Caton*, 25 Fed. Cas. No. 14,758, 1 Cranch C. C. 150 (1803). See also *Bradley, etc., Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69 (1893); *Ex p. Peck*, 19 Fed. Cas. No. 10,885, 3 Blatchf. 113 (1853); *In re Judson*, 14 Fed. Cas. No. 7,563, 3 Blatchf. 148 (1853).

2. *Burnside v. Dewstoe*, 9 Ohio Dec. (Reprint) 589, 15 Cinc. L. Bul. 197 (1886).

may be addressed to a public administrative board, e. g., a board of health.<sup>3</sup>

**§ 221. (Functions of Judicial Office; Executive; Compel Obedience to Directions); Public.**—Any person or member of the public, party or stranger, who interferes with the orderly administration of justice may be summarily dealt with by the judge.<sup>1</sup> For example, it is regarded as being against the dignity of judicial administration for a person to seek to give publicity to any fact which the court desires should remain unknown until made public in the due course of the proceedings. A judge may properly punish a newspaper reporter who seeks to learn, by eavesdropping, as to the deliberations of a jury, with a view to communicating the information to the public.<sup>2</sup> In like manner, it is improper for any person to seek to obtain information as to judicial action in anticipation of the regular course of proceedings, even though the purpose be a comparatively innocent one. Thus, a man is not at liberty to arrange a code of signals with a jurymen to be employed while he is in the juryroom, though the object is merely to enable the outsider to wager on the result to better effect.<sup>3</sup> In any matter not of a professional nature an attorney appears not as a member of the court but as an individual.<sup>4</sup> His knowledge of what is fitting and loyal to the court may merely aggravate his offense, without altering its essential character. Any person who interferes to prevent or even to dissuade another from obeying an order of the court will be deemed to have obstructed public justice.<sup>5</sup>

**3.** *Spokes v. Banbury, etc., Bd. of Health*, 11 Jur. (N. S.) 1010, 35 L. J. Ch. 105, 13 L. T. Rep. (N. S.) 453 (1865) [*affirming* L. R. 1 Eq. 42, 14 Wkly. Rep. 128].

**1.** *New Jersey*.—*State v. Doty*, 32 N. J. L. 403, 90 Am. Dec. 671 (1868).

*New York*.—*Hull v. L'Eplattenier*, 49 How. Pr. 500 (1875).

*Ohio*.—*State v. Post*, 6 Ohio S. & C. Pl. Dec. 200, 4 Ohio N. P. 157 (897).

*United States*.—*In re Acker* (Mont.) 66 Fed. 290 (1894).

*England*.—*Wellesley v. Mornington*, 11 Beav. 180 (1848); *Seward v. Paterson*, 1 Ch. 545, 66 L. J. Ch. 267, 76 L. T. Rep. (N. S.) 215, 45 Wkly.

Rep. 610 (1897); *Avory v. Andrews*, 51 L. J. Ch. 414, 46 L. T. Rep. (N. S.) 279, 30 Wkly. Rep. 564 (1882).

**Mere failure to communicate an order may be an insult to the court.** *Silliman v. Whitmer*, 173 Pa. St. 401, 37 Wkly. Notes Cas. 497, 34 Atl. 56 (1896).

**2.** *Orman v. State*, 24 Tex. App. 495, 6 S. W. 544 (1887).

**3.** *State v. Doty*, 32 N. J. L. 403, 90 Am. Dec. 671 (1868).

**4.** *State v. Keene*, 11 La. 596 (1837).

**5.** *Thomas v. Gwynne*, 8 Beav. 312 (1845); *McCartney v. Simonton, Jr.* R. 5 Eq. 594 (1843).

**§ 222. (Functions of Judicial Office; Executive; Compel Obedience to Directions); Witnesses.**—A summons of a court, in the form of a subpoena or similar writ is, according to its precept, a direct order of the court from which it was issued. The witness must attend, as directed,<sup>1</sup> provided, of course, the writ was issued under proper authority.<sup>2</sup>

**§ 223. (Functions of Judicial Office; Executive; Compel Obedience to Directions; Witnesses); Compulsory Exhibition of Person.**—For some consideration as to the power of the court to order a party or witness to submit to an examination of his body, or part thereof, in or out of court, reference may be had to the subject of evidence by perception.<sup>1</sup>

**§ 224. (Functions of Judicial Office; Executive; Compel Obedience to Directions; Witnesses); Order to Produce.**—An order to produce books, if justified by law, e. g., where a register in bankruptcy issues an order to a bankrupt to produce his books,<sup>1</sup> or in cases where the precept comes from a court to a witness by a *subpoena duces tecum*,<sup>2</sup> it must be obeyed. The same rule applies to the production of other writings or probative objects, so that a witness may examine them in connection with his testimony.<sup>3</sup>

*So, by special order*, the court may direct the production of books, papers or other documents. Failure to produce such documents is not, however, strictly speaking, a resistance to the execution of a lawful order by the court, being a mere nonfeasance.<sup>4</sup>

*It is, moreover, a condition* upon punishment that the evidence sought to be elicited, by means of the judge's orders, from oral testimony, documentary evidence or perception, should not only be relevant but material.<sup>5</sup>

1. *Baldwin v. State*, 126 Ind. 24, 25 N. E. 820 (1890); *State v. Newton*, 62 Ind. 517 (1878); *Tredway v. Van Wagenen*, 91 Iowa 556, 60 N. W. 130 (1894); *Woods v. De Figanieri*, 1 Rob. 607, 641, 16 Abb. Pr. 1 (1863); *Bleecker v. Carroll*, 2 Abb. Pr. 82 (1855).

2. *White v. Morgan*, 119 Ind. 338, 21 N. E. 968 (1889).

1. See EVIDENCE BY PERCEPTION.

1. *In re Allen*, 1 Fed. Cas. No. 208, 13 Blatchf. 271 (1876).

2. *Hannum v. McRae*, (Can. 1897) 17 Ont. Pr. 567 [affirmed in 18 Ont. Pr. 185 (1898)].

3. *Ludlow v. Knox*, 4 Abb. Dec. 326, 7 Abb. Pr. (N. S.) 411 (1869).

4. *People v. Webster*, 14 How. Pr. 242, 3 Park. Crim. 503 (1857); *People v. Benjamin*, 9 How. Pr. 419 (1853).

5. *California*.—*Ex p. Zeehandelaar*, 71 Cal. 238, 12 Pac. 259 (1886).

*Kansas*.—*Davis' Petition*, 38 Kan. 408, 16 Pac. 790 (1888). Compare

*Production of Evidence for Inspection.*—A court may order any person shown to be in possession of any object available as evidence to produce it for its inspection. A subordinate branch of a tribunal, such as a grand jury,<sup>6</sup> may not have the right *virtute officii* to order such production.

**§ 225. (Functions of Judicial Office; Executive; Compel Obedience to Directions; Witnesses); Separation of Witnesses.**—

The power of the court to order a separation of witnesses in any given case, the details of such an order and some of the consequences of disobedience to its terms are given elsewhere.<sup>1</sup> Where a witness, placed, as it is said, “under the rule” remains during the examination of other witnesses without permission, his conduct is in contravention of the right of the judge to direct the course of the witnesses attending at a trial.<sup>2</sup>

**§ 226. (Functions of Judicial Office; Executive; Compel Obedience to Directions; Witnesses); Testimony Required.**—

Every person, upon being directed by the presiding judge to do so, must submit to be sworn as a preliminary to testifying.<sup>1</sup> If he

*In re* Merkle, 40 Kan. 27, 19 Pac. 401 (1888).

*Montana.*—*In re* MacKnight, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451 (1891).

*New York.*—*Matter of* Leich, 65 N. Y. Supp. 3, 31 Misc. 671 (1900); *Matter of* Odell, 19 N. Y. St. 259, 6 Dem. Sur. 344 (1887).

*Pennsylvania.*—*Rauschmeyer v. Bank*, 2 L. T. (N. S.) 67 (1880).

*United States.*—*In re* Judson, 14 Fed. Cas. No. 7,563, 3 Blatchf. 148 (1853); *Ex p.* Peck, 19 Fed. Cas. No. 10,885, 3 Blatchf. 113 (1853).

6. *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961 (1892).

1. *Infra*, note 3. See, also:

*California.*—*People v. Boscovitch*, 20 Cal. 436 (1862).

*Georgia.*—*Hoxie v. State*, 114 Ga. 19, 39 S. E. 944 (1901).

*Illinois.*—*Bulliner v. People*, 95 Ill. 394 (1880).

*Iowa.*—*Grimes v. Martin*, 10 Iowa 347 (1860).

*Nevada.*—*State v. Salge*, 2 Nev. 321 (1866).

*New York.*—*Friedman v. Myers*, 14 N. Y. S. 142 (1891).

*Ohio.*—*Dickson v. State*, 39 Ohio St. 73 (1883).

*Oregon.*—*Hubbard v. Hubbard*, 7 Or. 42 (1879).

*Texas.*—*Cross v. State*, 11 Tex. App. 84 (1881).

*West Virginia.*—*Gregg v. State*, 3 W. Va. 705 (1869).

2. *California.*—*People v. Boscovitch*, 20 Cal. 436 (1862).

*Georgia.*—*Hoxie v. State*, 114 Ga. 19, 39 S. E. 944 (1901).

*Ohio.*—*Dickson v. State*, 39 Ohio St. 73 (1883).

*Texas.*—*Cross v. State*, 11 Tex. App. 84 (1881).

*Canada.*—*Sadlier v. Smith*, 14 U. C. L. J. (N. S.) 30 (1877).

1. *Ex p.* Stice, 70 Cal. 51, 11 Pac. 459 (1886); *Heard v. Pierce*, 8 Cush. 338, 54 Am. Dec. 757 (1851); *Com. v. Roberts*, 2 Pa. L. J. Rep. 340, 4 Pa. L. J. 126 (1841).

have conscientious scruples against swearing, he may indeed be permitted to affirm, under the circumstances mentioned by any statute on the subject.<sup>2</sup> A judge is justified in ordering a witness, having sworn or affirmed, to answer a given question<sup>3</sup> and may punish any refusal to do so<sup>4</sup> in any case where the court has jurisdiction.<sup>5</sup> Such a rule may well be applied to any refusal by a judgment debtor to state the disposition of his property;<sup>6</sup> and, *a fortiori*, it embraces the case of the wife of a judgment debtor, who may be ordered to answer as to whether any of her husband's property has come into her possession or control.<sup>7</sup>

**§ 227. (Functions of Judicial Office; Executive); Protect the Course of Justice.**—The presiding judge will protect the purity and unobstructed course of justice as a matter of paramount importance. More insulting to the dignity of a court of justice than any disorderly disturbance of its outward proceedings, or the most contemptuous refusal to obey the will of its minister presiding at the trial, is any attempt to corrupt or debauch the moral quality of justice itself. The judge will be prompt to resent and punish so grave an offense against those interests of society of which he is the guardian.

*By this is understood*, not the course of justice generally, but as administered by his own court. He will not undertake to protect the orderly administration of other tribunals.<sup>1</sup> Thus, a federal

2. *U. S. v. Coolidge*, 25 Fed. Cas. No. 14,858, 2 Gall. 364 (1815).

3. *Nevada*.—*Maxwell v. Rives*, 11 Nev. 213 (1876).

*New York*.—*People v. Marston*, 18 Abb. Pr. 257 (1864); *Clark v. Brooks*, 26 How. Pr. 254 (1864); *Taylor v. Wood*, 2 Edw. 94 (1833).

*Ohio*.—*Ammon v. Johnson*, 3 Ohio Cir. Ct. 263 (1888).

*Pennsylvania*.—*In re Kelly*, 200 Pa. St. 430, 50 Atl. 248, 86 Am. St. Rep. 719 (1901); *Carondelet Ave., etc., Co. v. Fairmount Ins. Assoc.*, 15 Wkly. Notes Cas. 125 (1884).

*Texas*.—*Holman v. Austin*, 34 Tex. 668 (1871).

4. *In re Kelly*, (Pa. 1901) 50 Atl. 248.

Other conduct, however objectionable, which does not amount to a re-

fusal to testify is not punishable as violation of an order requiring the person to be sworn and testify as a witness. *Manzella v. Ryan*, 73 N. Y. App. Div. 137, 77 N. Y. Supp. 132 (1902).

5. *In re Hall*, 10 Mich. 210 (1862); *In re Morton*, 10 Mich. 208 (1862).

6. *Berkson v. People*, 154 Ill. 81, 39 N. E. 1079 (1894); *Warren v. Rosenberg*, 94 Wis. 523, 69 N. W. 339 (1896); *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299 (1895); *Uhrig v. Uhrig*, (Can. 1892) 15 Ont. Pr. 53. But see *Bernheimer v. Kelleher*, 31 Misc. 464, 64 N. Y. Suppl. 409 (1900).

7. *In re O'Brien*, 24 Wis. 547 (1869).

1. A judicial officer cannot punish for contempt, unless the contempt is

judge will not intervene to prevent the employment of the process of his court as a means of impeding justice in a state tribunal.<sup>2</sup> In like manner a judge will not intervene to protect the course of justice in an inferior court from which an appeal lies to his own.<sup>3</sup> But where, in a capital case, an appeal has been allowed on behalf of the accused to the supreme court of the United States from a death sentence imposed in a state court, killing the accused to prevent this appeal from being prosecuted in the supreme court of the United States is an affront against the dignity of that body.<sup>4</sup>

**§ 228. (Functions of Judicial Office; Executive; Protect the Course of Justice); Prevent Insult to the Judge.**—No person whatever will be permitted to assail in public addresses, or otherwise, the motives and character of the judges of courts in such a manner as to bring the administration of justice into contempt.<sup>1</sup> From this point of view, a charge against a judge may be none the less objectionable because it is true.<sup>2</sup>

*Intent not Material.*—If the effect of an intentional act is to embarrass the orderly administration of justice, the fact that the actor disclaims having had any such purpose or desire is not important.<sup>3</sup> Where, however, the allegations of a proceeding for contempt involve imputation of a crime to the existence of which a particular mental state is necessary, the accused must be affirmatively shown to have had it.<sup>4</sup> The contrary has, however, been held.<sup>5</sup>

**§ 229. (Functions of Judicial Office; Executive; Protect the Course of Justice); Attorneys.**—Any attorney who wilfully obstructs the course of justice, even by a nonfeasance,<sup>1</sup> as where he contumaceously absents himself from court,<sup>2</sup> may be summarily

of the court over which he presides. *Ormond v. Ball*, 120 Ga. 916, 48 S. E. 383 (1904).

2. *In re Riggsbee*, 151 Fed. 701 (1907).

3. *Emery v. Law*, 149 Mich. 383, 112 N. W. 951, 14 Detroit Leg. N. 465 (1907).

4. *U. S. v. Shipp*, 203 U. S. 563, 27 S. Ct. 165, 51 L. ed. 319 (1906).

1. *U. S. v. Gehr*, 116 Fed. 520 (1902).

2. *Tracy v. State*, 28 Ohio Cir. Ct. R. 453 (1906).

3. *Terry v. State*, (Nebr. 1906) 110 N. W. 733; *King v. Charlier*, (Can. 1903) Rap. Jud. Que. 12 B. R. 385.

4. *U. S. v. Carroll*, 147 Fed. 947 (1906).

5. *Powers v. People*, 114 Ill. App. 323 (1904).

1. *Ex parte Clark*, 208 Mo. 121, 106 S. W. 990 (1907).

2. *In re Clark*, 126 Mo. App. 391, 103 S. W. 1105 (1907). The absence from the courtroom of an attorney, to the delay and embarrassment of a trial, if it amounts to a contempt,



treated. A lawyer who advises a course which results in contempt is himself guilty of that offense.<sup>3</sup> Indeed, the professional knowledge of an attorney renders any assault on the integrity of justice especially heinous.<sup>4</sup> For example, counsel who has repeatedly insisted upon the making of an order which the judge has as frequently declined to make, cannot abandon a half-tried case on the spot, although his offense is due to excess of zeal.<sup>5</sup> A legal practitioner has, however, rights as well as duties. Within his province, the attorney is as much a part of the administration of justice as is the judge. An honest error in seeking to protect the interests of his client in a respectful manner cannot be treated as an offense. This is true although he advises one court to make an order against the officer of another which that other regards as insulting to its dignity.<sup>6</sup> In general, where an attorney is pursuing in good faith what he supposes to be his right in a court of justice, he is not guilty of contempt though he falls into error and violates rules of court and statutes not penal. To constitute contempt in such a case, there must be something in the circumstances under which the act is done that is disrespectful to the judge or a hindrance of the administration of the affairs of the court. The act must, moreover, be done wilfully and for an illegitimate or improper purpose.<sup>7</sup> One may criticise an opinion of a court, take issue with it on its conclusions of law, or question its conception of the facts, so long as his criticisms are made in good faith and in ordinarily respectful language, when not designed to wilfully or maliciously misrepresent the position of the court, or tend to bring it into disrepute, or lessen the respect due the authority to which a court is entitled.<sup>8</sup>

constitutes one which is indirect rather than direct. *Ex parte* Clark, 208 Mo. 121, 106 S. W. 990 (1907). The absence of an attorney from the court in which he has business, and when he should be there to attend to it, and when his absence necessarily impedes or delays the court's business, is contempt of court. *In re* Clark, 126 Mo. App. 391, 103 S. W. 1105 (1907).

3. *People v. District Court of Tenth Judicial District*, 29 Colo. 182, 68 Pac. 242 (1901).

4. *Seastream v. New Jersey Exhibition Co.*, (N. J. Ch. 1905) 61 A. 1041.

5. *People v. Newburger*, 98 N. Y. App. Div. 92, 90 N. Y. Supp. 740 (1904).

6. *In re* Watts, 190 U. S. 1, 23 S. Ct. 718, Adv. S. U. S. 718, 47 L. ed. 933 (1903).

7. *Hunt v. State*, 27 Ohio Cir. Ct. R. 16 (1904).

8. *In re* Breen, (Nev. 1908) 93 Pac. 997; *In re* Maestretti, (Nev. 1908) 93 Pac. 1005.

**§ 230. (Functions of Judicial Office; Executive; Protect the Course of Justice); Court Officers.**—A court will protect officers and appointees exercising powers under it from indignities offered to them in the discharge of their official duty. Thus, a United States court will protect a trustee in bankruptcy from assault while engaged in the performance of his duties as trustee.<sup>1</sup> For, in general, attacking an officer of the court for the way in which he has discharged a judicial duty, is an assault upon the court itself for what it has done in the administration of justice.<sup>2</sup> Any attempt to tamper with a court officer in charge of a jury while in the conscientious performance of his duty<sup>3</sup> is a gross insult to the dignity of the court. These officers are to be prevented from doing what is wrong, as well as protected in doing what is right. Court officers and attendants are not themselves at liberty to obstruct or pervert the administration of justice<sup>4</sup>—e. g., by giving information to one about to be served with a search warrant that such a step is intended.<sup>5</sup>

**§ 231. (Functions of Judicial Office; Executive; Protect the Course of Justice); Grand Jurors.**—Newspaper attacks upon grand jurymen, tending to bring them into “hatred, ridicule or contempt,” to interrupt their proceedings, or otherwise embarrass their action, constitute an assault upon the integrity of justice.<sup>1</sup> Writing letters to a similar purport falls under a like condemnation.<sup>2</sup> For example, it is not proper to charge that a grand jury, or any member of it, is unfit or disqualified for the work in hand.<sup>3</sup> An individual attacked in his private capacity gains, however, no additional right to exemption from comment

1. O’Neal, (Fla. 1903) 125 Fed. 967.

2. *Ex parte McLeod*, 120 Fed. 130 (1903). The highest consideration of the public good demands that the courts protect their officers against revenges induced in consequence of the performance of their duties, as well as against violence while engaged in the actual discharge of such duties. *Ex parte McLeod*, 120 Fed. 130 (1903).

3. *Sinnott v. State*, 11 Lea, 281 (1883). See also *Keppele v. Williams*, 1 Dall. 29, 1 L. ed. 23 (1776) (pocketing venire).

4. But mere knowledge by a sheriff

that one whom he is summoning as a juror is a friend of one of the parties is not punishable. *Richards v. U. S.*, (Alaska, 1903) 126 Fed. 105.

5. *State v. O’Brien*, (Minn. 1902) 91 N. W. 297. See also *State v. O’Brien*, (Minn. 1902) 91 N. W. 297.

1. *Allen v. State*, 131 Ind. 599, 30 N. E. 1093 (1892); *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088 (1892).

2. *Matter of Tyler*, 64 Cal. 434, 1 Pac. 884 (1884). See also *Bergh’s Case*, 16 Abb. Pr. (N. S.) 266 (1875).

3. *In re Van Hook*, (N. Y. 1818) 3 City Hall Rec. 64.

in that social relation because he chances to serve, at the time, as member of a grand jury.<sup>4</sup>

*Past acts* of any grand jury constitute a fair subject for comment unless the criticism shall appear to have some apparent tendency to embarrass pending or future business still remaining to be performed by it.<sup>5</sup>

§ 232. (*Functions of Judicial Office; Executive; Protect the Course of Justice*); Jurors; Discussions.—The jurymen, being legally required to render his verdict according to the law and the evidence given him, will be protected by the administrative power of the judge from any attempt to cause him to act, in his judicial capacity, on other evidence, or from any other motive than belief in it. Each party has a substantive right to such a trial,<sup>1</sup> and in the enjoyment of it he will be secured by the powers of the court.

*Discussions with Jurymen.*—Any effort on the part of a juror to elicit extrajudicial evidence from sources outside the courtroom, as by conversation with the parties,<sup>2</sup> and any oral discussions with jurymen calculated to affect them in the impartial discharge of their duty,<sup>3</sup> even if it takes place in the courtroom,<sup>4</sup> will be deemed by the judge an assault upon the integrity of justice; and both the juror and the person seeking to influence him<sup>5</sup> will be summarily punished.<sup>6</sup> For this result, it is not essential that the

4. *In re Spooner*, (N. Y. 1820) 5 City Hall Rec. 109.

5. *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158 (1875).

1. *Infra*, §§ 408 *et seq.*

2. *State v. Helvenston*, (Ga.) R. M. Charlt. 48 (1820); *Ruff v. Rader*, 2 Mont. 211 (1874); *In re Gorham*, 129 N. C. 481, 40 S. E. 311 (1901); *In re May*, 1 Fed. 737, 2 Flipp. 562 (1880).

3. *Drady v. Dist. Court of Polk County*, (Iowa 1905) 102 N. W. 115; *In re Gorham*, 129 N. C. 481, 40 S. E. 311 (1901); *Davidson v. Manlove*, 2 Cold. 346 (1865).

An attempt to ascertain how a jurymen stands on a given point, not involving any effort to affect his views, is not punishable. *McRae*, (Tex. Cr. App. 1903) 77 S. W. 211.

One summoned as a juror but not

impanelled on any particular jury is within the meaning of this rule. *Marvin v. Dist. Court of Polk County*, (Iowa 1905) 102 N. W. 119.

4. *Baker v. State*, 82 Ga. 776, 9 S. E. 743, 14 Am. St. Rep. 192, 4 L. R. A. 128 (1889).

5. *McCaully v. United States*, 25 App. D. C. 404 (1905); *Emery v. State*, (Nebr. 1907) 111 N. W. 374, 9 L. R. A. (N. S.) 1124; *In re Gorham*, 129 N. C. 481, 40 S. E. 311 (1901).

6. On the contrary, it has been held that where the judge has made no order against acquiring outside information, the court is not required to penalize the jurymen. *People v. Oyer*, etc., Ct., 36 Hun 277 (1885) [*affirmed* in 101 N. Y. 245, 4 N. E. 259, 54 Am. Rep. 691 (1886)].

matter discussed should be actually pending before the jury, or is certain to come before them; it is sufficient if it *may* come before them.<sup>7</sup>

**§ 233. (*Functions of Judicial Office; Executive; Protect the Course of Justice; Jurors*); Obstructing Justice.**—Nor will any person be permitted, as a jurymen, willfully to obstruct the cause of justice. Thus, for example, a jurymen, summoned to attend in a jurisdiction where it is a disqualification to have formed and expressed an opinion regarding the guilt of the accused, will not be permitted, with impunity, to subsequently disqualify himself by expressing such an opinion with intention to create such a disqualification.<sup>1</sup>

**§ 234. (*Functions of Judicial Office; Executive; Protect the Course of Justice; Jurors*); Tampering with Jury.**—Ignorance and honest mistake may plead for indulgence in case of a discussion with a jurymen as to matters which may come before him. Intentional tampering with a jurymen's integrity is an unexcusable insult to the court.<sup>1</sup> This occurs where an attempt is made to bribe one of a jury,<sup>2</sup> or offer to that effect is made to a jurymen.<sup>3</sup>

**§ 235. (*Functions of Judicial Office; Executive; Protect the Course of Justice; Jurors*); Threatening Jury.**—Threatening the members of a grand or traverse jury is an assault upon the dignity of the court before which the proceedings with which the jurymen are concerned are pending.

**§ 236. (*Functions of Judicial Office; Executive; Protect the Course of Justice*); Magistrates and Inferior Tribunals.**—Where a magistrate seeks to perpetrate a fraud upon the court, as where a coroner presents for allowance by the judge a fictitious claim

7. *U. S. v. Kilpatrick*, 16 Fed. 765 (1883).

1. *U. S. v. Devaughan*, 25 Fed. Cas. No. 14,952, 3 Cranch C. C. 84 (1827).

1. *Re Odum*, 133 N. C. 250, 45 S. E. 569 (1903); *Harwell v. State*, 10 Lea 544 (1882).

2. *Hurley v. Com.*, 188 Mass. 443, 74 N. E. 677 (1905); *Nichols v. Judge Super. Ct.*, (Mich. 1902) 89

N. W. 691; *Langdon v. Judges of Wayne Cir. Ct.*, 76 Mich. 358, 43 N. W. 310 (1889); *Gandy v. State*, 13 Nebr. 445, 14 N. W. 143 (1882); *U. S. v. Carroll*, 147 Fed. 947 (1906).

3. *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224 (1883); *Nichols v. Judge of Superior Court of Grand Rapids*, (Mich. 1902) 8 Detroit Leg. N. 1197, 89 N. W. 691.

against the state,<sup>1</sup> an assault has been made against the dignity of the court.

§ 237. (*Functions of Judicial Office; Executive; Protect the Course of Justice*); Newspapers.— Warmth of feeling is apt to disturb the judgment and destroy much of a due appreciation of the relative importance of various considerations. It has proved easy, in times of personal or popular excitement to forget that such conditions are inimical to the doing of justice; or to realize that it is the duty of the court to preserve all connected with judicial proceedings from any influence which would tend to supplant the guidance of reason and the supremacy of the rules of law. Great injury has undoubtedly been caused to due administration by acts calculated to forestall public opinion through the newspapers, arguing the issues in advance of the evidence, anticipating, predicting and even demanding, either in the name of individuals or that of the “public,” i. e., of society, a particular result of the proceedings. Parties, witnesses, jurors and all other members of the court, have been invited to do certain acts or threatened, more or less directly, with unpleasant consequences should they fail to do so. Such publications make it extremely difficult to select an impartial jury for most important cases or that they should remain impartial in rendering their verdict. In the absence of statutory limitation,<sup>1</sup> such conduct, so far as preventable, will be checked by a judge who is aware of the ends which his administration of justice seeks to attain, and the powers with which he has been clothed for their attainment.

§ 238. (*Functions of Judicial Office; Executive; Protect the Course of Justice; Newspapers*); Embarrassing the Administration of Justice.— Any publication concerning a pending cause or regarding a matter likely to become the subject of judicial inquiry, which in any way tends to embarrass<sup>1</sup> the orderly adminis-

1. *Ex parte* Toepel, (Mich. 1905) 102 N. W. 369, 11 Detroit Leg. N. 759.

1. *In re* Daniels, (N. C. 1904) 131 Fed. 95.

1. *R. v. Parke*, 72 Law J. K. B. 839 (1903), 2 K. B. 432, 89 Law T. 439, 52 Wkly. Rep. 215, 67 J. Pac. 421 (1904); *R. v. Parke*, 72 Law J. K. B. 839, 2 K. B. 432, 89 Law T. 439, 67 J. P. 421 (Eng. 1903).

It is not material, in the matter of *liability*, that the cause is not pending nor to be tried at a time then determined. But the circumstance that the matter was to be heard judicially at a time then unascertained may be relevant upon the question of a suitable punishment for the offense. *Globe Newspaper Co. v. Com.*, 188 Mass. 449, 74 N. E. 682 (1905).

tration of justice will be deemed an offense against the dignity of the court.<sup>2</sup> To charge, for example, the supreme court of a state and certain of its judges with having been influenced by corrupt motives in their rulings in causes still pending for rehearing, is obviously calculated to bring justice into contempt.<sup>3</sup> Any publication, by newspaper or otherwise, which embarrasses the due and orderly administration of justice, or tends to sully, pollute or corrupt it, is an affront to the court before whom the proceedings affected are pending.<sup>4</sup> "Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard."<sup>5</sup> It is not material, in this connection, whether the statements made are true<sup>6</sup> or false; or whether, if false, they were by reason of intention or inadvertence,<sup>7</sup> or that the assault was directed at the members of the court and that the latter were not affected by it.<sup>8</sup> The protection is not designed for the *personnel* of the court, but for the dignity of judicial administration. The intent of the publisher is equally immaterial, on the matter of liability,<sup>9</sup> though it has a bearing as to what punishment would be proper.<sup>10</sup>

**§ 239. (Functions of Judicial Office; Executive; Protect the Course of Justice; Newspapers); Past Proceedings.**—The existence of a pending suit which the publication may affect, while a usual incident in the mischief, is not one absolutely essential to liability for publication. The true object of the court's action is the protection from public assault of the administration of justice. The interests involved are usually sufficiently protected by compelling abstention from comment in a pending cause. This, however, is not necessarily so in all cases. It has been said, indeed,

2. *Globe Newspaper Co. v. Com.*, 188 Mass. 449, 74 N. E. 682 (1905); *In re Providence Journal Co.*, (R. I. 1907) 68 Atl. 428.

3. *People v. News-Times Pub. Co.*, (Colo. 1906) 84 Pac. 912.

4. *U. S. v. Holmes*, 26 Fed. Cas. No. 15,383, 1 Wall. Jr. 1 (1842) [*cited* in *U. S. v. Anonymous*, 21 Fed. 761, 768 (1884)].

5. *Anonymous*, 2 Atk. 469 (1742), per Hardwicke, C.

6. *Hughes v. Terr.*, (Ariz. 1906) 85 Pac. 1058; *People v. News-Times Pub. Co.*, (Colo. 1906) 84 Pac. 912.

7. *In re Providence Journal Co.*, (R. I. 1907) 68 Atl. 428.

8. *People v. News-Times Pub. Co.*, (Colo. 1906) 84 Pac. 912.

9. *People v. News-Times Pub. Co.*, (Colo. 1906) 84 Pac. 912.

10. *Globe Newspaper Co. v. Com.*, 188 Mass. 449, 74 N. E. 682 (1905).

that no matter how defamatory of a court or judge a publication may be, it cannot be regarded as a contempt of court unless it be written and published with reference to a case then pending before the court.<sup>1</sup> Still, it is clear that a litigant is not at liberty as soon as his case is disposed of, and therefore, is no longer pending, to publish libelous statements concerning the presiding judge. This is a grave assault on the dignity of judicial proceedings.<sup>2</sup> A newspaper publisher is equally obnoxious to the imputation of committing a flagrant offense against justice who suggests that the judge who renders a certain decision was venal and corrupt.<sup>3</sup> The following distinction has properly been taken: Contempts relating to a pending cause may either consist in abusing parties concerned in cases pending in court, or in prejudicing mankind against persons before the cause is heard, while contempts consisting of scandalizing the court itself need not relate to a pending suit.<sup>4</sup>

**§ 240. (Functions of Judicial Office; Executive; Protect the Course of Justice; Newspapers); Improper Influence.**—The publication which is objectionable is one which concerns a pending cause. But to publish, in a newspaper or elsewhere, and circulate through the community utterances which tend to influence, one way or the other, the outcome of litigation, supplies something other than argument or evidence to the jury as a ground for their action and is an aggravated assault upon the dignity of the court.<sup>1</sup>

1. *Ex parte* Green, (Tex. Cr. App. 1904) 81 S. W. 723 [citing *State v. Anderson*, 40 Iowa, 207 (1875); *Stuart v. People*, 3 Scam. (Ill.) 395 (1842); *Story v. People*, 79 Ill. 45, 22 Am. Rep. 158 (1875); *Ex parte* Hickey, 4 Smedes & M. (Miss.) 751 (1844); *Ex parte* Wright, 65 Ind. 504 (1879); *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 56 Am. Rep. 199 (1886); *Ex parte* Barry, 85 Cal. 603, 25 Pac. 256, 20 Am. St. Rep. 248 (1890); *Rosewater v. State*, (Neb. 1896) 66 N. W. 640; *State v. Edwards*, (S. D. 1902) 89 N. W. 1011; *State v. Kaiser*, (Or. 1890) 23 Pac. 964, 8 L. R. A. 584; *State v. Tugwell*, (Wash. 1898) 52 Pac. 1056, 43 L. R. A. 717; *People v. Stapleton*, (Colo. 1893) 33 Pac. 167, 23 L. R. A. 787; *McClatchy v. Superior Court*, (Cal. 1897) 51 Pac. 696, 39 L. R. A. 691.

*Disapproving Com. v. Dandridge*, 2 Va. Cas. 409 (1824); *Ex parte* Moore, 63 N. C. 397 (1869); *Ex parte* McLeod, (Ala. 1903) 120 Fed. 130; *State v. Morrill*, 16 Ark. 384 (1855); *State v. Shepherd*, (Mo. 1903) 76 S. W. 79; *In re Chadwick*, (Mich. 1896) 67 N. W. 1071].

2. *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878 (1904).

3. *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903).

4. *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903).

1. *Arkansas*.—*State v. Morrill*, 16 Ark. 384 (1855).

*California*.—*Ex p. Barry*, 85 Cal. 603, 25 Pac. 256, 20 Am. St. Rep. 248 (1890).

*Colorado*.—*People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787 (1893); *Cooper v. People*, 13

As the effort of the court is rather to protect the course of justice than to punish individuals, and as the injury to the cause of justice is equally great whatever may have been the intent with which such a publication has been made, the nature of the intent of the actor is immaterial.<sup>2</sup> After the cause has finally been decided, all persons connected with it—even the judge himself—may be criticised by the press in the public interest.<sup>3</sup>

Colo. 373, 22 Pac. 790, 6 L. R. A. 430 (1889).

*Illinois*.—*People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528 (1872).

*Indiana*.—*Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199 (1886).

*Louisiana*.—*State v. Judge Civ. Dist. Ct.*, 45 La. Ann. 1250, 14 So. 310, 40 Am. St. Rep. 282 (1893).

*Montana*.—*State v. Faulds*, 17 Mont. 140, 42 Pac. 285 (1895); *In re MacKnight*, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451 (1891); *Territory v. Murray*, 7 Mont. 251, 15 Pac. 145 (1887).

*Nebraska*.—*Percival v. State*, 45 Nebr. 741, 64 N. W. 221, 50 Am. St. Rep. 568 (1895).

*New Hampshire*.—*In re Sturoc*, 48 N. H. 428, 97 Am. Dec. 626 (1869); *Tenney's Case*, 23 N. H. 162 (1851).

*New Jersey*.—*In re Cheeseman*, 49 N. J. L. 115, 6 Atl. 513, 60 Am. St. Rep. 596 (1886).

*New Mexico*.—*In re Hughes*, 8 N. M. 225, 43 Pac. 692 (1895).

*New York*.—*In re Bronson*, 12 Johns. 460 (1815); *In re Darby*, 3 Wheel. Crim. 1 (1824).

*North Carolina*.—*In re Moore*, 63 N. C. 397 (1869).

*Ohio*.—*Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638 (1889).

*Oklahoma*.—*Burke v. Territory*, 2 Okla. 499, 37 Pac. 829 (1894).

*Pennsylvania*.—*Bayard v. Passmore*, 3 Yeates 438 (1802); *Republica v. Oswald*, 1 Dall. 319, 1 Am. Dec. 246, 1 L. ed. 155 (1788).

*South Dakota*.—*State v. Edwards*, 15 S. D. 383, 89 N. W. 1011 (1902).

*Washington*.—*State v. Tugwell*, 19

Wash. 238, 52 Pac. 1056, 43 L. R. A. 717 (1898).

*West Virginia*.—*State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257 (1884).

*United States*.—*Gorham Mfg. Co. v. Emery, etc., Dry-Goods Co.*, 92 Fed. 774 (1899); *U. S. v. Duane*, 25 Fed. Cas. (Pa.) No. 14,997, Wall. Sr. 102 (1801).

*England*.—*Daw v. Eley*, L. R. 7 Eq. 49, 38 L. J. Ch. 113, 17 Wkly. Rep. 245 (1868); *In re Crown Bank*, L. R. 44, Ch. D. 649, 59 L. J. Ch. 767, 63 L. T. Rep. (N. S.) 304, 39 Wkly. Rep. 45 (1890); *Reg. v. Skipworth*, 12 Cox. C. C. 371 (1873).

*Canada*.—*Reg. v. Wilkinson*, 41 U. C. Q. B. 47 (1877).

2. *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 840 (1899).

3. *Arkansas*.—*Compare State v. Morrill*, 16 Ark. 384 (1855).

*Colorado*.—*Cooper v. People*, 13 Colo. 373, 22 Pac. 790, 6 L. R. A. 430 (1889).

*Illinois*.—*Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158 (1875).

*Indiana*.—*Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199 (1886).

*Iowa*.—*State v. Anderson*, 40 Iowa, 207 (1875); *Dunham v. State*, 6 Iowa 245 (1858).

*Michigan*.—*Compare In re Chadwick*, 109 Mich. 588, 67 N. W. 1071 (1896).

*Nebraska*.—*Rosewater v. State*, 47 Nebr. 630, 66 N. W. 640 (1896); *Percival v. State*, 45 Nebr. 741, 64 N. W. 221, 50 Am. St. Rep. 561 (1895).

*Ohio*.—*Post v. State*, 14 Ohio Cir. Ct. 111, 7 Ohio Cir. Dec. 257 (1897).

*Oregon*.—*State v. Kaiser*, 20 Oreg.



**§ 241. (Functions of Judicial Office; Executive; Protect the Course of Justice; Newspapers); Intimidation.**—The mischief is still greater where intimidation is attempted by a newspaper or other publication.<sup>1</sup> The more studied is such an attempt the more sternly will it be rebuked by the judge.<sup>2</sup>

Any form of practical intimidation of any portion of the tribunal,<sup>3</sup> especially where such is the *intended* effect, of the utterance, is a still graver indignity to the self-respect of justice, and the high esteem in the community which it must demand, for its own protection and that of society.

**§ 242. (Functions of Judicial Office; Executive; Protect the Course of Justice; Newspapers); Special Orders as to Publication.**

—The general rule seems fairly established that a correct report of the evidence taken on pending trials may properly be given in the public press;<sup>1</sup> fair criticism, even of pending cases, is allowable.<sup>2</sup> Especial indulgence is very properly accorded, in the public

50, 23 Pac. 964, 8 L. R. A. 584 (1890).

*Wisconsin.*—*State v. Eau Claire Co. Cir. Ct.*, 97 Wis. 1, 72 N. W. 193, 65 Am. St. Rep. 90, 38 L. R. A. 554 (1897).

1. *State v. Bee Pub. Co.*, 60 Nebr. 282, 83 N. W. 204, 50 L. R. A. 195 (1900); *Burke v. Territory*, 2 Okla. 499, 37 Pac. 829 (1894); *Mackett v. Herne Bay*, 24 Wkly. Rep. 845 (1876). The threat employed may be that of popular disapproval. *People v. Wilson*, 64 Ill. 195, 16 Am. Dec. 528 (1872).

2. *Bowden v. Russell*, 46 L. J. Ch. 414, 36 L. T. Rep. (N. S.) 177 (1877).

3. *Colorado.*—*Bloom v. People*, 23 Colo. 416, 48 Pac. 519 (1897); *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787 (1893).

*Illinois.*—*People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528 (1872).

*Iowa.*—*Field v. Thornell*, 106 Iowa, 7, 75 N. W. 685, 68 Am. St. Rep. 281 (1898).

*Mississippi.*—*Compare Ex p. Hickey*, 4 Sm. & M. 751 (1844).

*New Mexico.*—*In re Hughes*, 8 N. M. 225, 43 Pac. 692 (1895).

*New York.*—*In re Bronson*, 12 Johns. 460 (1815); *Noah's Case*, 3 City Hall Rec. 13 (1818).

*Ohio.*—*State v. Post*, 6 Ohio S. & C. Pl. Dec. 200, 4 Ohio N. P. 157 (1897).

*United States.*—*Hollingsworth v. Duane*, 12 Fed. Cas. No. 6,616, Wall. Sr. 77 (1801); *U. S. v. Duane*, 25 Fed. Cas. No. 14,997, Wall. Sr. 102 (1801).

*England.*—*Littler v. Thomson*, 2 Beav. 129, 17 Eng. Ch. 129 (1839); *Reg. v. O'Dogherty*, 5 Cox C. C. 348 (1848); *Tichborne v. Tichborne*, 39 L. J. Ch. 398, 22 L. T. Rep. (N. S.) 55, 18 Wkly. Rep. 621 (1870); *Kitecat v. Sharp*, 52 L. J. Ch. 134, 48 L. T. Rep. (N. S.) 64, 31 Wkly. Rep. 227 (1882); *Hunt v. Clarke*, 58 L. J. Q. B. 490, 61 L. T. Rep. (N. S.) 343, 27 Wkly. Rep. 724 (1889).

1. *McClatchy v. Sacramento Co. Super. Ct.*, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691 (1897).

2. *Stuart v. People*, 4 Ill. 395 (1842); *In re Press-Post*, 6 Ohio S. & C. Pl. 10, 3 Ohio N. P. 180 (1896).

interest, where the criticism does not attach to any pending case, but is leveled against a system in which it is claimed that abuses exist.<sup>3</sup> The power of a judge, by special order, to add to the ordinary and established duty of the newspaper publisher is a question of some doubt. It has been held that such a person could print true accounts of court proceedings although the judge has specially ordered that it should not be done.<sup>4</sup> A ruling has, however, been made to the contrary effect.<sup>5</sup>

**§ 243. (Functions of Judicial Office; Executive; Protect the Course of Justice; Newspapers); Place of Publication.**—The place of an offensive publication may well be other than the one where the court is sitting. The mischief is done if the newspaper or other vehicle of an assault on judicial dignity *circulates* among persons liable to be injuriously affected thereby.<sup>1</sup> That the publication ever actually came to the notice of the persons to be affected by it need not be shown.<sup>2</sup>

**§ 244. (Functions of Judicial Office; Executive; Protect the Course of Justice); Parties and Public.**—The judge has a right to freedom from personal abuse from suitors, their sympathizers or, indeed, from anyone, who feels resentment against him on account of his judicial acts. The prosecutor in a criminal case is not at liberty to upbraid or vilify the judge who imposes too light a sentence to meet his approval, even after an adjournment of court has been taken.<sup>1</sup> Where a criminal cause is pending, to state or openly to insinuate, at a public meeting or elsewhere, that defendant in a pending prosecution is not guilty, coupled with the affirmation that there is a conspiracy against him, and that he cannot or will not have a fair trial, is a gross offense against the dignity

3. *In re Shannon*, 11 Mont. 67, 27 Pac. 352 (1891).

4. *In re Shortridge*, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755 (1893). But see *Rex v. Clement*, 4 B. & Ald. 218, 23 Rev. Rep. 260, 25 Rev. Rep. 710, 6 E. C. L. 458 (1821).

5. *Dunham v. State*, 6 Iowa 245 (1858).

1. *State v. Judge Civ. Dist. Ct.*, 45 Ia. Ann. 1250, 14 So. 310, 40 Am. St. Rep. 282 (1893); Telegram

*Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159 (1899); *In re Sturoe*, 48 N. H. 428, 97 Am. Dec. 626 (1869); *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638 (1889).

2. *Gazette Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 155 (1899).

1. *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957 (1905).

of judicial administration.<sup>2</sup> Comments on a cause, written or spoken, while it is pending, which are of a nature to prejudice any of the parties, constitute an indirect contempt of court.<sup>3</sup> Still more clearly, a corrupt agreement entered into for a financial consideration to affect the action of the presiding judge is an offense against justice.<sup>4</sup> For a litigant to seek by any means to avoid the due and lawful effect of the process of a court to whose judgment he has become subject richly merits rebuke. Thus, when one court has made an order in a cause pending before it, for a party to institute similar proceedings in another court in order to prevent the enforcement of the prior order is an insult to the court first obtaining jurisdiction.<sup>5</sup> The penalties will not, however, apply to one whose name has been used without his consent and who has by no means connived or consented or agreed to the proceedings.<sup>6</sup> A party cannot without insulting the court which has made an order against him, in a controversy lawfully submitted to it, violate such order while prosecuting an appeal from it.<sup>7</sup>

**§ 245. (Functions of Judicial Office; Executive; Protect the Course of Justice); Service of Process.**—A court will require that the due and regular service of its process should not be impeded, delayed or obstructed,<sup>1</sup> by those who have notice of the facts.<sup>2</sup> Delaying a messenger of a court will, therefore, be resented by the judge.<sup>3</sup> Counseling and advising disobedience or resistance to the commands of such a writ is reprehensible as an insult to the cause of judicial administration.<sup>4</sup> Personal violence inflicted upon one

2. *King v. Charlier*, (Can. 1903) Rap. Jud. Que. 12 B. R. 385.

3. *King v. Charlier*, (Can. 1903) Rap. Que. 12 B. R. 385.

4. *In re Taylor*, (Cal. 1886) 10 Pac. 88; *In re Buckley*, 69 Cal. 1, 10 Pac. 69 (1886).

5. *Terry v. State*, (Nebr. 1906) 110 N. W. 733.

6. *Terry v. State*, (Nebr. 1906) 110 N. W. 733.

7. *People v. Horn*, 34 Colo. 304, 86 Pac. 263 (1906).

1. *California*.—*De Witt v. Fresno Co. Super. Ct.*, 47 Pac. 871 (1897).

*Illinois*.—*Horr v. People*, 95 Ill. 169 (1880).

*Louisiana*.—*State v. Herron*, 24 La. Ann. 619 (1872).

*Massachusetts*.—*Clark v. Parkinson*, 10 Allen 133, 87 Am. Dec. 628 (1865).

*New York*.—*People v. Gilmore*, 26 Hun 1 (1881); *Conover v. Wood*, 5 Abb. Pr. 84 (1857).

*Pennsylvania*.—*Com. v. Curtis*, 14 Phila. 361, 37 Leg. Int. 83 (1880).

*United States*.—*Albertson v. The T. I. Nevius*, 48 Fed. 927 (1892); *In re Sowles*, 41 Fed. 752 (1890); *In re Doolittle*, 23 Fed. 544 (1885).

2. *State v. District Court of Seventh Judicial Dist.*, 29 Mont. 230, 74 Pac. 412 (1903).

3. *Ex p. Page*, 1 Rose 1 (1810).

4. *King v. Barnes*, 113 N. Y. 476, 21 N. E. 182, 415, 23 N. Y. St. 263 (1889) [*affirming* 51 Hun 550, 4

who is serving the process, because he is doing so, is an affront to the court out of which it issues.<sup>5</sup> But the mere issuance of a warrant by a magistrate does not make one who refuses to submit to its precept guilty of an offense against justice.<sup>6</sup> Where specific remedies are provided by law, they must be resorted to; and it is not every act rendering ineffectual an order of court which can be followed up by the imprisonment for contempt of the person who brought about that result.<sup>7</sup> Secreting the property sought to be replevied so that it cannot be reached is equally reprehensible.<sup>8</sup> Hiding to escape arrest, if an offense against justice at all, is not a direct affront to the court.<sup>9</sup> Respect for the writ itself — the piece of paper — is not required.<sup>10</sup> Nor is protection extended to the officer, as an individual. A mere personal altercation between an officer serving a writ and the person on whom it is served is not protected by process of contempt.<sup>11</sup> The court will examine below surface indications and into the substance of the transaction. So regarded, acts apparently innocent, such as withdrawing a bid made at a trustee's sale,<sup>12</sup> may, in reality, constitute an attempt to obstruct justice.

**§ 246. (Functions of Judicial Office; Executive; Protect the Course of Justice); Witnesses.**— Equally alert will the judge be to prevent the use of threatening or insulting language to wit-

N. Y. Suppl. 247, 22 N. Y. St. 47, 51, 54 (1889)]; *In re Noyes*, 121 Fed. 209, 57 C. C. A. 445 (1902). Advising a client that a writ is void because of lack of jurisdiction on the part of the court is not overstepping the province of counsel. *In re Noyes*, 121 Fed. 209, 57 C. C. A. 445 (1902).

5. *Price v. Hutchinson*, (Eng.) L. R. 9 Eq. 534, 18 Wkly. Rep. 204 (1870); *Dastoinies v. Apprice*, Cary 91 (1820); *Rove v. West*, Cary 38 (1820); *Emery v. Bowen*, (Eng.) 5 L. J. Ch. (N. S.) 349 (1836). But see also *Adams v. Hughes*, 1 Brod. & Bing. 24, 5 E. C. L. 482 (1819). It is a contempt of court to seek to punish a judicial officer for his official acts elsewhere than before a constituted tribunal. *Ex parte McLeod*, 120 Fed. 130 (1903).

6. *Ormond v. Ball*, 120 Ga. 916, 48 S. E. 383 (1904).

7. *State ex rel. Duffy & Behan v. Civil Dist. Court for Parish of Orleans*, 112 La. 182, 36 So. 315 (1904).

8. *State v. District Court of Second Judicial Dist. for Silver Bow County*, (Mont. 1906) 83 Pac. 641. See also *State ex rel. Duffy & Behan v. Civil Dist. Court for Parish of Orleans*, 112 La. 182, 36 So. 315 (1904).

9. *Broderick v. Genesee Cir. Judge*, 125 Mich. 274, 84 N. W. 129 (1900).

10. *Weeks v. Whitely*, 3 Dowl. P. C. 536, 1 Hurl. & W. 218 (1835).

11. *Junius Hart Piano House v. Ingman*, 119 La. 1017, 44 So. 850 (1907).

12. *Quidnick Co. v. Chafee*, 13 R. I. 367 (1882).

nesses,<sup>1</sup> as by insulting him in open court, stigmatizing him a "liar."<sup>2</sup> Until the witness has been subpoenaed or summoned to attend, the interest of the court has not attached to him, and he cannot be shielded by its executive power.<sup>3</sup> While the protection of the court may be extended to one for whose attendance as a witness a summons has been sued out, such an effect does not follow the issuance of process in blank.<sup>4</sup>

**§ 247. (Functions of Judicial Office; Executive; Protect the Course of Justice; Witnesses); Arrest.**—Arresting a witness on civil process while going to or from the court or while in attendance thereon may be a contempt of the court in which the proceedings are pending.<sup>1</sup> Even where it is not objectionable to serve a party or one of his witnesses with legal process while in attendance on a trial,<sup>2</sup> still, if the person served is present on the express understanding that he shall be protected by the court, and he is at the time in custody of a court officer assigned for his protection, a judge may reasonably resent the service.<sup>3</sup>

**§ 248. (Functions of Judicial Office; Executive; Protect the Course of Justice; Witnesses); Bribery.**—All persons will be compelled to refrain from assailing the course of justice by improper conduct directed toward witnesses. Thus, actual or attempted *bribery* of a witness<sup>1</sup> will be promptly dealt with under the executive powers of the court.<sup>2</sup> It is not material, in this connection, whether the bribe be given or tendered for the purpose of

1. *U. S. v. Carter*, 25 Fed. Cas. No. 14,740, 3 Cranch C. C. 423 (1829).

2. *U. S. v. Emerson*, 25 Fed. Cas. No. 15,050, 4 Cranch C. C. 188 (1831); *Welby v. Still*, (Eng. 1892) 66 L. T. Rep. (N. S.) 523.

3. *McConnell v. State*, 46 Ind. 298 (1874). See also *Schlesinger v. Flersheim*, 2 D. & L. 737, 14 L. J. Q. B. 97 (1845).

4. *Dobbs v. State*, 55 Ga. 272 (1875).

1. *Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598 (1884); *State v. Buck*, 62 N. H. 670 (1883). See also *Butler v. People*, 2 Colo. 295 (1874).

2. *Ex p. Schulenburg*, 25 Fed. 211 (1885); *Elight v. Fisher*, 3 Fed. Cas. No. 1,542, 1 Pet. C. C. 41 (1809).

3. *Bridges v. Sheldon*, 7 Fed. 17, 18 Blatchf. 295, 509 (1880). See also *In re Healey*, 53 Vt. 694, 38 Am. Rep. 713 (1881).

**Witnesses, however, have duties to justice as well as claims upon it.** The court will compel them, as well as all other persons, to abstain from conduct impairing the efficiency of the administration of justice, obstructing its due course, or tending to diminish the popular respect to which it is entitled and which is essential to the adequate discharge of its functions.

1. *U. S. v. Carroll*, 147 Fed. 947 (1906).

2. *Fisher v. McDaniel*, 9 Wyo. 457, 64 Pac. 1056 (1901).

causing the witness to modify his evidence<sup>3</sup> or to induce him to abstain from giving any evidence whatever, as where he is persuaded to absent himself from court.<sup>4</sup>

§ 249. (*Functions of Judicial Office; Executive; Protect the Course of Justice; Witnesses*); **False Swearing.**—Of possible acts, few are so antagonistic to the objects of judicial administration as the intentional false swearing which seeks to baffle the search for truth, without which justice is impossible. Such swearing is a flagrant insult to the dignity of the court; and the same offense is committed by an attorney<sup>1</sup> or other person<sup>2</sup> who procures the giving of perjured testimony. The nature of the subject-matter of the false evidence may affect, according to its importance or consequence, the action of the court in awarding punishment. False swearing as to the disposition of property stands in a different position from more important matters.<sup>3</sup> But the offence, regardless of the materiality of the evidence given, may properly be dealt with as a contempt.

§ 250. (*Functions of Judicial Office; Executive; Protect the Course of Justice; Witnesses*); **Illustrations.**—False swearing in an affidavit is a punishable act,<sup>1</sup> for which ignorance is no excuse; though it may properly be regarded in assessing punishment.<sup>2</sup> So falsely testifying as a surety in an undertaking which is to be the basis of an order of arrest is equally culpable.<sup>3</sup>

3. *In re Hooley*, 79 L. T. Rep. (N. S.) 306, 6 Manson 404 (1898) (suppression).

4. *In re Brule*, (Nev.) 71 Fed. 943 (1895).

1. *Beattie v. People*, 33 Ill. App. 651 (1889); *Gibson v. Tilton*, (Md. 1829) 1 Bland 352, 17 Am. Dec. 306.

2. *Ricketts v. State*, (Tenn. 1903) 77 S. W. 1076.

3. *Illinois*.—*Berkson v. People*, 154 Ill. 81, 39 N. E. 1079 (1894).

*New York*.—*Eagan v. Lynch*, 3 N. Y. Civ. Proc. 236 (1883); *Bernheimer v. Kelleher*, (N. Y. 1900) 31 Misc. 464, 64 N. Y. Suppl. 409.

*Wisconsin*.—*In re Rosenburg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299 (1895).

*United States*.—*In re Fellerman*, 149 Fed. 244 (1906).

*England*.—*Stockham v. French*, 1 Bing. 365, 8 E. C. L. 550 (1823).

The contrary has been held in Louisiana. *State v. Lazarus*, 37 La. Ann. 314 (1885).

1. *In re Goslin*, 180 N. Y. 505, 72 N. E. 1142 (1904). See also *In re Goslin*, 88 N. Y. Suppl. 670, 95 App. Div. 407 (1904).

2. *Seastream v. New Jersey Exhibition Co.*, (N. J. Ch. 1905) 61 Atl. 1041.

3. *Nuccio v. Porto*, 76 N. Y. St. 96, 72 App. Div. 88 (1902).

An attorney who knowingly induces the court to accept a worthless bond is guilty of a like offense. *Nuccio v. Porto*, 76 N. Y. Suppl. 96, 72 App. Div. 88 (1902).

Fabricating real or documentary evidence, as where certain pages of a book are forged and then presented to the court as the basis for a preliminary injunction,<sup>4</sup> stands in the same position.

**§ 251. (Functions of Judicial Office; Executive; Protect the Course of Justice; Witnesses); Intimidation.**— Putting a witness in such fear of personal violence that he is forced to modify his evidence is clearly a most deadly thrust at justice, and will be accordingly punished.<sup>1</sup> The use of threatening language to a witness which has the effect of forcing him to vary his testimony is, according to the extent and seriousness of the forced deviation, of similar injury to the cause of justice.<sup>2</sup>

*Intimidation.*— No person is at liberty to intimidate a witness by such acts as will cause him to refuse to testify.<sup>3</sup> This is equally the rule in civil and criminal cases.<sup>4</sup>

**§ 252. (Functions of Judicial Office; Executive; Protect the Course of Justice; Witnesses); Suppressing Testimony.**— Bribery is by no means the sole method in which justice suffers indignity by being deprived of the witnesses or facts by which its search for truth may be aided. The same injury is done whenever a witness, who has been duly summoned, is in any way prevented from attending for the purpose of giving testimony.<sup>1</sup> The neces-

4. *Chicago Directory Co. v. United States Directory Co.*, 123 Fed. 194 (1903).

1. *Partridge v. Partridge, Tothill* 40, 21 Eng. Rep. (Reprint) 117 (1639).

2. *Shaw v. Shaw*, 8 Jur. (N. S.) 141, 31 L. J. P. M. 35, 6 L. T. Rep. (N. S.) 477, 2 Swab. 6 Tr. 517 (1861).

3. *Re Young*, 137 N. C. 552, 50 S. E. 220 (1905).

4. *In re Young*, 137 N. C. 552, 50 S. E. 220 (1905).

1. *Kansas.*— *In re Nickell*, 47 Kan. 734, 28 Pac. 1076, 27 Am. St. Rep. 315 (1892).

*Massachusetts.*— *Com. v. Reynolds*, 14 Gray 87, 74 Am. Dec. 665 (1859).

*Michigan.*— *Montgomery v. Palmer*, 100 Mich. 436, 59 N. W. 148 (1894).

*Ohio.*— *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 60 Am. St. Rep. 691, 36 L. R. A. 254 (1896) [*over-*

*ruling Baldwin v. State*, 11 Ohio St. 681 (1860)].

*Tennessee.*— *McCarthy v. State*, 89 Tenn. 543, 15 S. W. 736 (1891).

*Utah.*— *Ex p. Whetstone*, 9 Utah 156, 36 Pac. 633 (1893).

*Virginia.*— *Com. v. Feely*, 2 Va. Cas. 1 (1815).

*United States.*— See *Ex p. Savin*, 131 U. S. 267, 9 S. Ct. 699, 33 L. ed. 150 (1889).

Bona fide attempts to settle pending causes and to prevent the necessity for testimony present a situation very different from the one under consideration. *Herrmann v. Herrmann*, 81 N. Y. Suppl. 811, 82 App. Div. 437 (1903).

Technical defects in the subpoena, not known to the persons who decoyed away the witnesses will receive no consideration in this connection, as tending to justify the conduct of those

sity and power for punishing one who, knowing that a subpoena has issued to compel the attendance of a witness, conceals him so that the service cannot be made, is beyond question.<sup>2</sup>

*Advising a witness* to leave the jurisdiction of the court,<sup>3</sup> or to absent himself from the trial<sup>4</sup> is an insult to the presiding judge.

*One who refuses* to produce a person under his control, e. g., an articulated clerk,<sup>5</sup> is guilty of the same offense.

*Removing books, papers* or other writings so that their production cannot be compelled,<sup>6</sup> i. e., in such a way that they cannot be reached by compulsory legal process, is an offense of a similar nature.

**§ 253. (Functions of Judicial Office; Executive); Enforcement by Contempt Proceedings.**—As mentioned elsewhere, the executive powers of the court are most frequently ascertained and vindicated upon proceedings for contempt, so called. The proceeding is a special one, without direct connection with the matter in which it occurs.<sup>2</sup> No court is required *ex debito justitiæ* to find a person in contempt and award punishment for it. The matter is one of administration. Long delay in applying for relief may furnish ground for declining to act.<sup>3</sup> Being to ascertain guilt and, if found, to award punishment for it, the proceeding partakes of the nature of a criminal trial.<sup>4</sup> The complaint requires equal particularity of statement,<sup>5</sup> and proof of guilt should be clear and satisfactory.<sup>6</sup> A contempt proceeding is summary, and the extent of the hearing as to questions of law rests in the discretion

who have sought to suppress material evidence. *Scott v. State*, (Tenn. 1902) 71 S. W. 824.

2. *Haskett v. State*, 51 Ind. 176 (1875); *Clements v. Williams*, 2 Scott 814 (1836).

3. *Whittem v. State*, 36 Ind. 196, (1871); *In re Whetstone*, 9 Utah 156, 36 Pac. 633 (1893).

4. *Ex p. Robinson*, 19 Wall. 505, 22 L. ed. 205 (1873).

5. *Green v. Hill*, 3 Del. Ch. 92 (1866).

6. *Com. v. Braynard*, (Mass. 1826) *Thatch. Crim. Cas.* 146; *Bonesteel v. Lynde*, 8 How. Pr. 226 (1853).

1. *Infra*, § 204.

2. *In re Depue*, 185 N. Y. 60, 77 N. E. 798 (1906).

Therefore, it is no defense to such proceedings that the prior conduct of the main action has been irregular. *Christensen v. People*, 114 Ill. App. 40 (1904).

3. *Matheson v. Hanna-Schoellkopf Co.*, 122 Fed. 836 (1903).

4. *U. S. v. Richards*, 1 Alaska 613 (1902).

5. *Back v. State*, (Nebr. 1906) 106 N. W. 787. But a statute allowing for criminal appeals does not apply to judgments enforcing the dignity of the court. *State v. Peralta*, 115 La. 530, 39 So. 550 (1905).

6. *Wells v. Dist. Court of Polk County*, (Iowa 1905) 102 N. W. 106.



of the court, though one charged with contempt has the right to be heard in his defense.<sup>7</sup>

**§ 254. (Functions of Judicial Office; Executive; Enforcement by Contempt Proceedings); Civil and Criminal Cases.—**

A distinction is taken in certain cases between civil and criminal contempts. In essence, the two are the same. Proceedings for contempts are of two classes, criminal, which are conducted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders; and civil, instituted to protect and enforce the rights of private parties and compel obedience to the orders, judgments, etc., of courts made to enforce such parties' rights and remedies.<sup>1</sup>

*Civil contempts* have been defined as being such contempts as affect a private person, as, for instance, where a party refuses to obey an order of court which will benefit such private persons.<sup>2</sup>

*Criminal contempts* are those which are committed in presence of the court and disturb its administration of justice either physically and directly, as by disorderly conduct, or morally and indirectly by bringing the administration of justice into public disgrace. Criminal contempts are all acts committed against the majesty of the law, or against the court as an agency of the government, and in which, therefore, the whole people are concerned.<sup>3</sup> Criminal contempts are thus defined in the New York code:<sup>4</sup> "Disorderly, contemptuous, or insolent behavior, committed during" the sitting of court, "in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority."

*Good faith* and the advice of counsel operate to reduce punishment, e. g., to a nominal fine.<sup>5</sup> It has been held that on proceedings for criminal contempt proof of the necessary or constituent facts should be made to a certainty beyond a reasonable doubt.<sup>6</sup>

7. *State v. Nicoll*, 40 Wash. 517, 82 Pac. 895 (1905).

1. *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622 (1902).

2. *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903). Contempt proceedings in connection with equity processes as for the violation of an injunction are civil in their nature and a deposition may be used. *David-*

*son v. Munsey*, (Utah 1905) 80 Pac. 743.

3. *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903).

4. Code Civ. Proc., § 8, subd. 1.

5. *Rumney v. Donovan*, 28 Mont. 69, 72 Pac. 305 (1903).

6. *Hollister v. People*, 116 Ill. App. 338 (1904); *Connell v. State*, (Nebr. 1907) 114 N. W. 294; *Saal v. South*

In such cases, in other words, the "presumption of innocence" so-called, has been invoked.<sup>7</sup>

**§ 255. (Functions of Judicial Office; Executive; Enforcement by Contempt Proceedings); Direct and Constructive.**—

Closely related to the distinction between civil and criminal contempts is that between direct and constructive; — the direct contempt being, as a rule, punished criminally, constructive contempts being dealt with civilly.

*Direct Contempts.*—The administrative power and dignity of the court necessarily involve the right of punishing summarily for offenses against justice committed in the immediate presence and hearing of the judge,<sup>1</sup> or so near as to interrupt proceedings before him.<sup>2</sup> These are called direct contempts.<sup>3</sup> An act by any person done in presence of the presiding judge<sup>4</sup> which shows dis-

Brooklyn Ry. Co., 106 N. Y. S. 996, 122 App. Div. 364 (1907); *Johnson v. Austin*, 78 N. Y. S. 501, 76 App. Div. 312 (1902); *State v. Davis*, 50 W. Va. 100, 40 S. E. 331 (1901). Where obviously incriminating evidence has been received in silence by the accused, the "presumption of innocence" is said to be no longer operative to its full extent. *State v. O'Brien*, (Minn. 1902) 91 N. W. 297.  
7. *Hunt v. State*, 27 Ohio Cir. Ct. R. 16 (1904).

1. *Illinois*.—*Ferriman v. People*, 128 Ill. App. 230 (1906).

*Indiana*.—*Mahoney v. State*, 72 N. E. 151 (1904).

*Kansas*.—*State v. Anders*, 68 Pac. 668 (1902).

*Missouri*.—*Crow v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903).

*New York*.—*Saal v. South Brooklyn Ry. Co.*, 106 N. Y. S. 996, 122 App. Div. 364 (1907); *In re Teitelbaum*, 82 N. Y. S. 887, 84 App. Div. 351 (1903). Where the record shows a trial for indirect contempt conducted summarily, as though for a direct offense, appellant is entitled to be discharged until formal proceedings against him are instituted. *State v. Anders*, (Kan. 1902) 68 Pac. 668.

2. *Ex parte Clark*, 208 Mo. 121, 106

S. W. 990 (1907); *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903); *O'Neal*, (Fla. 1903) 125 Fed. 967.

3. The court can punish for a direct contempt only where the offense took place in the sight and hearing of the judge. *Fellman v. Mercantile F. & M. Ins. Co.*, 116 La. 733, 41 So. 53 (1906). A court may punish for a direct contempt without issue or trial in any form. *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878 (1904).

*Venue*.—In a prosecution for contempt in the presence of the court, defendant is not entitled to a change of venue because of alleged prejudice. *Connell v. State*, (Nebr. 1907) 114 N. W. 294.

4. *Arkansas*.—*Neel v. State*, 9 Ark. 259, 50 Am. Dec. 209 (1849).

*Colorado*.—*Watson v. People*, 11 Colo. 4, 16 Pac. 329 (1887).

*Indiana*.—*Snyder v. State*, 151 Ind. 553, 52 N. E. 152 (1898).

*Michigan*.—*In re Wood*, 82 Mich. 75, 45 N. W. 1113 (1890).

*Missouri*.—*In re Clark*, 126 Mo. App. 391, 103 S. W. 1105 (1907).

*New York*.—*Richmond v. Dayton*, 10 Johns. 393 (1813).

*North Carolina*.—*In re Oldham*, 89 N. C. 23, 45 Am. Rep. 673 (1883).

*North Dakota*.—*State v. Root*, 5

respect for his person or authority while acting in his official capacity<sup>5</sup> is an offense against the power and dignity of the court.<sup>6</sup> The judge needs no evidence; he is himself, in such cases, the percipient witness;<sup>7</sup> should pleadings be deemed advisable, they may be of the briefest and simplest description.<sup>8</sup>

*Constructive Contempts.*—Constructive contempts, on the other hand, may be defined as those arising from matters not occurring in court, but which tend to degrade or make impotent the authority of the judge, or which tend to impede or embarrass the administration of justice.<sup>9</sup> In dealing with contempts not committed in

N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568 (1896).

*Pennsylvania.*—*In re Hirst*, 9 Phila. 216, 31 Leg. Int. 340 (1874).

*South Carolina.*—*State v. Applegate*, 2 McCord 110 (1821); *State v. Johnson*, 2 Bay 385 (1802); *Lining v. Bentham*, 2 Bay 1 (1796).

*Virginia.*—*Com. v. Stuart*, 2 Va. Cas. 320 (1822).

*United States.*—*U. S. v. Anonymous*, 21 Fed. 761 (1884).

An act is done "in presence of the Court" when done so near as to disturb the orderly conduct of public business. *Winship v. People*, 51 Ill. 296 (1869); *Field v. Thornell*, 106 Iowa 7, 75 N. W. 685, 68 Am. St. Rep. 281 (1898); *Detournion v. Dormenon*, (La. 1810) 1 Mart. 137. Insulting a judge on the courthouse steps is against the dignity of the court. *Com. v. Dandridge*, 2 Va. Cas. 408 (1824).

Military evolutions so near as to disturb the judge by their music are in "presence" of the judge. *State v. Coulter*, (Ohio 1833) Wright 421; *State v. Goff*, (Ohio 1832) Wright 78.

5. *Matter of Taylor*, 60 N. Y. St. 136, 28 N. Y. Suppl. 500, 8 Misc. 159 (1894); *People v. Barrett*, 56 Hun 351, 9 N. Y. Suppl. 321, 18 N. Y. Civ. Proc. 180, 24 Abb. N. Cas. 430, 8 N. Y. Crim. 13 (1890); *Fisher v. McDaniel*, 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. Rep. 971 (1901); *Ex p. Savin*, 131 U. S. 267, 9 S. Ct. 699,

33 L. ed. 150 (1889); *U. S. v. Emerson*, 25 Fed. Cas. No. 15,050, 4 Cranch C. C. 188 (1831); *U. S. v. Carter*, 25 Fed. Cas. No. 14,740, 3 Cranch C. C. 423 (1829); *In re Johnson*, 20 Q. B. D. 68, 52 J. P. 230, 57 L. J. Q. B. 1, 58 L. T. Rep. (N. S.) 160, 35 Wkly. Rep. 51 (1887); *French v. French*, 1 Hog. 138 (1824).

A judge, even in the courtroom, while the court is not in session is simply a citizen. *Snyder v. State*, 151 Ind. 553, 52 N. E. 152 (1898). The rule is the same where a judge is engaged on a ministerial rather than a judicial act, e. g., where he is examining a docket. *Fidler v. Probasco*, 2 Browne 137 (1811).

6. *Baker v. State*, 82 Ga. 776, 9 S. E. 743, 14 Am. St. Rep. 192, 4 L. R. A. 128 (1889); *Stewart v. State*, 140 Ind. 7, 39 N. E. 508 (1895); *Penn v. Brewer*, (Md. 1841) 12 Gill & J. 113; *U. S. v. Gehr*, 116 Fed. 520 (1902).

7. *Gordon v. State*, (Nebr. 1905) 102 N. W. 458.

8. *Ferriman v. People*, 128 Ill. App. 230 (1906).

9. *O'Neil v. People*, 113 Ill. App. 195 (1904); *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903); *Saal v. South Brooklyn Ry. Co.*, 106 N. Y. S. 996, 122 App. Div. 364 (1907). An indirect or constructive contempt is one offered elsewhere than in the presence of the court, and which tends to degrade or weaken its authority, or in some manner to impede the due

the presence of the judge, the offender must be brought before the court by a rule or some sufficient process.<sup>10</sup>

*In other words, while the power to punish* in cases of direct contempts and constructive contempts is the same, the procedure is different; in cases of direct contempt the court acts spontaneously and commits the offender summarily; while in cases of constructive contempts the court, on information, issues a citation to the offender to show cause why he should not be punished for contempt.<sup>11</sup> The information in a proceeding for contempt is sufficient if it clearly apprise the defendant of the nature of the charge against him, and no particular form is, in general, essential.<sup>12</sup>

**§ 256. (Functions of Judicial Office; Executive; Enforcement by Contempt Proceedings; Direct and Constructive); Constructive Presence of Judge.**—The court is said to be present wherever during its sessions, the judge, court officers, jurors and other persons in attendance for the performance of judicial or ministerial functions in aid of judicial proceedings, are present, engaged in their respective duties, in the part of the courthouse reserved to their use.<sup>1</sup> It may be doubted, however, whether this is anything more than a restatement of the rules under which the judge protects the administration of justice from attacks made when, though the court is sitting, the judge is not near enough to be said with literal exactness to be present. For example, a disturbance before a grand jury cannot be properly dealt with as an offense done in the direct presence of the court itself.<sup>2</sup>

**§ 257. Judge Sitting as a Jury.**—With exceptions due to differences in intellectual equipment and a consequent absence of

administration of justice. *Ex parte* Clark, 208 Mo. 121, 106 S. W. 990 (1907).

10. *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878 (1904).

11. *Ex parte* Clark, 208 Mo. 121, 106 S. W. 990 (1907); *Crow v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903); *Ex parte* Morris, 28 Ohio Cir. Ct. R. 611 (1906).

12. *Hake v. People*, 230 Ill. 174, 82 N. E. 561 (1907); *Aaron v. United States*, (Mo. 1907) 155 Fed. 833, 84 C. C. A. 67.

1. *Com. v. Clark*, 13 Pa. Co. Ct. 439 (1893); *U. S. v. Anonymous*, 21 Fed. 761 (1884). A claim to occupy a room in the courthouse as a matter of right, coupled with retention of possession cannot be deemed an insult to the order of a commissioner's court which requires the tenant to vacate. *Watson v. Scarbrough*, (Ala. 1906) 40 So. 672.

2. *Ex parte* Hedden, (Nev. 1907) 90 Pac. 737.

danger of being misled by certain classes of evidence liable to be overestimated by an untrained mind,<sup>1</sup> the rules which govern the action of a jury apply equally to a judge sitting instead of one. Thus, a verdict will be directed where but one outcome of a hearing would be rational.<sup>2</sup> There must be a finding on every material fact alleged in the complaint and controverted by the answer necessary to support the judgment rendered.<sup>3</sup> Where the evidence is uncontradicted, the party is entitled to definite and direct findings with reference thereto.<sup>4</sup> Should the primary facts found lead to but one conclusion, the court is not required to make a specific finding of the constituent fact;<sup>5</sup> on the contrary, where he finds the constituent facts, as he should do in all cases where the relation between the probative and constituent facts is not one of law, i. e., rationally necessary, the judge is not bound in addition to find the probative facts.<sup>6</sup> If there be a conflict between the general and special findings made by the trial court, the special finding will control.<sup>7</sup>

*The waiver by the parties* of the benefit of a jury is not conclusive upon the judge. He may still, if in his administrative duty expedient, call and empanel a jury for the trial of the cause.<sup>8</sup>

**§ 258. (Judge Sitting as a Jury); Administrative Orders.**—The court, sitting as a jury, may make such administrative orders as he might have made were he presiding over a jury trial. Thus, where a party has closed his case and the judge has decided the issue, he may set aside the judgment, allow the party to withdraw his rest and introduce further evidence.<sup>1</sup> A request for special findings should be made at the commencement of the trial, and, if not then made, the right is waived, and thereafter it lies within the discretion of the court whether it will make a special finding

1. In the trial of an action by the court without a jury there is no necessity for the rigid insistence upon the rules of evidence which would otherwise be proper. *Shelley v. Westcott*, 23 App. D. C. 135 (1904).

2. *Infra*, §§ 390 *et seq.*

3. *Bell v. Adams*, (Cal. 1907) 90 Pac. 118; *Shuler v. Lashhorn*, 67 Kan. 694, 74 Pac. 264 (1903); *Crowley v. Crowley*, 72 N. H. 241, 56 Atl. 190 (1903).

4. *Lackmann v. Kearney*, 142 Cal. 112, 75 Pac. 668 (1904).

5. *Mount v. Board of Com'rs of Montgomery County*, (Ind. 1907) 80 N. E. 629.

6. *Robson v. Price*, (Mich. 1903) 10 Detroit Leg. N. 459, 96 N. W. 433.

7. *Citizens' Bank v. Stockslager*, 1 Nebr. (Unof.) 799, 96 N. W. 591 (1901).

8. *Fleming v. Wilson*, 39 Wash. 106, 80 Pac. 1104 (1905).

1. *Parker v. Ricks*, 114 La. 942, 38 So. 687 (1905); *Cochran v. Moriarty*, (Nebr. 1907) 111 N. W. 588.

or not.<sup>2</sup> He may also, if he desires, specially find as to facts not placed in issue by the pleadings but is under no obligation so to do.<sup>3</sup> Similarly, if a statement of fact is to be submitted to the judge for approval, it must be placed before him as early as the close of the arguments.<sup>4</sup> The trial court cannot be required to state the evidence upon which his fact findings are based.<sup>5</sup>

§ 259. (*Judge Sitting as a Jury*); *Rulings of Law*.—While there is a certain appearance of incongruity in the spectacle of a judge solemnly laying down rules of law to himself as a jury to guide his deliberations as to matters of fact, it is within the right of a litigant to demand that he do so,<sup>1</sup> provided there is sufficient evidence to render a proposition applicable to the case.<sup>2</sup> On trial by the court, a party asking a ruling correct in law has a right to know whether in deciding the case against him the judge acted on the rule of law stated.<sup>3</sup> Where a decision rests on one of two alternatives, one adjudged under a correct ruling, and the other under an incorrect one, the decision cannot be sustained.<sup>4</sup>

*The assumption of facts* as proved cannot be made in an instruction by the court to himself as a jury.<sup>5</sup> Propositions asked as propositions of law, which pertain purely to questions of fact, are properly refused.<sup>6</sup>

2. *Indiana*.—*Tevis v. Hammersmith* (Ind. App. 1907) 81 N. E. 614.

*Missouri*.—*Moberly v. City of Trenton*, 181 Mo. 637, 81 S. W. 169 (1904).

*Montana*.—*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6 (1905).

*New Mexico*.—*Bank of Commerce v. Baird Min. Co.*, 85 Pac. 970 (1906).

*South Dakota*.—*State v. Coughran*, 103 N. W. 31 (1905).

3. *Burton v. Mullenary*, 147 Cal. 259, 81 Pac. 544 (1905); *Jennings v. Frazier*, (Ore. 1905) 80 Pac. 1011.

4. *Hartmann v. Schnugg*, 99 N. Y. Suppl. 33, 113 App. Div. 254 (1906).

5. *Thompson v. Mills*, (Tex. Civ. App. 1907) 101 S. W. 560.

1. *Murphy v. Smith*, 112 Ill. App. 404 (1904); *White v. Black*, 115 Mo. App. 28, 90 S. W. 1153 (1905); *E. E. Souther Iron Co. v. Laclede Power Co.*, 109 Mo. App. 353, 84 S. W. 450 (1904). An exception to the court's conclusions of law admits the correct-

ness of the facts found by the court. *King v. Morristown Fuel & Light Co.*, 31 Ind. App. 476, 68 N. E. 310 (1903).

2. *Hayes v. Metropolitan St. Ry. Co.*, 84 N. Y. Suppl. 271 (1903). It is only in cases where the parties are entitled to a jury trial, and have waived a jury, that they are authorized by statute to call on the court to pass on propositions of law. *Sampson v. Commissioners of Highways of Chestnut Tp.*, 115 Ill. App. 443 (1904); *Clifford v. Gridley*, 113 Ill. App. 164 (1903).

3. *Jaquith v. Morrill*, 191 Mass. 415, 78 N. E. 93 (1906).

4. *Jaquith v. Morrill*, 191 Mass. 415, 78 N. E. 93 (1906).

5. *United Railways & Electric Co. of Baltimore v. H. Wehr & Co.*, 103 Md. 323, 63 Atl. 475 (1906).

6. *Crerar v. Daniels*, 209 Ill. 296, 70 N. E. 569 (1904); *Raferty v. Easley*, 111 Ill. App. 413 (1903).

**§ 260. (*Judge Sitting as a Jury*); Use of Argument.**— Where a case is tried by the court, and it is satisfied as to the evidence and the law, it is not compelled to listen to argument.<sup>1</sup>

**§ 261. (*Judge Sitting as a Jury*); View by Judge.**— The expedient of giving a judge sitting as a jury the same opportunity of viewing the *locus* or other facts rendered important by the evidence which a jury would have, seems clearly of value in the ascertainment of truth. Good administrative judgment is shown in permitting it.<sup>1</sup> It has, however, been refused, unless the parties consent to it.<sup>2</sup> The judge is not at liberty to use his observation contrary to the evidence.<sup>3</sup>

**§ 262. (*Judge Sitting as a Jury*); Weight of Evidence.**— The question of the weight of evidence is dealt with by the judge sitting as a jury in the same way that a jury would deal with it. Absence of direct contradiction by the mouth of a witness does not make a fact undisputed, in such a way as to require the court to find the same, in an equity case, for the court is at liberty to discredit any witness.<sup>1</sup>

**§ 263. (*Judge Sitting as a Jury*); Action of Appellate Courts.**— Where the judge has incorrectly applied the law, the error is dealt with as in case of a jury trial. Should a finding of fact be taken to an appellate court, the only scientifically proper question is the same as that presented to a trial judge on a motion for a new trial; Is the verdict or finding one which can be justified in point of reason? This as has been said, is a question of law. The appellate court, however, quite frequently assumes or has imposed upon it by the legislature, the burden of determining a different and more onerous proposition, one also which follows the analogy of a motion for a new trial, viz: was the verdict or finding in accordance with the weight of the evidence? This is a question of *fact*, and seems beyond the proper duty of an appellate court, and also subversive of any fair construction of the right of trial by jury; for, when two rational results may be reached on evi-

1. *Barnes v. Benham*, 13 Okl. 582, 75 Pac. 1130 (1904).

1. *Hutton v. Gregg*, (Cal. App. 1906) 88 Pac. 592.

2. *Atlantic & B. Ry. Co. v. City of Cordele*, 125 Ga. 373, 54 S. E. 155 (1906).

3. *Bigham v. Clubb*, (Tex. Civ. App. 1906) 95 S. W. 675.

1. *Allis v. Hall*, 76 Conn. 322, 56 Atl. 637 (1904).

dence, if it is not the right of the party to say that the *jury* are to decide which shall be taken, the right to a jury trial is a mere trap for prolonging litigation. The practice, however, is well established. Thus, it is proper to attack the court's findings of fact in an appellate court by specifications of insufficiency of the evidence to sustain them.<sup>1</sup>

**§ 264. (*Judge Sitting as a Jury; Action of Appellate Courts*); Distinctions between Law and Fact.**—Distinctions between law and fact still obtain where there is no jury. Since the judge sitting as a jury not only finds the constituent facts but applies the rule of law to them, constant danger exists lest the two may become blended and confused. While this distinction between law and fact is to a large degree in itself an artificial one and has no proper place in a system of jurisprudence where, as in the civil, canon or equity systems, the judge tries all issues, where a judge sits *as a jury* he is administering a system of law, procedure and practice which is, as it were, geared absolutely on this difference. It is, therefore, frequently essential to the rights of the parties that it be observed. Thus, for example, where counsel requested findings of fact and conclusions of law, it is not sufficient for the court to substantially answer such request by his independent findings, where he does not show what he regards as his answer to each request.<sup>1</sup> A ruling of law does not take the place of a finding of fact, except where the law gives a final effect to the fact established, or where the evidence is of such a conclusive character that the minds of men of ordinary intelligence will not differ as to its effect.<sup>2</sup> Per contra, the judge cannot be asked to make a finding of fact in the guise of announcing a proposition of law.<sup>3</sup> Where the findings are sufficient as to all material issues, a judgment will not be reversed or new trial granted for failure to make findings on certain immaterial ones.<sup>4</sup> Conversely, where the

1. *Kenworthy v. Mast*, 141 Cal. 268, 74 Pac. 841 (1903).

1. *Musselman v. Musselman*, 140 Cal. 197, 73 Pac. 824 (1903); *Kent v. Common Council of City of Binghamton*, 86 N. Y. Supp. 411, 90 App. Div. 553 (1904); *Pittsburg Stove & Range Co. v. Pennsylvania Stove Co.*, 208 Pa. 37, 57 Atl. 77 (1904); *Lehigh Valley Coal Co. v. Everhart*, 203 Pa. 118, 55 Atl. 864 (1903).

2. *Zachariae v. Swanson* (Tex. Civ. App. 1903), 77 S. W. 627.

3. *Whipple v. Tucker*, 123 Ill. App. 223 (1905); *United Railways & Electric Co. of Baltimore v. H. Wehr & Co.*, 103 Md. 323, 63 Atl. 475 (1906).

4. *Garvey v. La Shells* (Cal. 1907), 91 Pac. 498.



court fails to find on all of the material issues made by the pleadings, the judgment must be reversed unless a finding on such issue would not affect the judgment entered.<sup>5</sup> Should the court be required to find the facts it is his duty to do so, as it would, in a similar case, be that of the jury,<sup>6</sup> i. e., find the constituent facts so far as necessary<sup>7</sup> rather than the probative or evidentiary ones.<sup>8</sup> It is no objection to a finding of fact by the trial court that it is "wholly based on reasoning and presumption."<sup>9</sup>

**§ 265. (*Judge Sitting as a Jury; Action of Appellate Courts*); Federal Courts.**—In the federal courts, the judge may make general or special findings of fact as an administrative matter not reviewable.<sup>1</sup> Special findings by a trial judge in an action at law in a federal court, where a jury has been waived, have the same effect as special verdicts of a jury, and must embrace a finding on every material issue joined in the case; otherwise the result is a mistrial.<sup>2</sup>

**§ 266. Evidence as a Matter of Administration.**—In no branch of judicial procedure is the proportion of administration naturally and normally so great as in the law of evidence. In none are the elements characteristic of administration so prominent as here. Administration, for example, is guided by sound reasoning.<sup>1</sup> Thus, for example, reason is the controlling influence in the law of evidence.<sup>2</sup> The constant appeal to logical reasoning which runs through all parts of the law of evidence, in all subsidiary or incidental findings of fact, determinations of relevancy, the conclusions as to credibility, probative force and the like indicate the great preponderance of administration in the law of evidence when compared to that exhibited by other forms of procedure. Painstaking,

5. *State v. Baird*, 13 Idaho 29, 89 Pac. 298 (1907).

6. *Supra*, § 76.

7. *Contaldi v. Errichetti*, 79 Conn. 273, 64 Atl. 211 (1906); *Wood v. Broderson* (Idaho 1906) 85 Pac. 490.

8. *Moody v. Peirano*, (Cal. App. 1906) 84 Pac. 783; *Fairfield v. Hart*, (Mich. 1905) 11 Detroit Leg. N. 777, 102 N. W. 641. Where a trial judge is required to state in his decision the facts found by him and his conclusions of law thereon, it means not merely that evidentiary facts be stated, but that the ultimate conclu-

sions of fact drawn therefrom and essential to the settlement of the conflicting claims of the parties be stated. *McKenzie v. Haines*, (Wis. 1905) 102 N. W. 33.

9. *Metcalf v. Central Vermont Ry. Co.* 78 Conn. 614, 63 Atl. 633 (1906).

1. *School Dist. No. 11, Dakota Co., Nebr. v. Chapman*, 152 Fed. 887, 82 C. C. A. 35 (1907).

2. *Towle v. First Nat. Bank*, 153 Fed. 566, 82 C. C. A. 520 (1907).

1. *Supra*, § 176.

2. *Supra*, § 59.

scrupulous care in the use of the reasoning faculty has taken the place of all other methods and the reason acknowledges no other guide than logic and experience. Again, the essential object of administration is the attainment of justice.<sup>3</sup> The object of the law of evidence is the ascertainment of truth as a necessary preliminary to the doing of justice.<sup>4</sup> It is obvious that in few connections would it be more difficult satisfactorily to prescribe a hard and fast rule than in the effort to ascertain the truth with regard to disputed matters of fact. The attempt to apply formal or mechanical tests to the discovery of truth or the detection of error or falsehood has, to a very large extent, been abandoned as worse than useless.

*It cannot be doubted* that in the law of evidence is a large element of positive or substantive law. Nor is it questionable that a still larger admixture of procedural rules having the force of law must be regarded as part of it. But, in a special sense, and to an extent beyond that which is true in case of other forms of procedure, the law of evidence is a matter of administration.<sup>5</sup>

#### § 267. *Stare Decisis as Applied to the Law of Evidence.*—

The objection to any proposed exercise of administrative power, that no case has gone so far in a particular jurisdiction, may easily be accorded undue importance. The motto of *stare decisis* is of and should concern only the substantive law. No question can properly arise as to the propriety of following precedent in passing upon the substantive rights of the parties, including those relating to established rules of procedure as distinguished from those of practice or administration. Nothing but confusion could result, uncertainty as to all tenures of property, were any other course generally followed. But it is otherwise with regard to administration. A litigant has, in the nature of things, no better right to insist that a particular course be pursued in arriving at truth by the use of reason than he would have that his judges shall or shall not wear gowns. Matters of administration, rules of evidence, are, properly considered, purely utilitarian, mere methods

. 3. *Supra*, § 172.

4. "Knowledge of the truth is essential to justice." *Lane v. Ry. Co.* 21 Wash. 119, 57 Pac. 367 (1899).

5. "It is probable that the great

bulk of the law of evidence should be of this nature. These rules should for the most part guide judicial discretion, instead of excluding it." *Salmond, Jurisp.* 2d ed. 27.

of doing something else. In this, indeed the parties may have rights, but not in the *method* by which it is done. This is more properly a subject of direct judicial control, of rules of court, or even the mere establishment of a practice. Many of the difficulties under which the administration of justice at present labors — making it tedious, expensive and of uncertain issue — arise from ignoring so obvious a distinction. It is not hard to see that while a man may properly be said to have a legal right in the descent of real property or as to what shall constitute the elements of a valid deed, he cannot well be said to have such a right to demand that his claim to the land shall be adjudicated between certain hours of the day or that the genuineness of the signature to the deed shall or shall not be determined by inferences drawn from “comparison of hands.” Perhaps no result of the almost inextricable blending of substantive law with the rules of procedure or the canons of administration is so seriously against the public interest as that it has assisted in concealing this otherwise obvious distinction, and creating the impression that rules of evidence, the administrative practices of the courts, are, properly speaking, *rules of law* in the enforcement of which the parties have rights upon appeal. The only substantive right of the party in the exercise of a power of administration is that reason should have been employed.

*In dealing with witnesses* this is recognized and universally followed. No litigant, for example, would seriously expect to reverse a verdict upon appeal because he had not been allowed to cross-examine as long as he saw fit, if he has been accorded a reasonable opportunity for testing the evidence of the witness; or because the judge ordered a separation of the attendant witnesses.

*Blending Substantive Law with Administration.*— But recognition of the fact that no legal right exists to any particular exercise of an administrative power apparently ceases when jurisprudence comes to deal with the admissions of evidence or rulings as to the probative weight of particular inferences. The interblending of substantive law with the rules of practice or administration is apt to occur when the significant ruling is made that “evidence is admissible” or “not admissible” to prove a particular fact; that it is a “presumption of law” that certain inferences are correct; that a jury “would be justified” in finding from certain facts a given result. Here this blending has most frequently taken place. It is not difficult to understand why this confusion is so easy to overlook and so hard to notice. The concealment was, originally

at least, intentional and contrived by some of the keenest and most astute minds which have ever shaped the policy of the English law. To legislate and to seem not to legislate, was the problem before these judges. The phrases above mentioned are among the now familiar devices — almost the catch-words — by which this attempt to conceal judicial legislation in matter of substantive law was accomplished. Universally, it was conceded that rulings as to evidence, properly so called, were matters of administration, of practice, and, therefore, easily manipulated in the court's "discretion," i. e., his view of his administrative duty, to any desired end conducive to the public interest. In dealing with substantive law, the court was bound by precedent, often narrow, archaic and unjust; still it was a precedent and not lightly to be disregarded. In the field of evidence, the judge's hands were free. The material was mobile, plastic. To reach these intrinsically good ends which the judges sought, all that was necessary was to clothe a ruling on the substantive law in the language of evidence; as that a particular fact was "admissible" or would be "presumed," or that one who objected "had the burden of proof" and lo! the substantive law had taken a new step forward, another trammel of precedent had been broken, and no one had noticed. The judge had merely declared the rule which had always been the law.<sup>1</sup>

*A Startling Confusion.*— But subterfuges, even for excellent ends, often have their disadvantages. This particular one has ended by largely obscuring the very important and essential principle of judicial administration on which it originally rested, the free hand of the court in dealing with matters of evidence. For it necessarily resulted when a proposition of substantive law was thus blended with or made to assume the garments of a rule of evidence, that, whatever might be the proper claim of the litigant in the part which was really a rule of administration, he undoubtedly had legal rights in that portion of the blended whole which was substantive law. If the two could be separated, the legal rights might be made to attach to the substantive law alone.

1. The influence of a desire to perfect the precision of legal rules, which is elsewhere considered, may not be overlooked in this connection. *Infra*, §§ 556 *et seq.* Nor should the peculiarity of eighteenth and nineteenth

century English jurisprudence in using reason not as a test for admissibility but for devising general grounds for excluding entire classes of evidence be permitted entirely to escape attention.

If the blending was inextricable, the litigant had rights in the proposition as a whole; the more cleverly the union was effected, the more obviously just such a contention would necessarily appear, the more readily would it be conceded. The step from reserving rights in questions of substantive law carefully contrived to resemble questions of evidence, to reserving as of right, questions of pure evidence or administration, has proved an easy, and, indeed, almost an inevitable one. In other words, those whose aim was to bewilder others and conceal the real work that was going on, have ended by themselves losing the clue; and have left judges, lawyers and litigants alike, to wander, pathless and guideless, in a magic realm where several very dissimilar things are made to wear precisely identical maskings, so shrewdly fashioned as absolutely to resemble each other, revealing by no outward indication an identity which is learned only by first carefully disrobing any particular wearer; while yet, in this wonderful country, at every turn, such a bewildering interchange of garments, masks, and even features, is constant among its denizens as to render it highly improbable that anything will turn out ultimately to be quite what at first it appears to be. It is a realm in which, for example, a term like "presumption" has half a dozen distinct roles to play; and almost any ruling on evidence, being grasped and firmly held long enough for careful scrutiny, will be found to change, under one's very gaze; and back of the features of evidence and shining at first through them and a little later instead of them will appear the enshrouded lineaments of some familiar rule of substantive law.<sup>2</sup>

§ 268. *Recapitulation.*—To recapitulate this brief outline of the judge's functions, it may be said that these powers are of three general classes or descriptions: (1) Judicial functions which specially concern the enforcement of the rules of law, the ascertainment of the existence of facts and the application of the rule of law to the facts so ascertained; (2) administrative powers which concern the manner in which the rules of law, substantive or pro-

2. "A great portion of these rules (of evidence), as laid down by the courts and by our text writers, are working a sort of intellectual fraud by purporting to be what they are not. To the utter confusion of all orderly thinking, a court is frequently

represented as passing on questions of evidence when in reality it is dealing with some other branch, either of substantive law or procedure." Professor J. B. Thayer, *Preliminary Treatise on Evidence*, 511 (1898).

cedural or the usages of practice are to be conditioned in scope and operation by the higher social objects of litigation; and, (3) executive and police powers conferred for the purpose of enabling the judge to protect the dignity of his office, the public respect due to it and the purity of justice itself. It is further to be observed that the essential and fundamental consideration, so far as relates to the law of evidence, is not as to whether a rule of law which controls the action of the judge is substantive or procedural; but as to whether there is a *rule* on this subject, or there is none, i. e., as between law, on the one hand, and administration on the other. The presiding judge announces the rule of substantive law and applies it to the facts or allows or requires the jury to do so, according to their respective duties. The judge is bound by and applies the rules of procedural law in the same way. In exercising powers of administration the sole procedural rule and condition is that *reason* must be exercised, other control and direction being exerted by broad principles or canons designed for the doing of justice, which it is the special object of administration to attain. In judging of the reasonableness of the court's administrative action, the existence of any custom or usage of practice relating to it or any similar administrative questions, may properly be considered. It may be noted that the executive or police powers of the presiding judge are but specific illustrations of his general function of administration.

Applying these broad classifications to the subject of the law of evidence, it becomes clear that while a large admixture of substantive law is present within its boundaries, and a still greater proportion of procedural rules, either by statute or judicial legislation, which also have the force of law, that, in essence and by necessary consequence of the objects which it seeks to attain and the variety of means by which it endeavors to reach them, the law of evidence is a branch of judicial administration. As such, it is properly controlled, not by precedent, but by these canons or principles to the consideration of which the inquiry is soon to advance.

Before entering upon this inquiry, it seems appropriate, however, to consider, in the succeeding chapter, certain of the procedural rules and administrative principles connected with what is, so far as the law of evidence is concerned, probably the most dominating and characteristic factor in an English trial at common law — the institution of the jury.

## CHAPTER V.

### COURT AND JURY; JURY.

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§ 269. (Institution of the Jury); First Stage.— As the judge in all ages and civilizations has represented sovereignty in its function of awarding justice, so does the jury represent the peculiar Teutonic or Germanic idea of the right of the *people* — the body of free tribesmen, freemen, citizens or the like, to have a voice in their government, in any of its branches. It is the wild, free Witenagemote, the Al-thing.

*First Stage*.— In its earliest stage, such bodies, according to their jurisdiction, were courts as well as legislative assemblies, with all the turbulent irresponsibility of self-assertive freemen. Law and fact were alike within the individual knowledge of the freemen. The custom of the tribe, the act of the accused, the rights of the claimant were alike within their knowledge. Sympathy, emotion, dispatch of immediate matters regardless of the effect or precedent, such were prominent features of this rough and ready justice of the Saxon tribes in England.<sup>1</sup>

1. Brittle *v.* People, 2 Nebr. 198 819 (1897); Profatt Jury Tr. c. 1, (1873); Smith *v.* Times Pub. Co. 178 §§ 30, 34, 35. Pa. St. 481, 36 Atl. 296, 35 L. R. A.

"The great fundamental thing, to be noticed first of all, out of which all else grew, was the conception of popular courts and popular justice. We must read this into all the accounts of our earliest law. In these courts it was not the presiding officers, one or more, who were the judges; it was the whole company: as if in a New England town-meeting, the lineal descendant of these old Germanic moots, the people conducted the judicature, as well as the finance and politics, of the town.<sup>2</sup> These old courts were a sort of town-meeting of judges. Among the Germanic races this has always been so; nothing among them was more ancient than the idea and practice of popular justice.<sup>3</sup> This notion among a rude people carried with it all else that we find,—the preservation of very old traditional methods, as if sacred; a rigid adherence to forms; the absence of a development of the rational modes of proof. Of the popular courts Maine says, in the admirable sixth chapter of his 'Early Law and Custom,' while speaking of the Hundred Court and the Salic Law: 'I will say no more of its general characteristics than that . . . it is intensely technical, and that it supplies in itself sufficient proof that legal technicality is a disease, not of the old age, but of the infancy of societies.'"<sup>4</sup> It is to be noted that during this stage of the jury's development, no suggestion is made as to any action by the community or any portion of it, under the sanction of an oath. The oath was a proper thing for the party who appears before the community in council. It may be his oath-ordeal, his appeal to the *arbitrium Dei*, the judgment of God. But no oath imposes a fetter upon the action of the community or its representatives.<sup>5</sup>

2. See Forsyth, *Trial by Jury*, pp. 70, 71.

3. Thayer, *Prelim. Treat.*, p. 8, citing Maine, *Early Law and Custom*, c. 6; *Pop. Gov.*, pp. 89-92; *Essays in Anglo-Saxon Law*, 2-3.

4. Quoted in Thayer, *Prelim. Treat.*, 8. "The popular courts of the Anglo-Saxons were the means of cultivating, diffusing, and maintaining a spirit of freedom, order, and self-government, and in these courts we find the characteristic element of their jurisprudence." Proffitt on *Jury Trial*, § 14.

5. Yet it would scarcely be accurate to say that among the laws of

the Anglo-Saxons were no foreshadowings, of the twelve men under oath. The number twelve runs through most Teutonic jurisprudence and the *inquisitio* of the Normans finds its counterpart in the Saxon jury of accusation, the grand jury of later times. For example, "in order to provide a class of persons in the county court who should be possessed of the requisite knowledge, to be qualified as witnesses, it was provided by the laws of Edgar (I, 5), that in every 'burh' and in every hundred, there should be *twelve* witnesses before whom all contracts of buying and bartering were to be made, and it was

It may be convenient and helpful to a more complete understanding, before proceeding to the consideration of the institution of the jury itself, to examine briefly certain of its original contemporaries, using Prof. Thayer as our guide.

**§ 269a. (*Institution of the Jury; First Stage*); Early Forms of Trial other than that by Jury.**—Forms of trial other than that by jury grew up and flourished at this stage of legal evolution and, after a more or less protracted lingering in conservative England, died, leaving trial by jury to stand as their sole survivor.<sup>1</sup> However differing among themselves, these various modes of proof about to be described, possessed the common feature that from the modern standpoint, they were not trials at all. No appeal to reason was made; no attempt to convince the judgment was undertaken.<sup>2</sup> A party, plaintiff or defendant, claimed to establish his right or acquit himself of liability by doing something regularly and in order. If he showed to the court that he was entitled to avail himself of an opportunity to go through the form, he was admitted to do so.<sup>3</sup> The result conclusively and mechanically

also provided that no contract of which they had not knowledge should be deemed valid." Proffatt on Jury Trial, § 15. "But the most important and suggestive regulation occurs in the laws of Ethelred, in the third part, in section 3. It is [ordered] 'That a gemot be held in every wapentake (another name of the hundred); and the xii senior thanes go out, and the reeve with them, and swear on the relic that is given to them in hand that they will accuse no innocent man, nor conceal any guilty one.'" Proffatt on Jury Trial, § 16.

1. The present and immediately succeeding sections, §§ 269-271, are in effect, a summary of certain of the conclusions reached by Prof. J. B. Thayer, in chapters I and II of Part I of his Preliminary Treatise on Evidence at the Common Law. It will not be necessary to say that no adequate intimation is or, indeed, can be here given of the historical value and unique charm of scholarship which characterize the Preliminary Treatise

itself. See also Proffatt on Jury Trial, §§ 9-40.

2. "I use the word trial, because it is the word in common use during recent centuries. But as applied to the old law this word is an anachronism. The old phrases were *probatio*, *purgatio*, *defensio*; seldom, if ever, in the earlier period, *triatio*. In those days people 'tried' their own issues; and even after the jury came in, e. g., in the early part of the thirteenth century, one is sometimes said to clear himself (*purgare se*) by a jury; just as a man used to be said in our colonies to 'clear himself' and 'acquit himself' by his own oath, as against some accusations and testimony of an Indian. *Plym. Col. Rec. XI*, 234, 235 (1673); 1 *Prov. Laws Mass.* 151 (1693-1694)." Thayer, *Prelim. Treat.* 16.

3. "The body of the judicial business of the popular courts, seven and eight centuries ago, lay in administering rules that a party should follow this established formula or that, and

gives success or failure. Practically, the same situation is presented where a prisoner has been presumptively found guilty in a criminal case and is directed to purge himself by an appropriate test. In either case, the issue of repeating the formularies, undergoing the prescribed requirements or the like, and that alone, *proved* the right or liability, established the guilt or innocence. In general, something must be done or shown by one of the parties to entitle him to ask the court for the application to his case of a particular mode of making proof; or something must appear to authorize the judges to compel a person before the court to undergo the prescribed test.<sup>4</sup> There then remains the second step, that the party so authorized or constrained should undergo the test itself. The consequences, as well as the things to be done are rigidly fixed, formal, inevitable. "There were many modes of trial and some range of choice for the parties; but the proof was largely 'one-sided,' so that the main question was who had the right or, rather, the privilege, of going to the proof. For determining this question there were traditional usages and rules, and the decision of it was that famous *Beweisurtheil* which disposed of cases before they were tried. Since the trial was a matter of form, and the judgment was a determination what form it should take, the judgment naturally came before the trial."<sup>5</sup>

"*The old forms of trial* (omitting documents) were chiefly these: (1) Witnesses; (2) the party's oath, with or without fellow-swearers; (3) the ordeal; (4) battle. They were com-

according as he bore the test should be punished or go quit. The conception of the trial was that of a proceeding between the parties, carried on publicly, under forms which the community oversaw." Thayer, Prelim. Treat., 8.

4. "They [the popular courts] listened to complaints which often must follow with the minutest detail certain forms '*de verbo in verbum*,' which must be made probable by a 'fore-oath,' complaint-witnesses, the exhibition of the wound, or other visible confirmation." Thayer, Prelim. Treat., 9.

A modern survival from this relation between the two successive stages of a single trial is seen in the pro-

ceedings under which one accused of crime is, in many jurisdictions, first presented to the court by a grand jury as a necessary preliminary to being tried by a petit or traverse jury.

In respect to documents, the double stage of proceedings has had important modern effects upon the substantive or procedural law, as will more fully be made to appear hereafter. See DOCUMENTARY EVIDENCE. These are markedly prominent in connection with the doctrine of *profert* and, through the rules of *profert*, upon those of the "Best Evidence Rule" (q. v.) and the "Parol Evidence Rule" (q. v.).

5. Thayer, Prelim. Treat., 9.

panions of trial by jury when that mighty plant first struck its root into English soil.”<sup>6</sup>

**§ 269b. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury*); (a) Trial by Witnesses.**—

Trial by witnesses “appears to have been one of the oldest kinds of ‘one-sided’ proof. There was no testing by cross-examination; the operative thing was the oath itself, and not the probative quality of what was said, or its persuasion on a judge’s mind.”<sup>1</sup> The preliminary proof of right to establish a claim or defense by this mode of proof lay in the production of the collection of witnesses itself, the *secta*, as it was called.<sup>2</sup> “It was the office of the *secta* to support the plaintiff’s case, in advance of any answer from the defendant.”<sup>3</sup> The adverse party may produce a corresponding *secta*, in which case, the contest is decided upon a comparison of the respective *sectæ*, their numbers, respectability or the agreement of their stories.<sup>4</sup> On the other hand, the opponent may rest his case upon the examination of his adversary’s *secta*. If the *secta*, when so interrogated, agreed in their testimony, the party proposing them succeeded;<sup>5</sup> should they disagree or know nothing about the matter, he lost.<sup>6</sup>

6. Thayer, Prelim. Treat., 16. See also Stephen, Pl. (Tyler’s ed.) 114, 129; 3 Blackstone, Comm. 329.

1. Thayer, Prelim. Treat. 17, *citing* Brunner, Schw. 54–59, 84 *et seq.*, 195 *et seq.*, Big. Pl. A. N. XX, Stat. Wall., § 14, Lyon, 2 Hist. Dover, 292, 294.

2. Brunner, Schw. 428 *et seq.*, 2 Pollock & Maitland, Hist. Eng. Law, 603 *et seq.*

3. Thayer, Prelim. Treat. 13, *citing* 2 Palgrave Eng. Com., p. cxxxvii, pl. 21 (1221); s. c., Maitland, Pl. Crown for Gloucester, 92, pl. 394; ib. 45, pl. 174 and *notes* pp. 145, 150; 1 Pike’s Hist. Crime 52. See also Ass. Clarend., s. 12 (1166). See also Y. B. Ed. II, 507 (1323); Brunner, Schw. 170 *et seq.*; Lea, Sup. and Force, 4th ed. 95–6. “*Nullus ballivus ponat de cetero aliquem ad legem simplici loquela sua, sine testibus fidelibus ad hoc inductis.*” Magna Charta, Art. 38 (1215).

4. Dyer, 185a, pl. 65; Fitzherb.

Trial, 46; Bracton’s Note Book, iii, Case 1115 (1234); Bracton, 302.

Social position among the witnesses being approximately equal, numbers in the *secta* was apt to carry the day. Oaths being counted, a process of cancellation demonstrated on which side lay the right of the matter. Thought about such disputed matters was a sad puzzle and any rough and ready solution was welcome. Lib. Ass. 273, 26; Brooke, Ab. Trial, 90. Evidently the English common law was preserved from the folly of predicating probative weight upon the number of witnesses which has always characterized the civil law by some cause entirely apart from the wisdom of the English in this particular.

5. 2 Bracton’s Note Book Case, 325 (1229).

6. 3 Bracton’s Note Book Case, 1693 (1226). Except when thus examined the *secta*, the complaint-witnesses, need not be sworn.

*Decline of Trial by Witnesses.*—Proof of this nature might be made in any form of action. The *secta* has not been actually produced for several centuries,<sup>7</sup> though its allegation in pleading — *et inde producit sectam*, and therefore he brings his suit, has survived in common law declarations into very recent times.

**§ 269c. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury; [a] Trial by Witnesses*); Bargain or Transaction Witnesses.**—Bargain or transaction witnesses furnished a characteristic and important part of the scope of this form of trial. Certain dealings took place in the presence of persons preappointed and selected in advance for the purpose of establishing their nature should disputes arise on the point. The proof in such cases was entirely one-sided; there was no cross-examination.<sup>1</sup> The proof or test was merely as to what these transaction witnesses should say when interrogated by the judges of the King's court; or, in earlier times, declared to the body of freemen who constituted the popular tribunals. This method of proof by anticipatory witnesses goes back to very early times<sup>2</sup> and is obviously of the same historical lineage as the selection of attesting witnesses to wills, deeds and other formal instruments where attestation is required by law or adopted by the parties.<sup>3</sup> Prominent among these important transactions thus witnessed were those relating to dower,<sup>4</sup> the granting of charters<sup>5</sup> and the like. "In my opinion," says Brunner, "undoubtedly we are to include under the head of formal witness-proof these: (1) The

7. Y. B. 17 Ed. III, 48, 14 (1343); Maitland, "Mirror," XXIV; Id. 162, 71 (1290). See also 2 Pollock & Maitland, Hist. Eng. Law, 213. In 1314, counsel assert that the Court of Common Bench will not permit examination of the *secta*. Y. B. Ed. II, 242 (1314). Yet the fact that a plaintiff has no *secta* may well defeat his claim even as late as 1324. Y. B. Ed. II, 582 (1324). For an earlier case to the same effect, see 2 Rot. Cur. Reg. 102 (1199)

1. Liber Albus, 10 Ed. II (1316).

2. See Capitulary of Louis Le Débonnaire of the year 819 (Capitulari Primum Ludovici Pii, A. D. 819. Baluze, Capitularia Regum Francorum, 1, 601), quoted in Thayer's Prelim. Treat. 17.

3. See DOCUMENTARY EVIDENCE.

4. Brunner, Schw. 342-344, 432-434; Pl. Ab. 21, Col. 2 (1198).

5. Big. Pl. A. N. 239, citing Chron. Joc. de Boakel, 37 (Camden Soc.).

proof of age;<sup>6</sup> (2) the proof of death;<sup>7</sup> (3) the proof of property in a movable chattel.”<sup>8</sup>

§ 269d. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury*); (b) Trial by Compurgation.

—A second mode of trial or rather proof, among the Saxon and other Germanic tribes was *wager of law*, or, as it was frequently called, compurgation.<sup>1</sup> In this, the person admitted or compelled to proof by oath, swears in due and highly technical form,<sup>2</sup> to the truth of his contention and, at the same time, he produces fellow-swearers to make oath that his oath is a true one; — not necessarily that they themselves know anything as to the truth of the fact stated by the principal or party oath-taker. They were more

6. Bracton's Note Book, ii, Case 46, cited in Bracton, f. 424b (1219).

In later development, the functions of a jury may be given to these witnesses;—as by selecting them under royal authority requiring that the jurors should be of a definite age, demanding to know by what they fix the date which they announce, and similar matters. *Liber de Antiquis Legibus*, pp. cxlix-cliii (1409); Camden Soc. (1846); Bellewe, 237 (1397); (thunder, tempest, pestilence, etc.) Baigent, Crondal Records, 431-436 (1348); Pl. Ab. 293, Col. 1 (1297). In other words, certain of the features of an *inquisitio* are presented, and into this form of inquiry the proceeding later grew. Keilwey, 176-7 (1515). A method of determining age by inspection of the judges prevailed also during this period. *Supra*, § 151. But, in certain cases, the exercise of this power was not unattended with difficulty. “There is not a man in England who can rightly adjudge her of age or under age. Some women who are thirty years old will seem eighteen.” Y. B. 50 Edw. III, 6, 12 (1375), per Cavendish, C. J. The right to refer the matter to an inquest, *inquisitio*, i. e., a jury of the second stage, was unquestionable. Y. B. 21 H. VII, 40, 58, Brooke's Ab. Trial, 60 (1219).

7. Torne v. Rolff, Dyer (Ed. 1601) 185a; s. c., Old Benloe, 86 (1560). Cases which arose with special frequency were those relating to the death of the husband in proceedings to secure dower. Y. B. Edw. II, 24 (1308); Selden, Fortescue de Land, c. 21, n. 8; Br. N. B. ii, Case 356 (1229); Wm. Salt Soc. Coll. (Staffordshire), iii, 120-121 (1203). The use of this form of trial was not entirely abolished in England until 1834.

8. Bracton's Note Book, iii, Case 1115 (1234) (mare). Schw. 205.

1. 3 Black Com. 342, 343; 4 Black Com. 368, 414; 1 Pollock & Maitland, 426; 2 *Ibid.* 212, 598, 631-634; Prof-fatt on Jury Trial, § 12.

2. “In the city of Lille, down to the year 1351, the position of every finger was determined by law, and the slightest error lost the suit irrevocably.” Lea, Sup. and Force, (4th ed.) 78, cited in Thayer, Prelim. Treat., 25. “All comes to naught if the principal withdraws his hand from the book while swearing, or does not say the words in full as they are charged against him. . . . If a defendant fails to make his law he has to pay whatever the plaintiff has thought fit to demand.” Selden Soc. Publications, vol. IV, p. 17, cited in Thayer, Prelim. Treat., p. 25.

nearly his "backers," more frequently than not, his relatives.<sup>3</sup> Persons known to have perjured themselves could no longer avail of compurgation but were put to the ordeal.<sup>4</sup>

**§ 269e. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury; [b] Trial by Compurgation*); Number of Compurgators.**—While the number of these helper oath-takers, or compurgators, varied,<sup>1</sup> the custom was to require at least twelve, including the party.<sup>2</sup> The latter was said to purge

3. Lea, *Sup. and Force* (4th ed.); Lewis, *Anc. Laws of Wales*, 30, 112. "The organization of Anglo-Saxon society in those days was such that there was ample opportunity given to neighbors to become acquainted with a man's general character, and his reputation for veracity, so that declarations of his neighbors concerning his credibility might be received with no small degree of confidence. It was on this principal, '*fama publica*,' a man was accused and put on his defence, and in the same way he cleared himself. This was one of the distinguishing features of Anglo-Saxon law, that an accused person should only be put upon trial by the sworn presentment of his accusers, his neighbors, which is evidently the principle out of which our grand jury originated, and is truly one of the best safeguards bequeathed to us by our Saxon forefathers." Proffatt on Jury Trial, § 12. See also *Laws of Ethelred*, Mirror, C. I., § 15.

4. "We have ordained concerning those men who were perjurers, if that were made evident, or an oath failed to them, or were not proved, that they should afterwards not be oathworthy, but worthy of the ordeal." *Laws of Edward*, Ancient Laws and Institutes, p. 69, quoted in Proffatt on Jury Trial, § 12. In the same way, the Saxon laws provided that in case of notoriously untrustworthy men—men who were *tiht-bysig*—no purgation would be allowed. The same course was adopted where the accused had been taken with the *mainour*

[thing stolen] upon him, and the accusation was supported by the oaths of a competent number of friends joining with the accuser, which oath was called *vorath* or *forath*. Proffatt on Jury Trial, § 18. "And let every one (accused) buy himself law with XII ores, half to the lord, and half to the wapentake, and let every man of previous bad character go to the threefold ordeal, or pay fourfold." *Laws of Ethelred*, quoted in Proffatt on Jury Trial, § 18, n. 1.

1. Early statutes indicate the existence of a wide range in the number of compurgators which might be received as sufficient. Thus, in a statute of Richard II (Ch. 5), in the year 1382, compurgation by 3 or 4 helpers was permitted. By the later statute of Henry V (St. 1, Hen. 5, c. 6) in 1413, in aid of those who as liege subjects of the king had assisted in putting down the late Welsh rebellion and had thereby become subject to prosecution from the rebels, and who without this assistance would have been "imprisoned until that they made satisfaction or till they cleared themselves of the death of such rebels, and other trespasses, by an assach after the custom of Wales, that is to say, by the Oath of Three Hundred Men," such prosecution by the late rebels is forbidden under severe penalties.

2. Multiples of twelve were also common, the number varying in a criminal case, in a rough way, with the seriousness of the offense. For example, on an indictment for murder



or defend himself *duodecima manu*,<sup>3</sup> i. e., by his own oath and that of eleven others<sup>4</sup> or, as Lord Coke puts it, "an eleven and himself."<sup>5</sup>

§ 269f. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury; [b] Trial by Compurgation*); Popular Courts.—Compurgation was of great antiquity<sup>1</sup> and enjoyed much mediaeval popularity,<sup>2</sup> especially among the peace-loving citizens of the towns.<sup>3</sup> In England it was the customary procedure in the county<sup>4</sup> and hundred<sup>5</sup> courts<sup>6</sup> for civil and criminal<sup>7</sup> cases alike.

36 compurgators were ordered. Palg. Com. i, 217; ii, p. CXVI, *note*. See also John Lyon's History of Dover, ii, 265. Special provisions appear in the charters of the City of London which, while retaining 18 or 36 compurgators, give the defendant certain privileges of challenge and the like analogous to those creating a *struck jury* in more modern times. Liber Albus, Mun. Gild. Lond. i, 57-59, 92, 104, 203.

3. 2 Pollock & Maitland, Hist. Eng. Law, 598, n. 4; De Gruchy, Anc. Cont. de Norm. 192, n. 6.

4. Y. B. 33 H. VI, 8 (1454-1455), per Serjeant Needham; Laws of Canute, c. 66, Lea, Sup. & Force (4th ed.), 48. "*Cum undecim secum jurantibus*." Statute of Wales (1284). See also King v. Williams, 2 B & C. 538 (1824); s. c., 4 D. & R. 3, p. 33.

5. 2 Inst. 45, quoted in Thayer's Prelim. Treat. 14.

1. Hessels & Kern Col. 208, XXXVII.

2. Charters of London contain a clause entitling citizens to the benefits of compurgation—a welcome substitute for either ordeal or battle. Liber Albus, Mun. Gild. Lond. i, 128 *et seq.*; Norton's London, 324, *note*; Palg. Merchant and Friar, 180. The privilege of replacing a deceased compurgator by swearing above his grave seems to have been deemed of more doubtful probative value in later times. Liber Albus, Mun. Gild. Lond. i, 137-8; Riley's ed., 123, *note*.

3. Black Book of the Admiralty, II, 170-173.

4. "The court of general and superior jurisdiction was the county court, or *shire-gemot* which met every six months, and was presided over by the sheriff, and composed of all the freemen of the shire, who were termed suitors. In this court was tried all matters affecting the freeholders of the shire on the principle of arbitration, without any forms of regular justice, or the rules of a legal tribunal." Proffatt on Jury Trial, § 15. "And thrice a year let there be a *burh-gemot*, and twice a *shire-gemot*, under penalty of the wite, as is right, unless there be need oftener. And let there be present the bishop of the shire, and the ealdorman, and there let both expound as well the law of God as the secular law." Laws of Canute, 18, quoted in Proffatt on Jury Trial, § 15, n. 3.

Manorial Courts.—The use of compurgation in the Courts-Baron, Courts-Leet and other manorial courts was frequent. Palg. Com. i, 262-3; Seldon Soc. Publications, vols. II and IV. "If the suit was grounded upon a plaint the opinion of the suitors or the compurgatory oath constituted the common-law trial. . . . The same rule was observed in the manorial courts, in which by common right all pleas were determined by wager of law." Palg. Com. i, 262-3.

5. Palg. Com. ii, p. cxvi, *note* (Winchelsea in Sussex, 1440). These

**§ 269g. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury; [b] Trial by Compurgation*); Royal Courts.**—Even in the King's tribunals compurgation was the standard mode of making proof in personal and criminal<sup>1</sup>

are among the latest reported instances of compurgation in criminal cases.

The hundred court is characterized by Maine as "the oldest and most nearly universal of the organized Teutonic courts." Maine, *Early Law and Custom*, 144, *cited* Thayer, *Prelim. Treat.* 25. "The Court of the Hundred was the next court inferior to the county court. It was to be convened every four weeks, and was a tribunal for adjudicating matters appertaining to persons belonging to the same hundred, and had a limited jurisdiction. . . . It was really the important police court of Anglo-Saxon times." Proffatt on Jury Trial, § 16. "I will that each reeve have a gemot always once in four weeks, and so do that every man be worthy of folk-right, and that every suit have an end and a term, when it shall be brought forward." Laws of Edward, § 11, quoted in Proffatt on Jury Trial, § 16, n. 2. "First, that they meet within four weeks, and that every man do justice to another." Laws of Edgar, § 1, quoted in Proffatt on Jury Trial, § 16, n. 2.

The Saxon assertiveness against royal authority is evidenced in a provision of the laws of Canute that only when he had no home court, should a litigant apply to the king. "And let no one apply to the king unless he may not be entitled to any justice within his hundred." Canute, Laws, 17, quoted in Proffatt on Jury Trial, § 16, n. 3.

6. "The meetings of the people at the courts of shires, hundreds, and tythings, at which the humbler classes were necessarily more important than in the ordinary assemblies, contributed still more to cultivate the generous principles of equal law and pop-

ular government; and though trial by jury was then unknown, it cannot be doubted that the share of the people in these courts where all ordinary justice was administered must have led the way to that most democratical of judicial institutions." 1 Macintosh, *Hist. Eng.*, p. 81, quoted in Proffatt on Jury Trial, § 14.

7. Dr. Hooke's case, Gardiner, *Star Chamber and High Commission Cases* (Camd. Soc.), 276; Palgrave, *Merchant and Friar*, 182-3; Pollock and Maitland, *Hist. Eng. Law* i, 426.

1. Bracton, 410; Glanvill, Bk. 1, cc. 9 and 16 (1187); Maitl. Pl. Cr. i., case 61; Palg. Com. ii., p. cxix, *note*; Rot. Cur. Reg. i, 200 (1198).

After the Assize of Clarendon, however, in 1166, in which Henry II did much to establish the jury as the controlling factor of judicial trials, compurgation seems not to have been ordered as a means of making proof in serious criminal cases. "The mode of trial was to be what it had been before the Conquest, with the difference that compurgation was no longer permitted in those cases which were of sufficient importance to be brought before the justices in eyre." Pike, *Hist. Crime*, i, 130, quoted in Thayer, *Prelim. Treat.* 26. See also Palg. Com. i, 259; Pike, *Hist. Crime*, i, 122, 123; Stubbs, *Select Charters* (6th ed.), 142.

When trial by ordeal was removed from criminal proceedings by the implied prohibition of the Lateran Council, trial by jury or by appeal of battle alone remained as available forms under which to make proof or purge oneself. The difficulties experienced by courts in compelling a prisoner to plead to the country, i. e., the jury, are elsewhere noted. Notwithstanding all impediments, how-

actions. Even in real actions, where trial by battle<sup>2</sup> was the customary mode of "proving" the truth as to disputes, a party might be ordered or permitted to resort to compurgation in subsidiary matters.<sup>3</sup>

**§ 269h. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury; [b] Trial by Compurgation*); Decline of Compurgation.**—Compurgation is thus seen to have been unable to withstand the growing power of trial by jury and gradually declined in frequency<sup>1</sup> and both popular and judicial<sup>2</sup> approbation. Its survival in the actions of debt<sup>3</sup> and of

ever, the impetus thus given to the trial by jury on the practical abolition of compurgation and ordeal is self-evident.

2. *Infra*, § 269n.

3. Thayer's Prelim. Treat. 25, citing Bigelow, Pl. A., n. XVIII; Glanv. VIII, 9; 1 Palgrave, Eng. Com. 262-3. "Even in the king's court the incidental traverses in a real action, such as the denial of the summons by the tenant, were always determined by compurgators, and in all personal actions wager of law was the regular mode of trial, until new proceedings were instituted which enabled the judges to introduce the jury trial in its stead." Palg. Com. i, 262-3.

1. Pl. Ab. 291, col. I (1293).

As a matter of administration the judges could still order compurgation in cases where it was necessary to meet an unjust claim. Y. B. 19 H. VI, 10, 25 (1440) (contract). See also Y. B. 33 H. VI, 7, 23 (1454); Y. B. 15 Edw. III, 299 (1341); Y. B. 30 & 31 Edw. I, 189 (1302); 2 Rot. Cur. Reg. 125 (1198); Bracton, 334b. 366; Jenkins, Rep. IX (contract). Legislative relief was at times afforded in the same way, in order to remedy exceptional situations. St. 5, Henry IV, c. 8 (1403).

2. Courts will not admit a man to wage his law without good admonition and due examination. Slade's case, 4 Rep., p. 95 (1602), per Coke, C. J.

3. "We can admonish him, but if he will stand by his law, we cannot hinder it, seeing it is a method the law allows." Company of Glaziers case, Anon., 2 Salk. 682 (1699), per Holt, C. J., quoted in Thayer, Prelim. Treat., 31. Of this case Chief Justice Holt suggested in a later case that a different result might have been reached by the court had the plaintiff been more vigilant and resolute in insisting upon his rights. "It was," he observes, "a gudgeon swallowed, and so it passed without observation." London v. Wood, 12 Mod. 669, 684 (1701), per Holt, C. J. quoted in Thayer, Prelim. Treat., 32.

The particulars of the already unfamiliar process of compurgation are thus described by the reporter: "The defendant was set at the right corner of the bar, without the bar, and the secondary asked him if he was ready to wage his law. He answered yes; and then he laid his hand upon the book, and then the plaintiff was called; and a question thereupon arose whether the plaintiff was demandable? And a diversity taken where he perfects his law instantler, and where a day is given in the same term, and when in another term. As to the last, they held he was demandable, whether the day given was in the same term or another. Then the court admonished him and also his compurgators, which they regarded not so much as to desist from it; accordingly, the defendant was sworn,

detinue<sup>4</sup> furnished no small part of the professional eagerness to welcome the judicial substitutes of *indebitatus assumpsit*<sup>5</sup> and *trover*, respectively. The great advantage of these transparent fictions was that in them the defendant could no longer "wage his law."<sup>6</sup> With the characteristic conservatism of the English,

that he owed not the money *modo et forma*, as the plaintiff had declared, nor any penny thereof. Then his compurgators standing behind him, were called over, and each held up his right hand, and then laid their hands upon the book and swore, that they believed what the defendant swore was true." *Anon.*, 2 Salk. 682, quoted in Thayer, *Prelim. Treat.*, 31.

**Absence of other proof.**—The inability of the mediæval brain to sift out the truth from a mass of conflicting testimony is mentioned elsewhere in connection with ordeal. *Infra*, § 269i. Compurgation, as amounting in reality to ordeal by oath-taking, invoked the *arbitrium Dei*, judgment of God, in practically the same way as ordeal itself; and was regarded by the mediæval mind as being rendered necessary by the same inability to discover other proof which arose from the self-limitation imposed upon their mental powers by men of that day.

As a matter of sound administration it would seem to follow that wager of law was unnecessary and therefore inadmissible where satisfactory evidence on which the reasoning faculty could be exercised is furnished from other sources. As compurgation became judicially discredited this view-point came naturally to the front. Thus, in *London v. Wood*, 12 Mod. 669, 684 (1701), debt on a by-law of the city of London where wager of law was refused, Holt, C. J., said: "The secrecy of the contract which raises the debt is the reason of the wager of law; but if the debt arise from a contract that is notorious, there shall be no wager of law" (p. 679). "The reason wherefore in an action of debt upon a simple con-

tract, the defendant may wage his law is for that the defendant may satisfy the party in secret, or before witness, and all the witnesses may die; . . . and this for aught I could ever read is peculiar to the law of England." . . . Coke, 2 Inst. 45 (1642).

4. Steph. Pl. (Tyler's ed.) 131-2.

5. "Manwood (C. B.) said that it was the folly of the plaintiff, because that he may change his action into an action of the case upon an *assumpsit*, wherein the defendant cannot wage his law." Goldsborough, 51, pl. 13 (1587), quoted in Thayer, *Prelim. Treat.* 30; Doctor and Student, ii. c. 24, end.

In the Company of Glaziers case (*Anon.*, 2 Salk. 682 [1699]), where "wager of law," i. e., compurgation, was allowed on an action of debt on a by-law, it was remarked "per Northey (plaintiff's counsel), this will be a reason for extending *indebitatus assumpsits* further than before. Holt, C. J. We will carry them no further." Quoted in Thayer's *Prelim. Treat.* 31. "One shall hardly hear at present of an action of debt brought upon a simple contract." 3 Black. Com. 347, 348.

6. "In the room of actions of account a bill in equity is usually filed. So that wager of law is quite out of use; . . . but still it is not out of force. And therefore when a new statute inflicts a penalty and gives . . . debt for recovering it, it is usual to add 'in which no wager of law shall be allowed;' otherwise an hardy delinquent might escape any penalty of the law by swearing that he had never incurred or else had discharged it." 3 Black. Com. 347-8.

compurgation lingered<sup>7</sup> until it enabled a party to puzzle the court by actually offering to "wage his law," as late as 1824.<sup>8</sup> The institution was thereupon formally abolished,<sup>9</sup> as had, indeed, been anticipated by Palgrave, should a suitor arise who should venture to rely upon it.<sup>10</sup>

**§ 269i. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury*); (c) Trial by Ordeal.**—In a sense, trial by witnesses,<sup>1</sup> as well as compurgation, and trial by battle are *ordeals*, in that they all involved the *arbitrium Dei*, the direct judgment of God.<sup>2</sup> So far as probative effect could be predicated of these so-called modes of proof, it is probable that it consists in the assumption, very similar to that involved in the sanction of the modern oath,<sup>3</sup> that as God, as a perfect Being, necessarily punishes false swearing and protects innocency and right, any appeal to His intervention successfully undergone demonstrates the enjoyment by the invoking person of His favor.

*Still, as the development and treatment* of certain forms of test or proof-making, commonly spoken of as "trial by ordeal," present marked points of difference from others, it may be convenient to give them separate, though necessarily brief, consideration.

**§ 269j. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury; [c] Trial by Ordeal*); Early Forms of Ordeal.**—"Nothing is older [than trial by ordeal]; and to this day it flourishes in various parts of the world. The investigations of scholars discover it everywhere among barbarous

7. "If a man," argued counsel, "were now to tender his wager of law, the court would refuse to allow it." . . . "This was denied by the court," adds the reporter. *Barry v. Robinson*, 1 B. & P. (N. R.), p. 297 (1805), cited in Thayer, Prelim. Treat. 33, *in notis*.

8. "Debt on simple contract. Defendant pleaded *nil debet per legem*. . . . Langslow applied to the court to assign the number of compurgators. . . . The books [he says] leave it doubtful. . . . This species of defense is not often heard of now. . . . Abbott, C. J. The court will not give the defendant any assistance in this matter. He must bring such

number of compurgators as he shall be advised are sufficient. . . . Rule refused. The defendant [say the reporters] prepared to bring eleven compurgators, but the plaintiff abandoned the action." *King v. Williams*, 2 B. & C. 533, 4 D. & R. 3 (1824).

9. "No wager of law shall be hereafter allowed." St. 3 & 4 Will. IV, c. 42, § 13 (1833).

10. *Palg. Com.*, i. 262-3.

1. *Supra*, § 269b.

2. 4 Black. Com. 342; 1 Pollock & Maitland, *Hist. Eng. Law*, 15, 131, 433; 2 *Ibid* 596, 641, 647; Proffatt on Jury Trial, § 12.

3. *Infra*, § 2712.

people, and the conclusion seems just that it is indigenous with the human creature in the earliest stages of his development.”<sup>1</sup> The ordeal, properly so-called, and, to a certain extent, all reliance upon the *arbitrium Dei*, judgment of God,<sup>2</sup> as in compurgation<sup>3</sup> and battle,<sup>4</sup> grew out of the baffled state of the mediaeval mind when there was an absence of percipient witnesses, where an occurrence was secret, or a dispute arose between the only persons who knew. Patient sifting of conflicting testimony, weighing, by the aid of deliberative tests carefully evolved by the use of the reasoning faculty, the probability of the story of a witness, seemed to the Teuton something beyond human power, a mystery in which Divine knowledge could alone be a satisfactory guide. Hence the necessity of a direct appeal to Heaven.<sup>5</sup> This expectation of a decision in the ordeal which can only be settled by the

1. Thayer, Prelim. Treat., 34, citing Patetta, *Ordalie*, c. 1; Inst. of Narada, Jolly's Trans., 44-54.

2. In earlier forms before the mediaeval church had so firmly established the supremacy of ecclesiastical thought in all branches of human activity, the appeal was directly to the *instrumentality* of the ordeal. Thus, in the early Indian ordeal by balance, in which the party was weighed before and after taking his oath, his guilt being indicated by his growing heavier, the invocation to the scales is as follows: "O balance, thou only knowest what mortals do not comprehend. This man being arraigned in a cause is weighed upon thee. Therefore mayest thou deliver him lawfully from his perplexity." Inst. of Narada, part I, c. 5, §§ 127-8, cited in Thayer, Prelim. Treat., 35 *in notis*. So of the fire, water, poison or the like. "The balance, fire, water, poison, and sacred libation are said to be the five divine tests for the purgation of suspected persons." Inst. of Narada, part I, c. 5, § 110, quoted in Thayer, Prelim. Treat., 35 *in notis*.

Yet a religious element frequently enters into very early ordeals. Thus, in the Indian ordeal by poison, in which a most technical ritual was

prescribed, the invocation to the poison reads as follows: "Thou, O poison, art the son of *Brahma*, thou art persistent in truth and justice; relieve this man from sin, and by thy virtue become as ambrosia to him. On account of thy venomous and dangerous nature thou art the destruction of all living creatures; thou art destined to show the difference between right and wrong like a witness. Thou knowest the good actions and the conduct of men, whether it be good or bad, in *short* whatever men do not comprehend. This man is arraigned in a cause and wishes to obtain acquittal; therefore mayest thou lawfully deliver him from this perplexity."

3. *Supra*, § 269d.

4. *Infra*, § 269n.

5. "He whom the blazing fire burns not, whom the water soon forces not up, or who meets with no speedy misfortune must be held veracious in his testimony on oath. Let ordeals be administered if an offense has been committed in a solitary forest, at night, in the interior of a house, and in cases of violence and of denial of a deposit." . . . Inst. of Narada, Jolly's Trans., part I, c. 5, §§ 103-4, quoted in Thayer, Prelim. Treat., 35.

superior intelligence to which appeal is made is very evident in the earlier invocations, e. g., the one used in the Sanscrit formula in the fire-ordeal.<sup>6</sup>

§ 269k. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury; [c] Trial by Ordeal*); *Forms of Ordeal in England*.—The forms of ordeal commonly employed in England were those of fire<sup>1</sup> and water.<sup>2</sup> Apparently the use of these tests was arranged by the justices somewhat according to the social position of the person undergoing the ordeal. Thus

6. "Thou, O fire, dwellest in the interior of all creatures like a witness. Thou only knowest what mortals do not comprehend. This man is arraigned in a cause and desires acquittal. Therefore mayest thou deliver him lawfully from his perplexity." Inst. of Narada, part I, c. 6, §§ 10, 11, quoted in Thayer, Prelim. Treat., 35 *in notis*.

1. "Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron of one, two, or three pounds' weight; or else by walking barefoot, and blindfold, over nine red-hot ploughshares, laid lengthwise at unequal distances; and if the party escaped being hurt he was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty." 4 Black. Com. 343.

2. Plac. Ab. 90, col. 2. See also Maitland, Sel. Pl. Cr. 1, cases 116, 119, 122, 125. "Water-ordeal was performed either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby, or by casting the person suspected into a river or pond of cold water; and if he floated therein without any action of swimming, it was deemed an evidence of his guilt, but if he sunk he was acquitted. It is easy to trace out the traditional relics of this water-ordeal in the ignorant barbarity still practiced in many countries to discover witches by casting them into a pool of water and drowning

them to prove their innocence." 4 Black. Com. 343.

The Indian ordeal by water is thus regulated, under the conditioning environment of that country. "Persons laboring under suspicion should dive into water. The water in this kind of ordeals should be very clear, very cool, free from leeches and mud, broad, and not too shallow. The person shall enter into the water up to his navel, but he should avoid diving deeper than that. Another man shall discharge three arrows from a moderate bow. A strong bow is 700 feet, a moderate bow 600, an inferior bow 500 angulas long; this is the rule of the bow. But if the arrows have been discharged from a very strong or very inferior bow, one shall assign a space of 64 feet for him who has to discharge the arrows. If the arrows have been discharged in the right manner (*sthite tu vāna-sampāte*) a skilful and honourable man of a twice-born class, who is a swift runner, should be chosen, and enjoined to fetch one, the accused diving under water in the meantime. Having worshipped the deities Yama and Varuna, he shall dive under water which has no strong current. This proceeding shall be superintended by thoroughly honest persons, who know the rules of the law-code and are free from both love and hatred. But if, while the second arrow having been discharged is brought back by a strong man, he continues under water, he obtains ac-

Glanvill says:<sup>3</sup> “An accused person who is disabled by mayhem *tenetur se purgare . . . per Dei judicium . . . scilicet per callidum ferrum si fuerit homo liber, per aquam si fuerit rusticus.*”<sup>4</sup> In the legislation of Henry II ordeal was ordered as the mode of criminal trials, though the decree of exile might still be enforced against him whom the decree of Heaven, upon solemn appeal, had just declared to be innocent. “It was the hard order of the Assize of Clarendon that he who had come safely through the ordeal might be required to abjure the realm, a circumstance which recalls the shrewd scepticism of William Rufus when he remarked of the *judicium Dei* that God should no longer decide in these matters,—he would do it himself.”<sup>5</sup>

quittal. Otherwise he is guilty, though only one limb of his have been seen; or he shall dive down in another place than that where he first dived. The trial not having been decided, an experienced man shall again make him dive under the water, in order that the judges may be enabled without fail to distinguish right from wrong. If only his ear, eye, face, or nose become visible, while he is standing in the water, he is guilty; he obtains acquittal, if he is not seen *at all*. Women must not be compelled to undergo *this ordeal*, nor men of feeble constitution; it is on account of their timidity that women are exempted, feeble men on account of their incapacity to bear fatigue.” Inst. of Narada, Jolly’s Trans., part I, c. 7, §§ 1–13 inc.

3. Glanv., Book XIV, c. 1 (1187).

4. See also *Dialogus de Scaccario*, ii, 7 (1177); 1 Pollock and Maitland, Hist. Eng. Law, 154, n. 7.

Ordeal by *corsned*.—An additional form of ordeal mentioned by certain of the authorities consisted of the use of a morsel of some kind which was swallowed by the person undergoing the ordeal with the accompaniment of an imprecation that the morsel might choke or otherwise injuriously affect the person who took it, were he guilty. 4 Black. Com.

345; Proffatt on Jury Trial, § 12.

“Another species of purgation, somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition, was the *corsned*, or morsel of execration: being a piece of cheese or bread, of about an ounce in weight, which was consecrated with a form of exorcism; desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty; but might turn to health and nourishment, if he was innocent: as the water of jealousy among the Jews was, by God’s special appointment, to cause the belly to swell and the thigh to rot, if the woman was guilty of adultery. This *corsned* was then given to the suspected person, who at the same time also received the holy sacrament; if indeed the *corsned* was not, as some have suspected, the sacramental bread itself; till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly.” 4 Black. Com. 345.

5. Thayer, Prelim. Treat., 38, *citing* Brunner, Schw. 182; Eadmer, Hist. Nav. (Rolls Series), 102; Frederic II, Lea, Sup. & Force (4th ed.), 422 (1231); Pollock and Maitland, Hist. Eng. Law, ii, 597.



§ 269l. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury; [c] Trial by Ordeal*); Scope of Ordeal in England.— Trial by ordeal was a chief method of making proof among both Saxons and Normans<sup>1</sup> in England. It possessed the attractive feature which made it invaluable as a *dernier resort*, last expedient. It could always be applied. From trial by battle<sup>2</sup> a party might be debarred by non-age, sex, weakness of body or the like. Compurgation might be inoperative from lack of compurgators, or because they failed to agree. But the ordeal was normally at hand when other tests failed, regardless of individual characteristics of the party in mind, body or estate. This made ordeal specially usable in criminal cases. In this connection it was not only employed in the popular courts when compurgation was not available, but was adopted by Henry II in the Assizes of Clarendon (1166) and Northampton (1176) as the established mode in criminal proceedings where public accusation had been made in accordance with the King's legislation.<sup>3</sup>

§ 269m. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury; [c] Trial by Ordeal*); Decline of Ordeal in England.— The decree of the Fourth Lateran Council at Rome in November, 1215,<sup>1</sup> forbidding the clergy to take part in the imposition of the ordeal was construed as a ban of Holy Church against its use in other connections, and a death blow was dealt the institution of ordeal and the development of trial by jury to a corresponding extent further fostered and encouraged.<sup>2</sup>

*Ordeal, never having been actually abolished*, enterprising suitors continued to demand it as a matter of right. In 1679, an instance of this occurred.<sup>3</sup>

1. Bigelow, Pl. A. N. *passim*; Glanv., Book XIV, c. 1 (1187).

2. *Infra*, § 269n.

3. Rot. Cur. Reg., i, 204 (1198); see also Rich. I. in Pl. Ab. 13-17.

1. Sacros. Conc. XIII, ch. 18, pp. 954-5.

2. 2 Br. N. B., case 592 (1231). "It is an abuse, that proofs and purgations are not made by the miracle of God where no other proof can

be had." Maitland, "Mirror," 173, Book 5, c. 1, § 127 (1290). See also Maitland, Gloucester Pleas, case 383 and p. XXII; and notes on this case at p. 150 and on case 434, at p. 151, cited in Thayer, Prelim. Treat., 38 *in notis*.

3. Whitebread's Case, 7 How. St. Tr. 383, cited in Stephen, 1 Hist. Cr. Law, 253n.

§ 269n. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury*); [d] Trial by Battle.—Wager of battle, trial by battle, defending oneself “by his body” or however the many-titled mode of proof may be called, was distinctly a Norman institution. It was a characteristic product of a warlike race and of the turbulent and self-relying times in which it flourished.<sup>1</sup> In its peculiar form, the Saxons do not seem to have used it.<sup>2</sup> Indeed the great towns of England eagerly sought exemption from trial by battle,—“*quod nullus eorum faciat bellum.*”<sup>3</sup> In essence, it was a judicial duel in which the judgment of Heaven was invoked to designate, by the result of a personal combat, on which side of a disputed proposition of fact lay the truth. Battle thus was established as the *ultima ratio legum* in much the same way, and with the same logical inconclusiveness that it is still employed in the settlement of international controversies. As an appeal to the *arbitrium Dei*, trial by battle was, in effect, an ordeal. But its distinctly Norman and mediaeval character, as well as its separate scope in English judicial administration, seem to entitle it to the treatment as a distinct form of trial which it has commonly received.

§ 269o. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury*; [d] Trial by Battle); Scope of Trial by Battle.—As might be inferred from its Norman character, trial by battle was demandable only in the King’s Courts. In these tribunals, not only could it be claimed in personal<sup>1</sup> and real actions of any nature,<sup>2</sup> or in criminal appeals in offenses of a certain grade; it was a favorite method of settling a conflict between the opposing *sectæ* produced by the parties in a trial by

1. Bishop Wulfstan v. Abbot Walter, Essays in Anglo-Saxon Law, 379, Bigelow, Pl. A. N., 19; 3 Black. Com. 337, App. 3; 4 Black. Com. 346, 418, 422, 424. See also Brunner Schw., 197, 400–1; 1 Pollock and Maitland, Hist. Eng. Law, 16, 28, 68, 129, 2 *Ibid.* 203, 212, 597, 630, 664.

2. Pollock and Maitland, Hist. Eng. Law, i, 16.

3. Mun. Gild. Lond., i, 128, § 5; Patetta, *Ordalie*, 307, 308; Pike, Hist.

Crim. Law, i, 448; Pl. Ab. 26, col. 2, Lincoln; Thorpe, i, 502.

1. “A debt . . . is proved by the court’s general mode of proof, viz., by writing or by duel.” Glanv., Book 10, c. 17, cited in Thayer, Prelim. Treat., 39.

2. “They may come to the duel or other such usual proof as is ordinarily received in the courts,” etc. Glanv., Book 13, c. 11, cited in Thayer, Prelim. Treat., 40.

witnesses.<sup>3</sup> Naturally, this mode of making proof, like its companion forms, trial by witnesses, compurgation or ordeal can scarcely with any propriety be called a trial. Under certain circumstances, a trial by battle might be had in a *manorial court*.<sup>4</sup> Even the judge of a lower court who had given judgment against a suitor might be compelled to answer to him in the King's Court in a trial by battle on a charge of false judgment.<sup>5</sup> While comparatively few instances of the trial by battle are actually recorded,<sup>6</sup> sporadic cases may be found in the early records.<sup>7</sup>

§ 269p. (*Institution of the Jury; First Stage; Early Forms of Trial other than that by Jury; [d] Trial by Battle*); *Decline of Trial by Battle*.—As war ceased to be the principal occupation of the people of England, as feudalism declined and commerce increased, the imperfections of trial by battle as a method of settling disputes of fact became more conspicuous. Wager of battle was unsuited to persons of peaceful disposition, the aged, or those inferior in personal strength.<sup>1</sup> The privilege of fighting by a champion was early conferred upon women; and, at a later period, upon others.<sup>2</sup> But, in all cases, the oppression of the poor and

3. *Supra*, § 269b; Lea, *Sup.* and Force (4th ed.), 120. See also Brunner Schw., 197-8; *Ib.*, 68, 401, *citing* Glanv., Bk. 10, c. 12, Bk. 2, c. 21.

4. Glanv., Book 9, c. 1.

5. Glanv., Book 8, c. 9. See also *St. de Magn. Ass. et Duellis*, St. Realm., i, 218.

6. Selden, *Duello*, cs. 9, 13.

7. Cro. Car., 522 (1538); 2 Rushworth's Coll., 788; Bigelow, *Placita Anglo-Normannica*, 41-43, 61, 305; 1 *Rotuli Curiae Regis*, 23, 24, 26; Mich. T., 6 Rich. I. (1191), cited in Selden, *Duello*, c. 13.

1. In a criminal case, a person of sixty and over may decline battle; and the rule was the same where he was maimed. Glanv. (Beames' Trans.), Bk. XIV, Ch. 1.

2. *Hearsay*.—As in case of the jury, the champion might swear not alone of his own knowledge but of that of his father. Glanv., Bk. II, c. 3.

In England it was at first required

that the champion should be a witness who swore to his testimony before doing battle for it. A hired champion might, if the fact were discovered, be severely punished, as by losing a foot. 1 Maitland, Sel. Pl. Cr., 192; s. c., Brocton, 151b (1220). The effort to prevent the use of hired champions was, however, abandoned by the courts in 1275 by St. West., I, c. 41, which says: "Since it seldom happens that the demandant's champion is not forsworn in making oath that he or his father saw the seisin of his lord or ancestor and his father commanded him to *deraign*, it is provided that the demandant's champion be not bound to swear this; but be the oath kept in all other points." Thus was licensed that which had previously long existed; and it was no longer necessary that the champion should be a complaint-witness, testifying to facts known to himself or told him by his father.

weak by the rich and strong which this system made possible could not long escape general attention in England<sup>3</sup> or in any country where trial by battle prevailed.<sup>4</sup> It was largely for the express purpose of providing for the people of England a safer, cheaper and less burdensome and oppressive mode of proof than the trial by battle that Henry II took the steps in regard to the use of the *inquisitio* which so greatly fostered the growth of trial by jury. The duel was heartily detested as a Norman innovation upon the established Saxon customs out of which the jury grew; it was humiliating, costly and in many ways oppressive. The popular acclaim given to the organized use of the jury in its stead is undoubtedly voiced by Glanvill.<sup>5</sup> The duel, in consequence of these and similar considerations, gradually waned in

3. St. of Vouchers, 20 Edw. I, st. 1 (1292).

There were, nevertheless, sturdy persons to whom the old system was endeared. "It is an abuse that the justices drive a lawful man to put himself on the country when he offers to defend himself against the approver by his body." Mirror, Bk. 5, c. 5, § 19, quoted in Thayer, Prelim. Treat., 57.

4. "Saint Louis abolished battle in his country [France] because it happened often that when there was a contention between a poor man and a rich man, in which trial by battle was necessary, the rich man paid so much that all the champions were on his side, and the poor man could find none to help him." *Grandes Chroniques de France*, vol. 4, pp. 427, 430, al. 3, cited in Brunner, Schw. 295, note, and in Thayer, Prelim. Treat., 41, *in notis*.

5. The well known passage from Glanvill, who had a large share in directing these reforms, in praise of Henry II's work reads substantially as follows: "The Grand Assize is a royal favor granted to the people by the goodness of the king, with the advice

of the nobles. It so well cares for the life and condition of men that every one may keep his rightful freehold and yet avoid the doubtful chance of the duel, and escape that last penalty, an unexpected and untimely death, or, at least, the shame of enduring infamy in uttering the hateful and shameful word ['craven'] which comes from the mouth of the conquered party with so much disgrace, as the consequence of his defeat. This institution springs from the greatest equity. Justice, which, after delays many and long, is scarcely ever found in the duel, is more easily and quickly reached by this proceeding. The assize does not allow so many essoins [excuses for delay] as the duel; thus labor is saved and the expenses of the poor reduced. Moreover, by as much as the testimony of several credible witnesses outweighs in courts that of a single one, by so much is this process more equitable than the duel. For while the duel goes upon the testimony of one sworn person, this institution requires the oaths of at least twelve lawful men." Glanv., Bk. II, c. 7, quoted in Thayer, Prelim. Treat., 42 *in notis*.

popularity<sup>6</sup> and by 1565 had become practically unknown.<sup>7</sup> Still, as late as 1819, trial by battle was adjudged to be a constitutional mode of trying criminal appeals; and the famous case of *Ashford v. Thornton*<sup>8</sup> was finally determined in this highly sensational way. Trial by battle was thereupon formally abolished.<sup>9</sup>

**§ 270. (*Institution of the Jury*); Second Stage.**—When the judges of the Norman kings came to discharge the royal duty and prerogative of administering justice, it very naturally happened that, as a matter of right or convenience, resort should be had to the body of freemen, so far as the community affected by the sessions then held should supply them, for the determination of certain issues of fact. The judges might, and if proper steps were taken by the parties concerned, must award and supervise the more formal or, as may be said, *procedural* methods of trial. They might arrange the battle, and carry it through to the “proof” by its result. They could establish the ordeal and see to it, that down to its minutest detail the customary steps were observed. But trial by battle or by ordeal was dangerous to life and limb—better adapted to the war-loving baron or squire than to the more peaceful tradesman, or tiller of the soil. A weak or timid suitor, even a woman, might have a just cause. Trial *per juratam* had the further advantage that it could be made to answer a specific question. Disputes on matters of fact were constantly arising which the general verdict of the battle or the ordeal could scarcely settle—

6. The details of a wager of battle in criminal appeals are given in certain comparatively late cases with the curious particularity which speaks of a practice not in present use. Y. B. 1 H. VI, 6, 20, 29 (1422); Y. B. 9 H. IV, 3, 16 (1407); Y. B. 17 Edw. III, 2, 6; s. c., Lib. Ass., 48, 1 (1342).

7. “I could not learn that it was ever abrogated.” Smith, Com. England, Bk. II, c. 8.

Bigelow succinctly states the result as follows;—“The typical procedure of the Anglo-Saxons, the ordeal, is joined by the typical procedure of the Normans, the duel, and lingers on and finally, in the thirteenth century, dies out beside it; while the newly introduced procedure of the inquisi-

tion, soon developing into the possessory and petitory actions of real property law, and at the same time revealing the very features of the jury system, advances steadily to commanding influence and to permanent place. Beside the old purely verbal procedure, the Norman procedure by writ has taken firm root, and forms of action begin to appear, though as yet failing to give promise of the subtleties and conflicts of their later stage.” Bigelow, Pl. A.-N., Introd., XII.

8. 1 B. & Ald. 405 (1819). See also Neilson, Trial by Combat, 330 (1815).

9. Stat. 59 Geo. III, c. 46.

matters of seizin, dower and the like. Of their own knowledge, the royal judges knew nothing as to these things. By reason of these other considerations, trial *per juratam* grew in popular favor; and finally came to supersede, to a very considerable degree, the modes of proof associated with earlier and ruder times. When the formal, perjury-breeding *compurgation* was laid aside, there still remained this trial, as it were, by the community. The thought of laboriously hearing the statements of those who knew and disentangling truth from error or mistake had apparently not yet occurred to anyone.

But the *jurata*, the jury itself, had acquired much of the form which it exhibited in the second stage of its development from a distinctly Norman source; — which it may be helpful briefly to examine before proceeding to the third and present stage of the jury's growth.

**§ 270a. (*Institution of the Jury; Second Stage*); The Frankish Inquisition.**—While the institution of the jury was evolved out of the community knowledge appealed to in the popular courts of the county, hundred and the like, which was common to both Saxon and Norman, the particular machinery by which this community knowledge became available to the cause of judicial administration was essentially Frankish in origin and development. The Frankish kings early in their strong and comparatively centralized government employed the *inquisitio*, inquisition, in connection with many branches of the public service.<sup>1</sup> On

1. "The capitularies and documents of the Carolingian period have a procedure unknown to the old Germanic law, which has the technical name of *inquisitio*. The characteristic of it is that the judge summons a number of the members of the community, selected by him as having presumably a knowledge of the facts in question, and takes of them a promise to declare the truth on the questions to be put by him. . . . This *inquisition* . . . was applied both in legal controversy and in administration, and we must observe that the departments of administration and justice were then considerably united." Thayer, Prelim. Treat., p. 48.

An element of Roman law, or, more properly, of its influence, may not unreasonably be thought to have affected the growth of the *inquisitio*. The Norman had learned much from the more highly civilized nations he had conquered. As Bigelow puts it: "There are plain indications that the law of Normandy was not wholly free from the influence of the semi-Roman law and civilization of the South of France. The stimulating influence of the better institutions of the South had powerfully affected all the Continental German nations: primitive institutions passed by steady transition into new forms, and new institutions arose by the side of the old.

the Norman reorganization of English judicial institutions after the Conquest of 1066, the *inquisitio* was, with great naturalness, called into operation in the new Saxon environment. Domesday Book (1085)<sup>2</sup> is an excellent instance of the results of its application in the field of administration relating to taxation,<sup>3</sup> although it should be remembered that the use of the *inquisitio* in England was in fact somewhat earlier than Domesday Book.<sup>4</sup>

*Legislation of Henry II.*—The great step in connection with the sovereign's administration of justice was taken by Henry II (1154–1189). To transfer causes from the county and hundred courts into the royal tribunals, for the better serving of the subject and the incidental enhancement of the revenues of the Crown, this able and powerful monarch, familiar as Duke of Normandy with the value of the inquisition, conceived a plan, which well deserves the encomium of Ranulph de Glanville, his chief justice and prime minister. The procedure, in brief, was that of permitting a citizen who felt aggrieved to sue out a royal writ returnable to an assize, as it was called.<sup>5</sup> Among a conservative Germanic people, tenacious of custom and insistent upon per-

The Normans in France ceased to be Northmen, and became almost as far separated from the Anglo-Danes as from the Anglo-Saxons; and the Norman Conquest became the turning-point in the history of Germanic institutions in England. German law, now shaken, tottered to its fall." Bigelow, Pl. A.-N. Introd., XI.

2. The lines of administration of finance and those of justice lie, as was usual with the Norman kings, very close together. "Questions of title to land and services, and disputes over the status of persons were of constant occurrence before the commissioners, and the results are briefly stated." Bigelow, Pl. A. N. XLIX. The work was thoroughly done. "Not even an ox nor a cow, nor a swine was there left which was not set down in his records." See Palg., Com. i, 271–3. Persons appearing before the commis-

sioners of Domesday Book naturally offered to make proof from time to time according to law. Bigelow, Pl. A. N., pp. 37–61, 293–307.

3. Bigelow, *Placita Anglo-Normannica*. See Pollock and Maitland, Hist. Eng. Law, i, XXI and 75 *et seq.*

4. Bigelow, Pl. A. N., 24, citing Lib. Eliensis, 256 (1080).

5. The result reached was practically to give a party by royal writ the right to direct the King's *inquisitio* to certain sworn members of the community, called the grand or petty assize, who were selected in a particular way and who returned to the king's justices upon oath an answer, technically a *recognitio*, to the specific question covered by the writ which the party had obtained from the King. See Br. N. B. ii, case 592; St. 52 H. III, c. 22 (1267).

sonal freedom of initiative, it was a powerful effort of sovereignty to *compel* the persons who afterward became known as the jury to appear and submit to be sworn; — and, after that, to go further and examine<sup>6</sup> and report to the judges the truth of a given matter of fact.<sup>7</sup>

§ 270b. (*Institution of the Jury; Second Stage; The Frankish Inquisition*); Indirect Influence on Popular Courts.— The King's justices also in an indirect way came to exercise under this legislation a supervisory jurisdiction over the course of justice as then administered in the popular courts,<sup>1</sup> e. g., those of the

6. The other aspect of the matter is at least equally remarkable. That Teutonic litigants who had had, from earliest times under the *leges et consuetudines* of the realm the right to "prove" themselves entitled or innocent under a time hallowed form should consent to abide by what a set of their neighbors, using their knowledge, should say about it was an unheard of thing. A judicial system which could only kill a mute prisoner but could not force him to plead or plead for him (*infra*, § 270d) is hardly a code of laws into which the legislation of Henry II could comfortably fit. As Professor Thayer says: "The real wonder is that so much was done; for the introduction of a compulsory procedure of this sort was very foreign to the conceptions of the older law. By that, men had 'tried' their own cases. To put upon a man who had the right to go to the proof — instead of the *probatio, defensio, purgatio*, of the older law, where he produced the persons or the things that cleared him — the necessity of submitting himself to the test of what a set of strangers might say, witnesses selected by a public officer — this was a wonderful thing." Thayer, Prelim. Treat., 56. Even in

very early times Englishmen have been sensitive regarding any attempt by the sovereign to act contrary to the established customs of the realm. In this very matter of compelling a person to take an oath when tendered to him, some sturdy standing out against royal authority has been done by freemen tenacious of their rights. Pl. Ab. 227, Col. 2 (1291). "*La primier et la souveraigne abusio est que le Roy est oustre la ley.*" Mirror, bk. 5, c. 5, § 1.

7. Henry II accomplished this; — thereby organizing the jury. The circumstance is not alone a tribute to the power of his influence but demonstrates the extreme unpopularity of trial by battle, especially after the abandonment of ordeal.

1. The King's power to order the making of an examination and its return (*recognitio*) under oath, enabled him, by directing a writ to a popular court to turn the freemen of that community or a designated number of them into what, for practical purposes in those days, was a jury. This appears as early as Henry I (1100–1135). 2 Palg. Eng. Com. 184, n.; Bigelow, Pl. A. N. 139. See also Case of Bishop Gundulf (*temp. William Conqueror*) *infra*, in this section.



county<sup>2</sup> or hundred.<sup>3</sup> Perjury in making a false oath in the return of an attainted verdict assumed to have been based upon personal knowledge was severely punished by royal judges or appropriate legislation.<sup>4</sup> The subsequent step to a judicial *iter*, a journey in *eyre* by the royal judges to county courts proved a natural and easy one.<sup>5</sup>

§ 270c. (*Institution of the Jury; Second Stage*); Scope of the Assize.—In England, as previously in Normandy,<sup>1</sup> a great step in judicial reform was gained when the obtaining of a royal writ was a matter of right<sup>2</sup> instead of being a matter of prerogative and special favor as had hitherto been the case. The process of obtaining the response of the community or its representatives under oath in pursuance of the rights acquired under a royal writ, i. e., this private use of the early *inquisitio* by permission and authority of the Crown, was most frequently spoken of as a "*recognitio*." Properly speaking, as might be inferred, the *inquisitio* is the question, the answer to it is the *recognitio*. The latter is the return under oath as to the result of the jury's inquiry, the speaking of the truth as to the matter,—the *verdictum*, the verdict.

"Assize" an Ambiguous Term.—The term "assize" came by a not infrequent use of language to extend to the designated writs,

2. Men of Wallinford and Oxford v. The Abbot of Abingdon (1158) (Bigelow, Pl. A. N. 198, citing 2 Hist. Mons. Abingd. [Rec. Com.] 227); Gundulf, Bishop of Rochester v. Pichot, Sheriff of Cambridge, Bigelow, Pl. A. N. 34, citing *Anglia Sacra*, 338, Hickes, Dis. Ep. 33; Essays in Anglo-Saxon Law, 374 (before 1087). "It is not contested that the institution of a jury existed in the time of the Conqueror. The document which remains of the dispute between Gundulf, the bishop of Rochester, and Pichot, the sheriff, ascertains the fact." Turner, Hist. of Anglo-Saxons, vol. 1, p. 535, quoted in Proffatt on Jury Trial, § 23 n. 2. This is "the earliest mention of anything in the nature of a jury." Reeves, Hist. Eng. Law (Finl. ed.), i, 137.

3. See *Ranuli v. Ralph*, Bigelow, Pl. A. N. 307, citing 1 Domesday Book, 424. See also, to same effect, 2 Palg., Com. 183; Bigelow, Pl. A. N. 119 (1122).

4. The theory that an erroneous criminal verdict could not be retried because it would be *double jeopardy* had apparently not, as yet, arisen. Bigelow, Pl. A. N. 137; 2 Palg. Eng. Com. 184, n.

5. The King v. The Abbot of Tavistock (1099); Bigelow, Pl. A. N. 69, citing 2 Monasticon, 497 (ed. 1846). See also Hist. Proc. 93.

1. Brunner, Schw. 304-305.

2. 1 Black. Com. 148; 3 Black. Com. 58; 1 Hallam, Const. Hist. 8, n., 9.

instituting the *inquisitio* to which the *recognitio* or answer of the assembly (also "assisa") was to be returned.<sup>3</sup>

*Grand and Petty Assizes.*—The assizes were respectively designated the grand and the petty. These differed, not only in the method prescribed for selecting the jury itself, but as to the matters treated by that jury when duly constituted, reduced by challenges and ready for its work. The grand assize<sup>4</sup> was an appropriate method of trying a real action;<sup>5</sup>—sharing that function with trial by battle. "It was optional with the tenant, but not with the demandant."<sup>6</sup> The petty assizes, *recognitiones*, as they were often called, on the other hand, were in main possessory actions, where the question of seizin alone was involved.<sup>7</sup> These recognitions, *recognitiones*, were equally obligatory on both

3. The term *recognitio* came later to indicate the solemn answer under oath returned to proceedings instituted by the ducal writ of the dukes of Normandy. Brunner, Schw. 293–294. In England, the term assize (assisa), at first denoting the administrative assembly, partly legislative, partly judicial, came shortly to cover in addition all that belonged to the assembly, the writs which were tried there, the answers of the tribunals there convened. "In England the technical expression 'assisa' got established for recognition in the narrower sense. *Assisa* means, in the first place, the *thing*, the assembly, as well judicial as legislative. In its extended sense, it means what belongs to or comes from such an assembly, the judgment or the ordinance. As to these specific assizes which introduced the recognitions, the term 'assize' has passed over to them." Brunner, Schw. 299. "This name assize is *nomen equivolum*, for sometimes it is taken for a jury [quoting the beginning of the record of an assize of *novel disseisin*, *assisa venit recognitura*, etc.]. . . And sometimes it is taken for the whole writ of assize. . . And sometimes assize is taken for an ordinance." Littleton, § 234, quoted in Thayer, Prelim. Treat., 57, *in notis*.

See also Mirror (Whittaker's Selden Soc. ed.), c. 25, p. 65. As to the relation between these several writs, their original or ancillary character and the like, see Glanv., bk. XIII, c. 1 and 2; 1 Pollock and Maitland, Hist. Eng. Law, 128; Reeves, Hist. Eng. Law (Finl. ed.) 223–232.

The laws enacted at a given assisa, the ordinances adopted there, are equally to be regarded as entitled to style themselves assizes. Thus, the Assize of Clarendon (1166), Northampton (1176), the Assize of Arms (1181), and the Assize of the Forest (1184) are phrases frequently employed as designating the enactments or ordinances promulgated by these conventions. See Thayer, Prelim. Treat., 58. See also Brunner, Schw. 302; Glanv. bk. II, c. 7, 19; bk. XIII, c. I; Stubbs, Charters (6th ed.) 135, 140, 150, 156.

4. *Infra*, § 270e.

5. The writ of right is described as early as Glanville. Glanv. bk. I, c. 5.

6. Thayer, Prelim. Treat., 55. To protect the tenant in appealing to the King's court from the popular tribunal, a writ of prohibition will be directed to the latter. Glanv. bk. II, c. 3.

7. *Infra*, § 270f.

parties.<sup>8</sup> Possessory *recognitiones* were commonly designated as "assizes."

*Number of Assizes.*—No precise reason appears why the original number of these assizes should not have been greatly increased. For example, no satisfactory explanation, except the existence of ordeal,<sup>9</sup> can readily be suggested as to why assizes were not extended so as to cover criminal cases. Such a step would at once have eliminated all necessity for the *peine forte et dure*,<sup>10</sup> and have had other important beneficial procedural effects.

§ 270d. (*Institution of the Jury; Second Stage; Scope of the Assize*); Criminal Cases.—When ordeal was practically eliminated by the decree of the Fourth Lateran Council of the Roman Catholic Church (1215), trial by battle or *per juratam* alone remained for use in criminal cases.<sup>1</sup> In this dilemma,<sup>2</sup> the effort of the royal judges was to induce the defendant voluntarily to place himself upon a jury.<sup>3</sup>

8. See Britton, 218b.

9. *Supra*, § 269i.

10. *Infra*, § 270d.

1. Dugd. Orig. Jur. 87. The Constitution of Clarendon, in establishing a jury of accusation and requiring a resort to the ordeal in criminal cases, was assumed to have abolished compurgation in this connection *quoad* the royal court.

2. "The next *eyre* [judicial journey of the royal judges] . . . took place in the winter of 1218-19. The judges had already started on their journeys when an order of the king in council was sent round to them . . . : 'When you started on your *eyre* it was as yet undetermined what should be done with persons accused of crime, the Church having forbidden the ordeal. For the present we must rely very much on your discretion to act wisely according to the special circumstances of each case.' The judges were then given certain general instructions: Persons charged with the graver crimes, who might do harm if allowed to abjure the realm, are to be imprisoned, without endangering life or limb. Those charged with less crimes, who would have been tried by the or-

deal, may abjure the realm. In the case of small crimes there must be pledges to keep the peace. Maitland, Glouc. Pleas XXXVIII." Thayer Prelim. Treat., 69, *in notis*. See also Rymer's *Foedera* (old ed.), 228, *ib*. (Rec. Com. ed.) 154.

3. Br. N. B. ii, case 592. The king's justices spend much time in seeking to convince the accused of the fairness of a jury. Frequently, the defendant replies that they are prejudiced against him, desire to have him punished regardless of the facts, and asks for the right to make some other form of proof. Maitland, Court Baron (4 Seld. Soc. Pub.). Where (p. 62) one accused of larceny and who offers battle which is declined by the steward, is in vain urged to plead to a jury. A very interesting summary is given in Thayer, Prelim. Treat., 73. This also was done in the manorial courts. For stewards and other officers experienced much the same difficulty in their own limited jurisdictions. A reference to the nature of the criminal jury, which consisted in part of the jury of accusation, may assist to explain the defendant's position in the matter.

*Accused Might Have a Jury.*—The prisoner might have a jury at the assize if he desired one. After the abandonment of ordeal in 1215 the *jurata* obviously became the natural mode of proof in criminal cases in the King's courts, where compurgation had, as has been noted,<sup>4</sup> no standing except in collateral matters. On incidental pleas in criminal cases, e. g., an *exceptio*, an assize might unquestionably be had.<sup>5</sup> By Magna Charta such writs were no longer to be refused or sold by the Crown but were demandable as of right.<sup>6</sup> Apparently, then, one accused of crime could have a jury if he asked for it, i. e., he might put himself on the country (*patria*).<sup>7</sup> The peculiarity of the situation, however, is obvious. No compulsory assize is provided in criminal cases—as there might well have been. For nearly six hundred years no one felt it necessary to supply a compulsory criminal assize or the equivalent of one.

*The Criminal Jury.*—A single fact assists to explain the hesitation of accused persons in pleading to a jury. Should the criminal defendant conclude to place himself upon the jury or *patria*, he was in the hands of an entirely different body than would be chosen to judge him in a civil matter. The Assize of Clarendon (1166) provided for an accusing jury;—which, after all, in many cases, might merely have the office of stating the

4. *Supra*, § 269g, n. 1.

5. Of this nature was a plea that a criminal complaint was maliciously and oppressively brought. 1 Maitland, Pl. Cr., case 54 (1207) (see also cases 81, 87, 91, 92, years 1202-5); 2 Palg. Com., p. 186; Rot. Cur. Reg. ii, 30, 97, 230, 265 (1200).

6. "*Nihil detur vel capiatur de cetero pro brevi inquisitionis de vita vel membris sed gratia concedatur et non negetur.*" Art. 36, Magna Charta (1215).

7. Extent of the "country."—The accused might be permitted at times to place himself upon a jury drawn from a particular territory selected by himself; and this verdict of sworn men drawn from this designated *patria* would be accepted as conclusive. Thus, for example, in 1220, "a party begins by putting himself 'on the county of Essex or Norfolk or Southampton or all of them,' and af-

terwards 'puts himself on the county of Surrey or on all men in England who know him.' At Easter came twenty-four Knights from Surrey, at the king's summons, who declared him to be a robber. 'And since he put himself upon these, let him be hanged.'" 1 Maitland, Sel. Pl. Cr., 193, quoted in Thayer, Prelim. Treat., 83. This concession to the accused was not, however, invariably accorded. "If he made choice of the trial *per patriam*, he was not to prefer the *patria* of any hundred he liked, for that was to be determined by the judge, who might assign which twelve he pleased of those returned for each hundred. This practice was in order to guard against partiality and collusion; for, says Bracton, a man might have lived very reputably in one *patria*, and not so in another." Reeves, Hist. Eng. Law. ch. 8, p. 477, quoted in Proffatt on Jury Trial, § 29.

facts as to who was under suspicion.<sup>8</sup> The defendant in putting himself upon the criminal jury, in reality to a considerable degree fell into the hands of the same men who had accused him.<sup>9</sup> The jurors at these assizes were, as a rule, either knights or persons of quality and social position, as required by the Assize of Clarendon. Under that ordinance, the criminal accusations were to be made by men of superior position, *per xii legaliores homines de hundredo, et per iv legaliores homines de qualibet villata*. The trial jury was selected from the same jurors thus brought into attendance. The regular practice seems to have been for the trial jury to be composed, in part at least, of the persons who had brought the charge or pointed to the accused as suspected. "As we read the rolls and Bracton's text, what normally happens is this: the hundred jury, without being again sworn,—it has already taken a general oath to answer questions truly,—is asked to say in so many words whether this man is guilty or no. If it finds him guilty, then 'the four townships' are sworn and answer the same question. If they agree with the hundredors, sentence is passed. This we believe to have been the normal trial. But there were many juries about, for every hundred had sent one, and upon occasion the justices would turn from one to another and take its opinion about the guilt of the accused. By the end of Henry III's reign (1272) it is common that the question of guilt or innocence should be submitted to the presenting jury, to the jury of another hundred, and to the four villis. They are put before us as forming a single body, which delivers an unanimous verdict."<sup>10</sup> Much irregularity, however, prevailed and other combinations were easily possible.<sup>11</sup>

8. When asked by the justices to declare precisely, *præcise dicere*, as to whether the accused was guilty, they might acquit him. 2 Pollock and Maitland, *Hist. Eng. Law*, 645.

9. "Certainly, indictors be not there, [on the inquest] it is not well for the King." Y. B. 14 & 15 Edw. III, 261 (1340).

Later, a sense of fairness intervened and the fact that a juryman had united in an indictment was regarded as good ground of *exceptio*, challenge, on the part of the accused. Y. B. 30 & 31 Edw. I, 531 (1302). Britton,

12; Britton, Nichol's Ed., 29, 30 (1291). This practice was subsequently ratified by statute, it being enacted "that no indictor be put on an inquest upon the deliverance of one indicted for trespass or felony, if he be challenged for this cause by the party indicted." Stat. 25 Edw. III, 5, c. 3 (1351).

10. 2 Pollock and Maitland, *Hist. of Eng. Law*, 644, quoted in Thayer, *Prelim. Treat.*, 81.

11. North. Ass. Rolls, (Surtees Soc.) 374 (1279) (juries of accusation and one specially elected).

*Accused could not be forced to place himself on a jury.* While the accused might have a jury, it by no means followed that he wanted one. Indeed, he might have the best of reasons for preferring *not* to submit the consideration of his punishment to the neighborhood who knew or thought they knew all about him and what he had done. The accused, it was agreed both in England<sup>12</sup> and Normandy,<sup>13</sup> could not be forced to place himself upon the country, e. g., no one could effectively do it for him.<sup>14</sup>

*Peine Forte et Dure.*—The legal right of an accused to stand mute was impliedly recognized by the statute of Westminster I<sup>15</sup> which provides a penalty or punishment (*peine*) calculated to stimulate the assent of an accused person to having his case tried by a jury. The practice of the *peine forte et dure*, thus authorized continued until its abolition in 1772.<sup>16</sup>

*In cases of felony or treason,*<sup>17</sup> as forfeiture of goods and attain of blood followed upon conviction, many resolute men declined to plead. Judges were astute in devising reasons to induce them to do so;<sup>18</sup> but not a few were obdurate or loved their heirs more

12. This principle of administration has been abandoned in England since Stat. 7 & 8 Geo. IV, c. 28.

13. Brunner, Schw. 474.

14. Early exceptions are to be found where prisoners who had not placed themselves on the country were, nevertheless, tried by a jury and executed in pursuance of its verdict. Hale, Pleas of the Crown, ii, 322 n.; s. c., Maitland, Pl. Cr. i, Cases 153, 157; Maitland, Glouc. Pleas, XXIX. See also Stat. Wal., c. XI. There is much force in the suggestion of Bracton that since a woman or an infirm person cannot be tried by battle, and since ordeal had been abolished, such persons should be forced to plead to a jury. Brac. bk. III, cc. 21, 22.

Upon general principles of early law, no necessity for any form of trial is experienced where the accused is taken in the fact, or upon fresh pursuit or is discovered while in possession of the stolen goods, i. e., with the *mainour* upon him. Y. B. 30 & 31 Edw. I, 545; North. Ass. Rolls, (Surtee's Soc.) 70 (1256); Maitland, Br. N. B. ii, 138; Brac.

N. B. III, Case, 1724; Maine's Anc. Law, c. 10. Possibly the looseness of this practice assisted to give rise to the stricter rule that standing mute was not equivalent to confession.

15. "Notorious felons, openly of ill-fame, who will not put themselves on inquests for felonies with which they are charged before the justices at the king's suit, shall be put in strong and hard imprisonment (*en le prison forte et dure*) as refusing the common law of the land. But this is not to be understood of persons who are taken on light suspicion." 3 Edw. I, c. 12 (1275).

16. Stat. 12 Geo. III, c. 20, § 1. See, on the entire subject, 2 Pollock and Maitland, Hist. Eng. Law, 647; St. 7 Ann., c. 21, § 5.

17. Trials for misdemeanor are rare in the second stage of the jury's development. The royal judges apparently go directly from presentment to sentence. 2 Pollock and Maitland, Hist. Eng. Law, 649.

18. Smith, Com. Eng. bk. 2, c. 26 (1565).

than their life, which was thereupon crushed out by the *peine forte et dure*.<sup>19</sup> Stretched on the bare ground with a rope drawn to the corners of the room from each foot and wrist,<sup>20</sup> a sharp stake under the back, or some similar torture applied,<sup>21</sup> weights piled upon the chest "as much as he may bear, and more,"<sup>22</sup> black bread one day and foul<sup>23</sup> water the next,<sup>24</sup> in a vain attempt to make the accused plead to the indictment, by placing himself

19. In a somewhat grim reference to the practices of the Church for sin, this situation of an accused is spoken of as a *penance*, *graunt penance*.

20. "Needham went to Newgate and asked judgment *in forma quae sequitur*. That the appellee be remanded to his prison . . . and be put in a cell, and be naked on the bare ground without litter or rushes, or cloth or anything, and shall lie there naked on his back, . . . his head and feet covered, and that one arm be drawn with a cord to one quarter of the cell, and the other to the other quarter, and that one foot be drawn to one quarter of the cell and the other to the other, and that on his body be put a piece of iron as much as he can bear, and more (*un p  ce de ferre tant come il poit suffre et port sur luy, et pluiss*), and the first day after, he shall have three morsels of barley bread without any drink, and the second day he shall thrice drink, without bread, as much as he can of water standing near the prison, and this shall be his diet until he be dead." Y. B. 14 Edw. IV, 8, 17 (1474), quoted in Thayer, Prelim. Treat., 76.

21. Kelyng (old ed.), 27 (1662) (thumbs tied together with whipcord); Pal. Com. ii, 189-191; 2 Pike, Hist. Crime, 194, 195, 283-285; Smith, Com. Eng. bk. 2, c. 26 (1565) (table on him).

22. "We find Gascoigne, by advice of all the justices, awarding the penalty with further details. Two appealed of robbery and 'mute of malice, to delay their death,' are to lie on the ground naked, save trowsers, to have

put upon them as great a weight of iron as they can bear and more (*tant de ferr et pois come ils puissent porter et pluiss*), and to have for food only the poorest bread that can be found, and standing water from the place nearest to the jail, and these only on alternate days, bread only on one day, and only water on the next—and so to lie till death." Y. B. 8 H. IV, 1, 2 (1406), quoted from Thayer, Prelim. Treat., 75.

23. "The judgment was that two persons accused should lie prostrate and have as much weight put on them, etc., etc., and that their heads should not touch the earth, and they would only have *Rye bread, et le prochein ewe standing al dit prison*; 'it shall not be running water, and they shall stay so until they are dead.'" Keilwey, 70, pl. 4 (1505). Thayer, Prelim. Treat., 75 *in notis*. "That he should be put in a house on the ground in his shirt, laden with as much iron as he could bear (*oharge de tant de fer cum il poit porter*), and that he should have nothing to drink on the day when he had anything to eat, and that he should drink water which came neither from fountain nor river." John de Darley's Case, Y. B. 30 & 31 Edw. I, 510 (1303), quoted in Thayer, Prelim. Treat., 75.

24. For certain details of the application of the *peine forte et dure*, see 4 Black. Com. 328; Britton, Nichols, I, 26-27; *Fleta*, bk. 1, c. 34, § 33. Women were exposed to the same treatment. 1 Pike, Hist. Crime, 211.

"upon the country,"<sup>25</sup> the unfortunate victim of mediæval justice exemplified the curious inability of the procedure of the times to violate what were regarded as the unalienable privilege of an accused to plead or not as he saw fit.<sup>26</sup>

Modern judicial administration finds no difficulty in entering the plea of not guilty or even to adjudge him guilty as charged,<sup>27</sup> where one accused of felony stands mute.<sup>28</sup> It presents, however, what to the jurist of the future may seem almost equally odd, permitting an indicted person various privileges of silence and, when these have enabled him to escape punishment, turning him loose upon society with a constitutional guarantee that, however clearly his offense may subsequently be established in spite of these privileges of silence, he shall never be prosecuted for it again.

**§ 270e. (*Institution of the Jury; Second Stage; Scope of the Assize*); The Grand Assize.**—The selection of the juries for the grand assize was regulated by the constitutions of Clarendon (1166) and of Northampton (1176).<sup>1</sup> The steps began with the selection of four knights of assize "girt with swords," *gladiis cinctos*,<sup>2</sup> for each county. Further details, as to selection of other

25. The Mirror, not unnaturally, looks upon all this as an abuse. Lib. 5, c. 1, § 54.

26. "It is a singular proof of the want of attention to any general principles of legislation that a custom equally foolish and barbarous should have continued so long unaltered. And the subject is one, among others, which shows that the English law must forfeit many of the encomiums . . . which have so long passed current amongst us." Palg. Com., *quoted* in Thayer, Prelim. Treat., 78. See 1 Stephen, Hist. Cr. Law, 300.

27. 7 & 8 Geo. IV, c. 28 (1827); 12 Geo. III, c. 20 (1772).

28. 7 & 8 Geo. IV, c. 28 (1827); 11 & 12 Will. III, c. 7, § 6 (1700). See also Stat. of Wales, c. 11 (1284) (in matters of trespass).

1. 3 Black. Com. 341, 351, App. 5; 4 Black. Com. 422; 1 Pollock and Maitland, Hist. of Eng. Law, 125; 2 *Ibid.* 62, 601, 618, 627.

2. "Girt with swords above their garments." Lord Windsor *v.* St. John, Dyer, 103b (1554). The writ requires the knights to be girt with swords not that they should appear actually with swords but to indicate those who were able to do knight service. Coke, 2 Inst. 597. The royal writ for summoning the knights of a grand assize, as given by Glanvill, is as follows: "The King to the Sheriff, Health. Summon, by good summoners, four lawful Knights of the Vicinage of Stoke, that they be at the Pentecost before me, or my Justices, at Westminster, to elect on their oaths, twelve lawful Knights of that Vicinage, who better know the truth, to return on their oaths, whether M. or R. have the greater right in one Hyde of Land in Stoke, which M. claims against R. by my Writ, and of which R., the Tenant, hath put himself upon my Assise and prays a Recognition to be made, which of them have the



knights, challenges, etc., are minutely given in the early authorities.<sup>3</sup> The pompous formality of the method of selecting the jury of the grand assize<sup>4</sup> flourished in much popular and judicial<sup>5</sup> favor,<sup>6</sup> until abolished in 1834.<sup>7</sup>

**§ 270f. (*Institution of the Jury; Second Stage; Scope of the Assize*); Petty Assizes.**—By contrast with the Grand Assize which seems more properly to have been used to designate the

greater right in that Land and, cause their names to be imbreviated. And summon, by good Summoners, R. who holds the Land, that he be then there to hear the election, and have there the Summoners, etc." Glanv. (Beames' Trans.) bk. II, c. XI.

3. Y. B. 7 H. IV, 20, 28 (1406); Y. B. 30 & 31 Edw. I, 117 (1302). A party might challenge a juror for having formerly given false evidence or for bias, serfdom, consanguinity, affinity, enmity or close friendship. Bract. Bk. 4, c. 19.

4. "These knights [the four] and twelve of the recognitors so elected, together making a jury of sixteen, constitute what is called the grand assize." Stephen, Plead. (Tyler's ed.) 129.

5. The history of the times and the menacing claims of the Church, represented by Thomas à Becket, should not be overlooked in connection with the applause which followed Henry II's legislation, establishing the Assize and, through it, the jury. The claims of the Church threatened the autonomy of the English Crown and the Canon law presented a rational and powerful instrumentality of the clergy operating in the ecclesiastical courts. The hopeless formalism of the procedure of the popular tribunals gave great aid to the growth of the more intelligent, if still formal, procedure of the Ecclesiastical Courts. The struggle of the royal judges to curb the growth of clerical power in judicature was one which meant much to the politics as well as to the jurisprudence of the realm. The compara-

tively flexible and rational system of the *inquisitio* exacting a response under oath from certain representatives of the community, was, it is fair to conjecture, in part at least, designed to meet a situation partly political in its nature. It was, therefore, naturally welcomed both by the royal judges and the popular tribunals and such portion of the people as were loyal to the government of England, as loyalty was then understood. Here again, as in later years, the jury gained a reputation as a palladium of liberty from political causes very remote from questions of jurisprudence. Much shrewd inference is contained in the suggestion of Dr. Brunner (Schw. 300-304): "The need of innovation must have already made itself felt, for the reason that a dangerous rival to the rude and inelastic procedure of the temporal courts was growing up, in the canon law. . . . It may therefore be regarded as no mere coincidence that Henry II, the reformer of procedure, was the man who first succeeded in forcing the ecclesiastical jurisdiction into narrower limits." See also Bigelow, Pl. A. N., XXVII, n.; Brunner, Schw., 300-304; Y. B. 30 & 31 Edw. I, 492 (1303), *per* Bereford, J.

6. North Ass. Rolls (Surtees Soc.), 137 (1269); 2 Rot. Cur. Reg. 27 (1199); 1 Rot. Cur. Reg. 197, 198, 200, 201 (1198). See also Brunner, Schw., p. 365.

7. The latest case in England is apparently, *Davies v. Lowndes*, 1 Bing. N. C. 597 (1835), *retried* 5 Bing. N. C. 161 (1838).

*recognitio* arising under a writ of right in a real action,<sup>1</sup> certain possessory writs directed for summoning and impaneling a jury for the trial, rendering a recognition on, certain specified questions were classed as petty assizes.<sup>2</sup> As commonly employed at a later period, these petty assizes were four: (1) *Utrum*,<sup>3</sup> (2) *Novel Disseisin*,<sup>4</sup> (3) *Mort D' ancestor*,<sup>5</sup> and (4) *Darrein Presentment*.<sup>6</sup> Extraordinary writs, both original and ancillary could be issued by special indulgence of the Crown, while, by consent of the parties, the assize could be used for the settling of matters other than those for which express provision had been made;—or, as Glanvill puts it, *ad aliquam controversiam terminandam*.<sup>7</sup>

The writ directed in case of the petty assize differs materially from that used in case of the Grand Assize. A specimen writ is given by Glanvill.<sup>8</sup>

1. *Supra*, § 270e.

2. 1 Pollock and Maitland *Hist. Eng. Law*, 128; 2 *Ibid* 567. Whether additional assizes were at first provided, and if so, as to their nature, seems uncertain. The official records of the legislation of the Assizes of Clarendon and Northampton are lost, and can be reconstructed merely from the fragments of Glanvill supplemented by the industry of scholars like Palgrave, Pollock, Maitland or Thayer. 2 *Palg. Com.* 166. See 1 Stubbs *Const. Hist.* 469, as to the value of Palgrave's discovery of a manuscript copy of Glanvill in the British Museum—"The most important document in the nature of law or edict which has appeared since the Conquest." See Thayer, *Prelim. Treat.*, 61.

Eight of these minor *recognitions* are mentioned by Glanvill. "*De morte antecessoris, de ultima presentatione, utrum tenementum sit feudum ecclesiasticum vel laicum, utrum seiscitus de feodo vel de vadio, utrum sit infra etatem* (c. 16), *utrum seiscitus de feodo vel de warda* (c. 14), *utrum presentaverit occasione feodi vel wardæ, de nova disseisina*; and the writs for these are given in succession," quoted in Thayer, *Prelim. Treat.*, 64.

3. For this assize provision is made

in *Constitutions of Clarendon*, chap. IX.. See 1 Pollock & Maitland, *Hist. Eng. Law*, 123, 218.

4. *Assize of Northampton* (1176), Art. 5. See, however, 1 Pollock & Maitland, 124, in which the date of the assize is given as 1166.

**Number of essoins.**—No excuses for delay [essoins] are allowed in the petty assize of *novel disseisin* and but two in other possessory recognitions. As compared to the numerous *essoins* permitted on the trial by battle, this was a great relief to a suitor without endless powers of endurance.

5. The assize is apparently provided by the assize of Northampton (1176), Art. 4.

6. By the *Constitutions of Clarendon* (1164), regulating the vexed relations between the King and the Church, the presentation and advowson to livings are placed in charge of the King's courts and the assize of *Darrein Presentment* is provided for ascertaining the right. See Stubbs, *Charters* (6th ed.), 136.

7. *Rot. Cur. Reg.*, ii, 189 (1200).

8. "The King to the Sheriff, Health. If G., the son of T. shall make you secure of prosecuting his claim, then, summon by good Summoners, twelve free and lawful men of the Neighborhood of such a Vill, that they be be-

§ 270g. (*Institution of the Jury; Second Stage*); Separation of Jurata.—The body of freemen selected for the trial of these assizes or *recognitions* were early separated from the general body of the community and spoken of as the *jurata*; or *jurata patriæ*.<sup>1</sup> For the times, this was procedural legislation of a high order; and had, as is observed elsewhere, the incidental advantage of enabling a suitor to avoid the dangers and expense of trial by battle which, up to that time, had been the appropriate mode of making proof in a real action. "An inquest or jury, in civil causes, was never adopted according to the usual course of the popular courts of Anglo-Saxon origin; unless by virtue of the king's special precept."<sup>2</sup> In the King's Courts if the *jurata* disagreed new jurors were added until twelve agreed in opinion.<sup>3</sup> Severe penalties were imposed upon a jury for false swearing;—including infamy and forfeiture of goods.<sup>4</sup>

§ 270h. (*Institution of the Jury; Second Stage*); Growth of the Jurata.—But influences other than the objections to contemporaneous modes of proof,<sup>1</sup> distrust of the ecclesiastical tribunals<sup>2</sup> or even the successful administration of the assize to which these and other causes contributed, assisted to foster the growth of the *jurata* or jury. To the King, as the fountain of justice, resort

fore me, or my Justices, on such a day, prepared on their oath to return, if T. the father of the aforesaid G. was seised in his Demesne as of Fee, of one Yardland, in that Vill, on the day of his death—if he died after my first Coronation, and if the said G. be his nearer Heir. And, in the meantime, let them view the Land and cause their names to be imbreviated; and summon, by good Summoners, R. who holds that Land, that he be then there to hear such Recognition; and have there the Summoners etc., Witness etc." Glanv. (Beames' Trans.), Bk. XIII, c. 3.

1. 1 Pollock & Maitland, Hist. Eng. Law, 128. See also Pike, Y. B. 12 & 13 Edw. III., pp. XXXIX-LXX.

2. Palg. Com., i, 262-263. An early instance of this sort took place in the reign of the Conqueror between Pichot, sheriff of Cambridgeshire on behalf of the king in opposition to Gundulf,

Bishop of Rochester, referred to in Proffatt on Jury Trial, § 23. A king's judge, Otho, Bishop of Bayeux, presided over the county court, all being sworn. The men of the county were then ordered to choose twelve of their number who were sworn. These confirmed the verdict; but, certain of their number having confessed to perjury in so doing, the twelve were tried and punished. See also Hickes, Thes. Dissert. Epist., p. 33.

3. This, it will be noted, is also the number usual in a compurgation; and seems to be the historical, and probably the sole, reason why a grand jury of twenty-three may act by a majority vote, while a *petit* or traverse jury of twelve is required to be unanimous.

4. Glanv., Bk. I., c. 19.

1. *Supra*, § 269p.

2. *Supra*, § 270e, n. 5.

was to be had when the ordinary machinery of the courts proved inadequate. In all such instances, the form of trial ordered by royal favor, or by means of legislation<sup>3</sup> was that of the jury.<sup>4</sup> The practice of the Norman kings, to whom the administration of justice was a financial perquisite of no small value, of exacting a large and uncertain fee for awarding a writ, even where the suitor was entitled to receive it,<sup>5</sup> or of granting special privileges to which the petitioner had no claim,<sup>6</sup> was an early and grievous abuse corrected by *Magna Charta* (1215).<sup>7</sup>

*Subsequent developments in respect to judicial administration* ran smoothly along similar lines. The curtailing in 1258 of the royal right to issue new writs<sup>8</sup> and the substituted authorizing of the clerks in chancery to issue such writs *in consimili casu*, i. e., actions on the case,<sup>9</sup> exerted a powerful influence in increasing the scope of the jury's jurisdiction. In the same way, actions of

3. For example, by St. West. I., c. 12 (1275), one accused of felony who refuses to put himself on a jury is treated as refusing "the common law of the land." See Thayer, Prelim. Treat., 60, *in notis*. Juries were required in the Inquest of Sheriffs (1170), in the Assize of Arms (1181), in the Assize of Northampton (1176). See Thayer, Prelim. Treat., 61.

4 It became, therefore, the established form of trial, to be used when no conflicting provision had been expressly made by law.

5. 1 Rot. Cur. Reg. 354, 375 (1199).

6. Bigelow, Hist. Proc. 187-190.

7. The demand of the barons upon King John included Art. 30 "*Ne jus vendatur, vel differatur vel vetitum sit.*" The concession of King John in Art. 40 of *Magna Charta* (1215) was equally explicit: "*Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam.*" See Stubbs, Charters (6th ed.) 293; Thayer, Prelim. Treat., 66.

The *judicium parium* of the 29th Article of *Magna Charta* (1215)—that no freeman shall be hurt in either his person or property "*nisi per legale judicium parium suorum*

*vel per legem terrae*"—has been assumed to be the foundation of the English right to a trial by jury. 4 Black. Com. 349. The *judicium parium* had, however, an established meaning at this time;—the decision as to the tenure of a tenant of a given lord by the formal statement of his fellow tenants. In other words, should a dispute arise between a lord and his vassal respecting any agreement about holding land, the vassal was to prove his case by the testimony of his *peers*, i. e., those holding by the same tenure as his own. Laws of William I, Leg. Gul. Cong. 23. See also Laws of Henry I, Leg. 21, § 7. The object of the barons in securing the insertion of this clause (Art. 29) in *Magna Charta* was to prevent seizure of their lands by the King. They desired benefit of a trial. Lingard, Hist. Eng., vol. 2, c. 14. The enactment is, therefore, the endorsement of the principle of trial by equals which underlies trial by jury rather than the establishment or even the ratification of that institution.

8. Bigelow, Pl. A. N. Introd. XXVIII-XXX.

9. St. Westm. II, c. 24 (1285).

trespass, though of early origin,<sup>10</sup> were frequently tried before a jury at a somewhat later period.<sup>11</sup> As early as 1436, the acknowledged supremacy of the jury as a method of trial is inferentially asserted in a statute designed for the remedying of certain abuses in this form of procedure.<sup>12</sup> The statute, after reciting that "Our Lord, the King, considering that the trial of the life and death, lands and tenements, goods and chattels of every person of his liege people of this realm, touching matters in deed [fact], by the law of the same realm doth remain and stand and daily is very likely to be had and made, by the oaths of inquests of twelve men duly summoned in his courts," proceeds to remedy the evils of which complaint has been made.

**§ 270i. (*Institution of the Jury; Second Stage*); Personal Knowledge Required.**—It cannot too firmly be grasped that these *juratores*, the jurymen, did not at this stage of the evolution of the institution weigh the evidence of those who knew — the witnesses — who should testify before them. The jury themselves were those who knew things and decided the issue laid before them by the justices upon that knowledge. "The knowledge required of them is their own perception, or what their fathers have told them, or what they may trust as fully as their own perceptions (*per proprium visum et auditum vel per verba patrum suorum, et per talia quibus fidem teneantur habere ut propriis*)."<sup>1</sup> Thus, for example, in the writ of right the plaintiff, upon the assize being ordered, was given, according to Glanvill,<sup>2</sup> a subsidiary writ for summoning four knights of the county and neighborhood to choose twelve others of the same neighborhood *best acquainted with the truth of the matter in dispute*. These knights, upon being assembled, are placed under oath and inquiry is made as to whether any of them are ignorant of the fact in dispute. Should any prove ignorant, they stand aside and others are chosen in their stead. It followed that where, in a criminal case, the offense had been committed *secretly* there could be no trial by jury. This had

10. Bigelow, Hist. Proc. 160.

11. "And since in a plea of trespass the defendant can hardly escape making his defense by the country, the justice, by consent of parties, shall make inquiry of the truth by lawful inquest." 1 St. Realm, p. 66.

See also Heselrigg's case, Pl. Ab. 285, col. 1 (1291); Prof. Ames, Harv. Law Rev. III, 29, n.; 2 Pollock and Maitland, Hist. Eng. Law, 524, n.

12. Stat. 15 H. VI, c. 5.

1. Thayer, Prelim. Treat., 63.

2. Glanv. bk. I, cc. 12, 14, 15.

been the special field of the ordeal and of compurgation. When these were done away, battle alone remained.<sup>3</sup>

*A Lingering Survival.*—Long after the general theory had been accepted that the jury were to judge of the effect of oral or documentary evidence a certain degree of personal knowledge was attributed to them.<sup>4</sup> By the time of Henry IV the duty of the jury to decide upon the evidence furnished them in court has become established.<sup>5</sup>

*Administrative Details.*—The thought that the jury had an inherent and essential sanctity and were anything beyond an instrumentality of judicial administration designed for the ascertainment of truth had not, as yet, developed. "In the capacity of witnesses the jury were subject to interrogation by the court as to the source and means of their knowledge, and whenever the justices holding the trial had good reason to believe the charge to be well-founded and suspected that the jurors through fear, love or malice were inclined to conceal the truth, they might separate the jury one from the other and make a separate examination in order to discover the truth of the matter."<sup>6</sup> The *recognitio* of the *jurata*, i. e., the verdict of the jury, might be either general or special.<sup>7</sup> As in later times,<sup>8</sup> the *jurata* might be used by the justices to give an answer or *recognitio* as to minor or subsidiary matters, *per juratam patriæ vel visineti*.

3. Reeves, Hist. Eng. Law, c. 8, p. 476.

4. Reeves, Hist. Eng. Law, c. 11, p. 164. To secure this personal knowledge, certain of the jury were to be from the hundred of the accused. Stat. 27 Eliz., c. 6. "And do you challenge a juryman because he is supposed to know something of the matter? For that reason the juries are called from the neighborhood, because they should not be wholly strangers of the fact." Reading's case, 7 State Tr. 259 (1679), per Sir Francis North, quoted in Proffatt on Jury Trial, § 34. Personal knowledge is now no longer required. It is sufficient that the jurors should be selected from the body of the county. 6 Geo. IV, c. 50.

5. "Que le jury apres ceo que ils furent jurés, ne devient veier ne porter ovcs que eux nul autre evidence, sinon ceo que a eux fuit livrerre par le court, et per le party mis en court sur l'evidence monstre." Y. B. 2 Henry IV.

6. Proffatt on Jury Trial, § 29, citing Bract. 1436.

7. "The knights may either say, directly and shortly, that one party or the other has the greater right, or merely set forth the facts, and thus enable the justices to say it,—what we call a special verdict." Thayer, Prelim. Treat., 63.

8. *Supra*, §§ 97 et seq.

§ 271. (*Institution of the Jury; Second Stage*); **Third Stage Contrasted.**—The jury in the second stage of its development presented striking features of dissimilarity of function and mode of judicial operation to those exhibited by the institution as it exists at the present day. Though earlier forms of trial were becoming gradually obsolete, as the direct intervention of Heaven upon solemn appeal became limited to the solemnity of the oath, the sole available test of truth for many issues of fact was the general knowledge of a community, which had but few and simple things with which to concern itself. This was the same sort of “knowledge” as that of the tribal assemblage of the first stage of the jury’s evolution. To certain selected representatives of this community-knowledge, placed under oath and so called *juratores* or jury certain issues of fact were committed. No evidence in the modern sense of that term was offered for their consideration; but, upon their own knowledge, hearsay, rumor, information of their fellows, and the like, under the sanction of the oath, and the penalty of *attaint*<sup>1</sup> in case of a false verdict, the *juratores* returned their *veredictum*, or verdict—the statement as to the truth of the proposition of fact referred to them by the court.

§ 271a. (*Institution of the Jury; Second Stage*); **Transition to the Jury Acting upon Evidence.**—The growing complexity of an advancing civilization was, however, during the period which has briefly been considered, making it increasingly difficult for either the accusing or the trial jury to determine matters upon their own knowledge. Under the primitive conditions of Anglo-Saxon and early Norman days in England, where each man, whether freeman or villein, knew intimately the few and simple affairs of his neighbors; and where such knowledge was made of personal importance by the patriarchal responsibility of each wapentake (hundred) or tithing for the acts of its members, it might be reasonable to expect that a plain issue of general interest might be submitted to twelve men of the neighborhood (*de vicaneto*) with a fair prospect of their determining

1. *Attaint*, and “many anomalies of the like kind such as the *peine forte et dure* for refusing to plead, banishing a party on trial for challenging peremptorily more than twenty jurors instead of simply overruling his challenge, and many other practices of like kind, show how little the true nature

and principle of jury trial, in its perfection, were understood; and afford as a caution against attributing much weight to rules and precedents of such a period.” *Com. v. Anthes*, 5 Gray (Mass.) 185, 198 (1855).

it correctly upon their own knowledge. Occasionally, as where an act was done secretly or without witnesses, the plan broke down. But in such cases there was always the invocation of the *arbitrium Dei*, by some form of ordeal, *lex manifesta*; and, on the whole, personal knowledge was fairly adequate for the needs of the times in other connections.

*Changed social conditions* eventually demanded a modification in the mode of proof before the *jurata*. The increasing difficulty of finding a jury with actual personal knowledge made the penalties for an *attaint*<sup>1</sup> for a false verdict by the jury, even without the continual intervention of open perjury<sup>2</sup> and gross corruption,<sup>3</sup> press with unwelcome hardship upon those selected as members of the *jurata*.<sup>4</sup> Additional knowledge must come from other

1. "Whenever a party had a right to suspect a wrong judgment, he obtained a writ summoning twenty-four jurors, who should consider the same matter as the former jury of twelve. When they were assembled the proceedings and record of the former trial were read to them; they immediately took cognizance of the subject, after being sworn, and the judge explained to them the matters in dispute; and when they declared their decision, if he thought fit he might require each to declare the grounds of his decision. If this latter jury found a different verdict from the former, the punishment of the jury first impanelled was severe; they were immediately arrested and imprisoned, their lands and chattels were forfeited to the king, and they became for the future unworthy of credit; as Bracton says, they were no longer Othesworth." Proffatt on Jury Trial, § 32, citing Bracton, 292.

"Still later a more severe punishment was inflicted, that their wives and children should be turned out of their houses, which were to be demolished and their trees and meadows destroyed, but subsequently a pecuniary penalty was inflicted instead of this terrible penalty." Proffatt on Jury Trial, § 32, citing Co. Litt. 294b.

2. "For as much, as certain people of this realm doubtless to make a false oath than they ought to do, whereby much people are disherited

and lose their right; it is provided, that the king, of his office, shall from henceforth grant attaints, upon inquests in plea of land, or of freehold, or of anything touching freehold when it shall seem to him necessary." Stat. 3 Edw. I., c. 38, quoted in Proffatt on Jury Trial, § 32. "The evil [which is obviously the ground for the severe penalties prescribed for the punishment of an attainted jury] is further mentioned in 3 Hen. VII. c. 1; 11 Hen. VII. cc. 21, 24; 23 Hen. VIII. c. 3, which is entitled 'An act against perjury and untrue verdicts.'"

3. "In the 11 Hen. VI., c. 4, the remedy by attaint is still more facilitated, and this emphatic language is used. 'Our lord the king by the grievous complaint of his commons, considering the great mischiefs had within the realm, and yet not remedied, and also the great damage and disherison that cometh by the usual perjury of jurors impanelled upon inquests, as well in the courts of our lord the king, as of other, the which perjury doth abound and increase daily more than it was wont, for the great gifts that such jurors take of the parties in pleas sued in the said courts.' " Therefore it is enacted, etc. 11 Hen. VI. c. 4, quoted in Proffatt on Jury Trial, § 32, n. 1.

4. "The theory on which this writ of attaint was allowed, and on which the punishment was based which it



sources if the system were to continue to work out a satisfactory approximation to justice. This reinforcement could come only from those who had personal information to give, the one who had himself observed the fact in question, the *oyant et voyant*, the witness in the modern application of that term. Yet it was many years before evidence was commonly produced in court, or a defendant customarily allowed to clear himself by any other oath than that of the jury.

*Preappointed Witnesses.*—Probably the earliest use of the modern witness, he who testifies to the jury as to his own knowledge, was in connection with the preappointed bargain or transaction witnesses, to which brief reference has above been made.<sup>5</sup> Where individuals had been called in to witness a transaction, or had signed or otherwise authenticated a document as attesting or subscribing witnesses, the administrative expedient was adopted by the justices of joining them to the *jurata*, with whom they retired and in whose consultations they participated.<sup>6</sup>

*Other causes contributed* to compel the modern use of witnesses. As an accusing jury, the *jurata* must examine into the trustworthiness of the stories which had come to them. As soon as

awarded, was that the jurors being witnesses were qualified to declare the truth, and a mistake or wrong decision could only be attributed to wilful perjury and corruption. "It was, therefore, incumbent on those who discharged this office to make themselves acquainted with the matter in controversy by personal inspection and inquiry before the day of trial so as to be possessed of the requisite knowledge for forming a judgment." Prof. Bracton on Jury Trial, § 32, citing Bracton, 293.

The granting of new trials was naturally a welcome substitute for the *attaint*. *Infra*, § 306 *et seq.*

*Attaint* was abolished by Stat. 6 Geo. IV., c. 50.

5. *Supra*, § 269c.

6. "That the modern jury are the same with the *jurata patriæ* of Glanvill and Bracton, their name, number, and general duty, which to this days is *dicere veritatem*, sufficiently prove, although it is clear that a very great change has taken place

as to the manner of exercising their important functions. Even so lately as the reign of Henry III. they exercised a kind of mixed duty, partly as witnesses, partly as judges of the effect of testimony; in the case of a disputed deed the witnesses were enrolled amongst the jury, and the trial was *per patriam et per testes*; and to so great an extent was their character then of a testimonial nature, that it was doubted whether they were capable of deciding in the case of a crime secretly committed, and where the *patria* could have no actual knowledge of the fact (Bract. f. 173). It was, however, at this period, that the capacity of juries to exercise a far wider and more important function in judging of the weight of testimony and circumstantial evidence, began to be appreciated, for about this time the trial by ordeal fell into disuse; and when this superstitious invention, the ancient refuge of ignorance, had been rejected as repugnant to the more enlightened notions of the age,

the jury were required to weigh the testimony of others, the law of evidence came into being as a necessary adjunct. They must be guided and assisted by the judges before whom they appeared. The intuitive knowledge of the jury, mysteriously derived from a highly venerated but not very obvious source, had not at that time been discovered. Undoubtedly the main influence in bringing about these changes was that of judicial administration.<sup>7</sup> Fortescue (*temp.* Henry VI)<sup>8</sup> describes what is practically the function of a modern jury.<sup>9</sup> The full constitution of a jury of the present day may be said to date from the beginning of the Tudor period of English history;<sup>10</sup> a time when the power of the prerogative reached its highest point,<sup>11</sup> and the juries, venal and corrupt, acted as mere creatures of the Crown.<sup>12</sup> The jury in the time of the Stuarts became involved in the political quarrels between this prerogative of the Crown and the liberties of the subject;—to which attention is now to be directed.<sup>13</sup>

**§ 271b. (*Institution of the Jury; Second Stage*); A Lighter View.**—The foibles of our ancestors, the formality of their pro-

it happily became a matter of necessity to substitute a rational mode of inquiry by the aid of reason and experience for such inefficacious and unrighteous practices." Starkie, *Evidence*, pp. 8, 9, note (c), quoted in Proffatt on Jury Trial, § 27.

7. *Supra*, § 174.

8. De Laud. Leg., c. 26.

9. The opening of the case being described, the author continues:

"After which each of the parties has liberty to produce before the court all such witnesses as they please, or can get to appear on their behalf; who being charged upon their oaths shall give in evidence all that they know concerning which the parties are at issue; and if necessity so require, the witnesses may be heard and examined apart. . . . The whole of the evidence being gone through, the jurors shall confer together at their pleasure as they shall think most convenient upon the truth of the issue before them, with as much deliberation and leisure as they can well desire." Proffatt on Jury Trial, § 34.

10. Proffatt on Jury Trial, § 34.

11. Bushell's Case, Vaughan, 135 (1677).

12. "In ancient times, more especially in the reign of Henry VIII.; when from the devastation made in the civil wars, amongst the ancient nobility, and other causes disturbing the balance of the constitution, the influence of the crown was become exorbitant, and seems to have been at its zenith, to be accused of a crime against the state and to be convicted were almost the same thing. The one was usually so certain a consequence as the other that exclusively of Lord Dacres' case in the reign of Henry VIII., and that of Sir Nicholas Throckmorton in his daughter Mary's, the examples to the contrary are very rare. But those which do occur ought to be remembered in justice to the times they belong to, as a sort of balance for the reproach deservedly cast upon them, for the culpable facility of condemnation so conspicuous in most other instances." Hargrave's Note to Lord Dacres' Case, 1 How. St. Tr. 407 (1535). See also Throckmorton's Case, 1 How. St. Tr. 870 (1554).

13. See Trial of Seven Bishops in 1688, Macauley, *Hist. of Eng.*, ch. 8.

cedure, their reliances upon mechanical processes of doing things, are thus humorously stated by a well-informed writer. Discussing the alleged fondness of the citizens of England for the institution of the jury, as at present constituted, the critic, after considering briefly the jury in its first stage of development, proceeds to say: "Some centuries later, when a sort of jury had come into vogue, there was good cause to love it. It provided an alternative to the other modes of trial then existing, modes which were even more haphazard than the verdict of the jury, and which incidentally were less comfortable to an accused man. Compurgation was still used. On this plan, if five witnesses swore a man guilty of theft, he might escape by the oaths of six who had not seen him steal. But this resulted in frequent inaction, and, as the mediaeval idea of justice required that someone should be hanged, the other modes of settling a doubt were resorted to. Trial by battle and trial by ordeal were both methods of decision which should commend themselves to all but an accused person on account of their fine, bluff, open-handed, Anglo-Saxon characteristics. Trial by battle, beginning as it did with invocation, combined the attractions of a prize-fight with those of a religious ceremony. Trial by ordeal was more popular among prosecutors, because it eliminated the unpleasant chances of battle. The accused person, being bound hand and foot, was thrown into a pond. If he 'swam,' as it was expressed, he was taken out and dealt with as guilty. If he sank and drowned, his innocence was manifest, and he was buried with all decency and respect. But the horns of this dilemma were somewhat close-set. A not unreasonable dissatisfaction was felt amongst the criminal classes, which at that time constituted the bulk of the population. Even the red-hot harrows which were introduced as a reformed method of trial by ordeal, were felt to be but one step in the right direction. Accordingly, mediaeval genius turned with relief to the jury. This was then a great advance, and its popularity calls forth no surprise."<sup>1</sup>

§ 271c. (*Institution of the Jury*); Third Stage.—The jury, in its third and final stage, under the direction of the judge, weigh the statements of witnesses, the declarations of documents or otherwise follow the rational leadings of their perceptive faculties, upon materials of fact supplied by others. Here, as in the second stage, only a limited range of fact is submitted to them by the court; i. e., the issue as formulated by the pleadings.<sup>1</sup> The

1. 20 Jurid. Rev. pp. 61, 62.

1. *Infra*, § 942.

characteristic difficulty in this period, from the standpoint of judicial administration is created, as will be more fully noticed later, during the political struggles of England in certain centuries between democracy and the power of the Crown; in which the party of broader popular privilege found it expedient to exalt the power of the jury at the expense of that of the judges. A customary humane protest against the rigors of the criminal code in England gave further popular esteem to the jury as curbing the ferocity for blood of which judges were, frequently against their wills and consciences, the forced representatives. Treason and criminal libel, the instrumentalities by which that which the popular party regarded as tyranny, sought to crush and exterminate critics of its policy,<sup>2</sup> were by no means the only offenses in connection with which the jury earned, by their rebellion against the orders of the court, a popularity which the system rather curiously retains, under absolutely changed social and political conditions. The entire penal code of these centuries was tempered merely by the humanity of juries.<sup>3</sup>

**§ 272. (*Institution of the Jury*); Reserved Powers for the Judge.**— It is important to observe that the duties and powers of the jury are specific; the enumerated powers of the court are merely typical and symbolical of others not specified. No reserve of power or function exists in case of the jury. Functions of the mixed tribunal not assigned to the jury are all with the judge. The jury are but an *instrument* for the attainment of justice. The

2. *Infra*, § 304.

3. "Throughout all our constitutional history juries stand out prominently as bulwarks of liberty. At a time when judges were the mere minions of kings and cabals, juries more than held their own in popular favor. It was small wonder if the amateur band of verdict-givers was loved for its greater honesty. The trial of the Seven Bishops is a sufficient illustration of this. London went half-mad with joy over the jury which disagreed. Some of the jurymen, it was said, had been bribed by the Crown, but the obduracy of others resulted in acquittal. This was put down to the credit of the system. In the course of the next, the eighteenth century, juries did undoubted service to the cause of mercy by refusing to bring

in verdicts of guilty where judges, as was then their wont, strained the law to the breaking point of severity, notably in cases of treason and libel. But the law at that time, both Scots and English, was full of a cruelty which, strictly enforced, would disgust a Nero. Thus when a jury swore a five pound note to be of the value of thirty-nine shillings and eleven pence, in order to save a poor wretch from strangulation, Blackstone himself calls it 'pious perjury.' Pious or not, one can readily understand the popular approval which the jury system gained in these times, an approval which has lingered illogically, and which cannot now be reasonably supported by its ancient merits." 20 Jurid. Rev. p. 62.

responsibility for attaining it in the individual case and care for the general gain to the community at large, rest upon the judge. As power and function go hand in hand, his are the reserved, unenumerated powers which alone suffice for the proper execution of so extended a mandate as that for the administration of justice.

**§ 273. Function of the Jury.**— The special and distinctive function of the jury in a trial by judge and jury according to the established usages of the English law, is limited to the ascertainment of what is the truth as to a particular proposition of fact which the parties, through the operation of a preliminary branch of procedure called pleading, have seen fit to submit to their decision. To aid them in so doing, to guide their reasoning in an orderly and decorous manner, to prevent their being misled by unworthy considerations or influenced by weightless facts, is the primary object of the English law of evidence. Without bearing constantly in mind the existence of his impulsive, ignorant but usually well-intentioned yoke-fellow in the service of justice, it is frequently impossible to understand the action of the English or American judge in administering this branch of procedural law, or to gain any adequate appreciation of the real reasons for many of the rules of the law itself or as to the basis on which its principles of administration rest.

**§ 274. (*Function of the Jury*); Duty of Ascertainment.**— It is to be noted that this duty of the jury is limited to *ascertainment*. The court, as a whole, exists for the purpose of doing justice, according to certain conventionalized standards which the community has established and embodied in their substantive or procedural law, oral or written. But a necessary preliminary to the administration of justice is the ascertainment of truth. The parties come to the court in dispute as to the truth of a material proposition. One, the actor, asserts the affirmative of this proposition, the other, *reus* or nonactor, with equal positiveness, denies it. The existence of some fact essential to their respective rights is disputed between them. Until this dispute is determined justice cannot be done. The judge is powerless to act in the matter. If the fact is so important that the parties are willing to hazard the result of the litigation upon a decision as to its existence it becomes what Stephen calls<sup>1</sup> “fact in issue” and the ascertainment as to the truth regarding it is the special function of the jury. With the subsequent steps, in which the truth of the issue,

1. *Supra*, § 62.

as ascertained by the jury, is used as a basis for carrying out what the community regards as justice, the jury have normally no concern. They merely give a *verdict*, ascertain and *speak* the truth as to the issue.

**§ 275. (*Function of the Jury*); Jury Confined to the Issue.—**

This function of ascertainment is one which the jury is well adapted to discharge; and a very useful contribution to the administration of justice is thus effected by the introduction of the average common sense, experience and standards of conduct prevalent in the community for the purpose of determining what is the truth regarding disputed matters of fact with which the jurors are familiar. They are to use and of necessity do use the general knowledge of the community in dealing with the matters on which they are to pass and it seems eminently beneficial that parties litigant should have their conduct interpreted by the same standards as those under which the acts themselves were done. In dealing with the credibility of witnesses, the probability of alleged occurrences, the general weight of evidence, the jury are especially well qualified by experience to aid the court in this specific field of ascertaining the truth.

*It is commonly said that* "It is the office of the judge to instruct the jury in points of law; of the jury to decide on matters of fact."<sup>1</sup> But this, as is also stated elsewhere, seems too broad an assignment of function to the jury. The province of the jury is properly confined to deciding the truth of the issue, first ascertaining the constituent facts, and next, in many cases, proceeding to apply to these constituent facts the rule of law announced by the court. That the jury are, in all cases, to find the constituent facts is conceded. All inferences of fact — themselves matter of fact — are to be drawn by the jury. The conflicting testimony and inferences to be drawn from it are for them, and not for the court, either at the trial or on the motion for judgment *non obstante veredicto*.<sup>2</sup>

**§ 276. Comment on Facts.** — A difference of judicial opinion and practice exists as to whether the court, in discharge of its duty to promote the attainment of substantial justice, is at liberty while recognizing the right of the jury to judge as to the truth of the facts, including the credibility of witnesses and the general weight of evidence, to endeavor to assist them by his comments

1. Penn Co. v. Conlan, 101 Ill. 93, 107 (1881).

2. Lamb v. Prettyman, 33 Pa. Super Ct. 190 (1907).

in these and other particulars. In the normal and typical discharge of the jury's function of ascertaining truth, it would have the benefit of the suggestions and comments of the court, which while not affecting their autonomy and independence of action, furnished them help from a trained and disinterested mind, controlled by the wider social interests of litigation and enriched by long professional experience in dealing with questions which the jury are usually approaching for the first time. Such was trial by judge and jury at common law.

**§ 277. (*Comment on Facts*); English and Federal Courts.—**

The common law relation of judge and jury in this particular continues to be the practice of the English judges, a fact which assists largely to account for the very satisfactory efficiency of the system of jurisprudence over which they preside.

*Federal Courts.*—Such also is and for many years has been the practice of the judges of the Federal courts of the American Union.<sup>1</sup> In these courts the judge is permitted to comment on the weight of the evidence,<sup>2</sup> provided the jury be distinctly and cogently informed that it is mere advice and suggestion which they are entitled to disregard.

**§ 278. (*Comment on Facts*); The American Minority; Connecticut.—** The Federal courts do not stand entirely alone among the tribunals of America in preserving the common law landmarks as to the respective provinces of court and jury. Connecticut adopts

1. *Simmons v. United States*, 142 U. S. 148, 155 (1891); *U. S. v. Hall*, 44 Fed. 864 (1890); *Lovejoy v. U. S.* 128 U. S. 171, 173, 8 Sup. Ct. R. 77 (1888); *United States v. Philadelphia, etc., Co.*, 123 U. S. 113 (1887); *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545, 553 (1886); *McLanahan v. Ins. Co.* 1 Pet. 170, 182 (1828). "Trial by jury in the primary and usual sense of the term at the common law and in the American constitutions, . . . is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against

the law or the evidence." *Capitol Traction Co. v. Hof*, 174 U. S. 13 (1899). "But he (the judge), should take care to separate the law from the facts and to leave the latter in unequivocal terms to the jury as their true and peculiar province." *Starr v. U. S.* 153 U. S. 614 (1893). Where the decided weight of evidence on an issue is in favor of one party, it is not improper for the judge in a Federal court to express his opinion to that effect in his charge to the jury, leaving it to them, however, to determine the fact. *Butler v. Barrett & Jordan*, (Pa. 1904) 130 Fed. 944.

2. *State v. Moses*, 2 Dev. 452, 458 (1830); *Vicksburg R. Co. v. Putnam*, 118 U. S. 545, 553, 7 Sup. 1 (1886).

a rule of administration to which no just exception can be taken.<sup>1</sup> The court, for example, may caution a jury which has heard the evidence of a child of nine, who has talked the matter over with his mother, to remember the aptitude of such a child to repeat what he has heard.<sup>2</sup> Where the court submitted the questions of fact to the jury, without any direction as to how they should find in regard to them that the court either directly or inferentially expressed its opinion on the facts is not error in the absence of abuse of discretion.<sup>3</sup> But it has been very properly held that no instruction which tends to supplant the reasoning of the jury by that of the judge is permissible.<sup>4</sup>

**§ 279. (*Comment on Facts; the American Minority*); Minnesota.**— In like manner, the State of Minnesota permits a trial court to express in civil cases to the jury in its instructions to them its opinion of facts in issue, provided the ultimate determination as to the truth thereof is left to them.<sup>1</sup> As in other states, no objection can reasonably be found to an assumption by the court of the existence of an uncontroverted fact.<sup>2</sup>

**§ 280. (*Comment on Facts; the American Minority*); Pennsylvania.**— In Pennsylvania, the judge is permitted to comment on the evidence provided he does so fairly,<sup>1</sup> and is careful

1. Sackett v. Carroll, 80 Conn. 374, 68 Atl. 442 (1908).

2. Banks v. Connecticut Ry. & Lighting Co. 79 Conn. 116, 64 Atl. 14 (1906).

3. Crotty v. Danbury, 79 Conn. 379, 65 Atl. 147 (1906); Shupack v. Gordon, 79 Conn. 298, 64 Atl. 740 (1906).

4. To the same effect, regarding proof of contradictory statements, see Bradley v. Gorham, 77 Conn. 211, 58 Atl. 698 (1904).

1. Bonness v. Felsing, 97 Minn. 227, 106 N. W. 909 (1906). Without a statute on the subject, the trial court may express to the jury its opinion of the facts (People v. Vane, 12 Wend. 78; People v. White, 14 Wend. 111; People v. Rathbun, 21 Wend. 509), though it may not, where there is a fair conflict of evidence, direct the jury how they shall find them. If a party fears undue influence upon the jury of what the court says in

regard to the facts, he may request an instruction that the jury, and not the court, are to determine the facts." Ames v. Cannon River Mfg. Co., 27 Minn. 245, 6 N. W. 787 (1880). See also First Nat. Bank v. Holan, 63 Minn. 525, 65 N. W. 952 (1896).

2. Johnson v. Crookston Lumber Co. (Minn. 1904) 100 N. W. 225.

1. Sperry v. Seidel, 218 Pa. 16, 66 Atl. 853 (1907); Bernstein v. Walsh, 32 Pa. Super. Ct. 392 (1907). "It is well settled that it is not error for a judge in his charge to the jury, to express his opinion upon the facts, if done fairly; in some cases it might be his duty to do so, provided he does not give binding instructions or interfere with the province of the jury. Com. v. Johnson, 133 Pa. 293; Com. v. Warner, 13 Pa. Super. Ct. 461. Bernstein v. Walsh, 32 Pa. Super. Ct. 392 (1907).



to explain to the jury that they are not bound to follow his suggestions.<sup>2</sup> In like manner, he may properly comment upon the fact that a party has not seen fit to call a witness upon whose statement he is relying.<sup>3</sup> In all cases, he must leave the jury free to determine the case on the evidence.<sup>4</sup> Therefore, a charge which removes from the jury their right to pass upon the credibility of witnesses is improper.<sup>5</sup> Nor may the judge assume the existence of material facts,<sup>6</sup> except where these are undisputed.<sup>7</sup>

Excellent administrative considerations are thus stated by the Supreme Court:<sup>8</sup> "As a general rule, that the judge should submit the facts, without expressing his opinion thereon, and without making an argument in favor of either side, is safer, more satisfactory, and better accords with the rights of parties to have disputed facts decided by the jury. It is difficult for a judge to act as an advocate for one of the parties without giving just cause of offence. Exceptional cases arise where it is the duty of the judge to express his opinion of the facts and guide the minds of the jury to a correct view of the evidence; and, therefore, it has been settled that when he does so without misleading or controlling them in the disposition of the facts, there is no ground for reversing. Often the court below is better able than the court of review to judge of the propriety or necessity of commenting on the evidence or the character of witnesses. The address of counsel to the jury may have been the moving cause, and of that a court of review would know nothing. For instance, if a witness testify to a decisive fact, yet inconsistent with other testimony, and counsel presses on the jury that if they disbelieve the witness he is perjured, the court could properly inform the jury that their adverse verdict would not convict him of perjury, and that it would only show they thought him mistaken."

**§ 281. (*Comment on Facts*); American Majority.**—The great majority of the American states have in their constitutions

2. *Knee v. McDowell*, 25 Pa. Super Ct. 641 (1904).

3. *Rondinella v. Metropolitan Life Ins. Co.* 24 Pa. Super Ct. 293 (1904).

4. *Lappe v. Gfeller*, 211 Pa. 462, 60 Atl. 1049 (1905). "It is the practice, and we have held that the trial judge may in his charge express his opinion and make comments on the testimony, witnesses or parties, provided he leave the jury free to de-

cide the case on the evidence." *Lappe v. Gfeller*, 211 Pa. 462, 60 Atl. 1049 (1905).

5. *Thomas v. Law*, 25 Pa. Super Ct. 19 (1904).

6. *Conger v. Wiggins*, 208 Pa. 122, 57 Atl. 341 (1904).

7. *Wolf Co. v. Western Union Tel. Co.* 24 Pa. Super. Ct. 129 (1904).

8. *Leibig v. Steiner*, 94 Pa. 466, 472 (1880).

and statutory legislation turned "trial by judge and jury" as it existed at common law into "trial by jury"—a very anomalous and modern type of judicial procedure. The attempt, steadily pursued by these, is apparently to reduce the function of a presiding judge to one substantially analogous to that of the moderator of a New England town-meeting.<sup>1</sup> In this conception of the proper position of a presiding judge, his duty is merely to preserve order in the courtroom, rule as requested upon sufficient points of evidence or substantive law to enable the defeated party to take an appeal to a higher court; and, having done this, simply turn the case over to the joint control of counsel acting as masters of ceremony and of the jury sitting as arbitrators between the litigants.

*Judicial Decision.*—Where such statutory or constitutional enactments have not been made, comment by the judge is restrained by judicial decision.<sup>2</sup>

*In pursuance of the line of thought* above referred to as dominating a majority of American courts, a judge is forbidden to comment upon the facts of any given case in instructing or otherwise addressing the jury,<sup>3</sup> or even in their hearing intimating

1. "I am compelled, though reluctantly, to deny the motion for a new trial in this case. My reluctance arises from the fact that, in my opinion, the weight of the evidence did not sustain the contention that excessive force was used in ejecting plaintiff from the train, but that issue was submitted to the jury, and was decided in favor of the plaintiff, and as, under our judicial system, the trial judge in a civil jury case has little more power or authority than a 'mentor at a town meeting,' I am not at liberty to disturb the jury's finding on that issue." This phraseology of the trial judge was repudiated by the appellate court. But the characterizations of the position of a presiding judge seems nevertheless, a graphic one. *Clark v. Ry. Co.* 37 Wash. 537 (1905).

2. *Alabama.*—*Huff v. Cox*, 2 Ala. 310 (1841).

*Arkansas.*—*Jenkins v. Tobin*, 31 Ark. 306 (1876).

*Georgia.*—*Wannack v. Mayor*, 53 Ga. 162 (1874).

*Illinois.*—*Frame v. Badger*, 79 Ill. 441 (1875).

*Indiana.*—*Union, etc., Co. v. Buchanan*, 100 Ind. 63, 81 (1884); *Case v. Weber*, 2 Ind. 108 (1850).

*North Carolina.*—*Crutchfield v. Richmond, etc., R. Co.*, 76 N. C. 320 (1877).

*Texas.*—*Ross v. State*, 29 Texas 499 (1861).

3. *Alabama.*—*Loveman v. Birmingham Ry., L. & P. Co.*, (Ala. 1907) 43 So. 411.

*California.*—*Manning v. App. Consol. Gold Min. Co.*, (Cal. 1906) 84 Pac. 657.

*Florida.*—*Supreme Lodge, K. P. v. Lipscomb*, (Fla. 1905) 39 So. 637.

*Georgia.*—*Georgia Co-Operative Fire Ass'n v. Lanier*, 1 Ga. App. 186, 57 S. E. 910 (1907).

*Idaho.*—*Kroetch v. Empire Mill Co.*, (Idaho 1903) 74 Pac. 868.

*Illinois.*—*People v. Peden*, 109 Ill. App. 560 (1903).

*Indiana.*—*Indianapolis Traction & Terminal Co. v. Richey*, (Ind. App. 1907) 80 N. E. 170; *Indianapolis St.*

the opinion he has formed from the evidence; and a caution to disregard this observation, addressed directly to the jury, may well

*Ry. Co. v. Taylor*, (Ind. 1905) 72 N. E. 1045.

*Iowa*.—*Bauer v. City of Dubuque*, (Iowa 1904) 98 N. W. 355.

*Massachusetts*.—*Rubinovitch v. Boston Elevated Ry. Co.*, (Mass. 1906) 77 N. E. 895.

*Missouri*.—*McReynolds v. Quincy, O. & K. C. R. Co.*, 115 Mo. App. 676, 91 S. W. 446 (1906); *Smith v. Sovereign Camp of Woodmen of the World*, 179 Mo. 119, 77 S. W. 862 (1903).

*Montana*.—*Harrington v. Butte & Boston Min. Co.*, (Mont. 1905) 83 Pac. 467.

*Nebraska*.—*Wiese v. Gerndorf*, (Neb. 1906) 106 N. W. 1025.

*New York*.—*Corrigan v. Funk*, 96 N. Y. Supp. 910, 109 App. Div. 846 (1905); *Ward v. Metropolitan St. Ry. Co.* 90 N. Y. Supp. 897, 99 App. Div. 126 (1904).

*North Carolina*.—*Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201 (1905).

*Oklahoma*.—*Goodwin v. Greenwood*, 16 Okl. 489, 85 Pac. 1115 (1906).

*Oregon*.—*Keen v. Keen*, 90 Pac. 147, 10 L. R. A. (N. S.) 504 (1907).

*South Carolina*.—*Nickles v. Seaboard, etc., Ry.*, 74 S. C. 102, 54 S. E. 255 (1906); *Ballentine v. Hammond*, 68 S. C. 153, 46 S. E. 1000 (1904).

*Texas*.—*Missouri, K. & T. Ry. Co. of Texas v. Avis*, 91 S. W. 877 (1906); *Western Union Telegraph Co. v. Campbell*, 91 S. W. 312 (1905).

*Wisconsin*.—*Ferguson v. Truax*, (Wis. 1907) 110 N. W. 395.

Comments on the evidence and in-sinuations and intimations of the court as to the weight of the evidence or credibility of the witnesses should be avoided in instructions. *Imboden v. Imboden's Estate*, (Mo. App. 1905) 86 S. W. 263.

4. *Georgia*.—*Atlantic Coast Line R. Co. v. Powell*, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769 (1907).

*Idaho*.—*McKissick v. Oregon Short Line Ry. Co.*, 13 Idaho 195, 89 Pac. 629 (1907).

*Iowa*.—*Paxton v. Knox*, (Iowa 1904) 98 N. W. 468.

*Texas*.—*Thomson v. Kelley*, 97 S. W. 326 (1906); *Bath v. Houston & T. C. Ry. Co.*, 78 S. W. 993 (1904).

*Washington*.—*Patten v. Town of Auburn*, 84 Pac. 594 (1906).

*Wisconsin*.—*Davis v. Dregne*, 97 N. W. 512 (1903).

A statement commenting on the evidence violates no right of a party where it was not made in the presence of the jury. *Coulter v. Barker's Estate*, (Minn. 1906) 107 N. W. 823. It is equally objectionable to endorse a remark made by counsel. *Georgia Ry. & Electric Co. v. Baker*, 1 Ga. App. 832, 58 S. E. 88 (1907); *Perkins v. Knisely*, 204 Ill. 275, 68 N. E. 486 (1903). A prohibition against instructing a jury as to matters of fact does not apply to incidental remarks by a trial judge during the examination of witnesses. *Partelow v. Newton & B. St. Ry. Co.* (Mass. 1907) 81 N. E. 894. See also *Fitzgerald v. Benner*, 219 Ill. 485, 76 N. E. 709 (1906); *Continental Nat. Bank v. First Nat. Bank*, 1 Tenn. Ch. App. 449 (1902).

Out of the hearing of the jury the court may with propriety address a severe reprimand to a witness or even threaten him with a prosecution for perjury under certain conditions. *Zink v. Lahart*, (N. D. 1907) 110 N. W. 931.

Regrets as to rule of law. Remarks by the judge indicating a dissent from the position of the appellate tribunal as the law of the case is not objectionable;—provided he yet loyally applies the rule from which he dissents. *Lee v. Williams*, 30 Pa. Super. Ct. 349, 357 (1906).

Strictures on counsel by way of reprimand not indicating any infer-

be regarded as ineffective for the purpose.<sup>5</sup> The error is rendered the more prejudicial where a judge incorrectly states to the jury that there is no evidence to a given effect;<sup>6</sup> or assumes that there is evidence of a particular fact where in reality there is none.<sup>7</sup>

**§ 282. (Comment on Facts; American Majority); Assumption of Facts.**—The judge will not give expression to any idea which could only exist properly in his mind if the truth of a controverted fact were proved or disproved.<sup>1</sup> In like manner, a judge cannot assume that evidence has been introduced which has not, in

ence the court may have drawn from the evidence is not objectionable. *Chicago City Ry. Co. v. Shaw*, 220 Ill. 532, 77 N. E. 139 (1906); *Finan v. New York Cent. & H. R. R. Co.*, 97 N. Y. Supp. 859, 111 App. Div. 383 (1906). Subsequent attempts to remove the impression so created may properly, at times, be deemed as of doubtful efficacy. *Kramer v. Northwestern Elevator Co.*, (Minn. 1904) 98 N. W. 96. Where, however, such remarks tend to prejudice unreasonably the cause of the party, error may be committed. *Chicago City Ry. Co. v. Enroth*, 113 Ill. App. 285 (1904); *Kramer v. Northwestern Elevator Co.*, (Minn. 1904) 98 N. W. 96; *Kleinert v. Federal Brewing Co.*, 95 N. Y. Supp. 406, 107 App. Div. 485 (1905); *Dallas Consol. Electric St. Ry. Co. v. McAllister*, (Tex. Civ. App. 1905) 90 S. W. 933. The same result follows under the general rule where the comments of the court are calculated to impair, with the jury, the weight of the evidence itself. *Dallas Consol. Electric St. Ry. Co. v. McAllister*, (Tex. Civ. App. 1905) 90 S. W. 933.

**Contradiction.**—A judge is not at liberty to call attention to what he deems a contradiction in the evidence. *Merritt v. Bush*, 122 Ill. App. 189 (1905). Where, however, the fact is uncontroverted no error may have been committed. *Herrstrom v. Newton & N. W. R. Co.*, (Iowa 1905) 105 N. W. 436.

5. *Davis v. Dregne*, (Wis. 1903) 97 N. W. 512.

6. *Rose v. Kansas City*, 125 Mo. App. 231, 102 S. W. 578 (1907); *McLaughlin v. Syracuse Rapid Transit Ry. Co.*, 115 N. Y. App. Div. 774, 101 N. Y. Suppl. 196 (1906). Statement of an obvious and uncontroverted inference carries no prejudice. *Webb v. Atlantic Coast Line R. Co.*, 76 S. C. 193, 56 S. E. 954, 9 L. R. A. (N. S.) 1218 (1907).

7. *Steltemeier v. Barrett*, 115 Mo. App. 323, 91 S. W. 56 (1905); *Texas & Louisiana Lumber Co. v. Rose*, (Tex. Civ. App. 1907) 103 S. W. 444.

**Comment in questions.**—The comment may take the form of a question—as “What would you have had him (plaintiff in an action for personal injuries) do more than he did do?” *Davis v. Dregne*, (Wis. 1903) 97 N. W. 512.

**Punning or mere judicial jocularity** on the part of a presiding judge will not be regarded as reasonable, if the remark may be construed as a prejudicial comment. *Perkins v. Knisely* 204 Ill. 275, 68 N. E. 486 (1903).

1. *Alabama.*—*Louisville & N. R. Co. v. Christian-Moerlein Brewing Co.*, 43 So. 723 (1907).

*Arkansas.*—*Western Coal & Mining Co. v. Jones*, 87 S. W. 440 (1905).

*Florida.*—*Southern Pine Co. v. Powell*, 37 So. 570 (1904).

*Georgia.*—*Atlantic & B. Ry. Co. v. Hattaway*, 126 Ga. 333, 55 S. E. 21 (1906)

*Illinois.*—*Springfield Consol. Ry. Co. v. Gregory*, 122 Ill. App. 607 (1905); *Forster, Waterbury & Co. v.*

fact, been received;<sup>2</sup> nor that there is no other evidence on a given point.<sup>3</sup>

**§ 283. (Comment on Facts; American Majority); Refusal of Assumptive Instructions.**—It follows that the judge will not give a charge at the request of counsel which presents the feature of assuming the existence or nonexistence of certain facts.<sup>1</sup>

Peer, 120 Ill. App. 199 (1905); Swift & Co. v. Mutter, 115 Ill. App. 374 (1904).

*Indiana.*—Sasse v. Rogers, 81 N. E. 590 (1907); Manion v. Lake Erie & W. Ry. Co. 80 N. E. 166 (1907); Indianapolis St. Ry. Co. v. O'Donnell, 73 N. E. 163 (1905).

*Iowa.*—Hanson v. City of Cresco, 109 N. W. 1109 (1906).

*Kentucky.*—Baltimore & O. S. W. R. Co. v. Sheridan, 101 S. W. 928, 31 Ky. L. Rep. 109 (1907); McGrew's Ex'r v. O'Donnell, 28 Ky. Law Rep. 1366, 92 S. W. 301 (1906); Straight Creek Coal Co. v. Haney's Adm'r, 27 Ky. L. Rep. 1117, 87 S. W. 1114 (1905).

*Maryland.*—Baltimore & O. R. Co. v. State, 64 Atl. 304 (1906).

*Michigan.*—Karrer v. City of Detroit, 12 Detroit Leg. N. 765, 106 N. W. 64 (1905).

*Mississippi.*—American Express Co. v. Jennings, 38 So. 374 (1905).

*Missouri.*—York v. City of Everton, 121 Mo. App. 640, 97 S. W. 604 (1906); Klein v. St. Louis Transit Co., 117 Mo. App. 691, 93 S. W. 281 (1906); Stripling v. Maguire, 108 Mo. App. 594, 84 S. W. 164 (1904).

*Montana.*—Gallick v. Bordeaux, 78 Pac. 583 (1904).

*New York.*—Durst v. Ernst, 91 N. Y. Supp. 13, 45 Misc. Rep. 627 (1904).

*North Carolina.*—Brewster v. Corporation of Elizabeth City, 54 S. E. 784 (1906); Peoples v. North Carolina R. Co., 49 S. E. 87 (1904).

*Rhode Island.*—Taber v. New York, P. & B. R. Co. 28 R. I. 269, 67 Atl. 9 (1907).

*Texas.*—Texas Cent. R. Co. v. Wal-

die, 101 S. W. 517 (1907); San Antonio & A. P. Ry. Co. v. Fisher, 99 S. W. 1042 (1907); International & G. N. R. Co. v. Brice, 95 S. W. 660 (1906); Chicago, R. I. & M. Ry. Co. v. Harton, 81 S. W. 1236 (1904).

*Washington.*—Hall v. West & Slade Mill Co., 81 Pac. 915 (1905).

No prejudice exists if the fact be undisputed. Cowles v. Carrier, 101 S. W. 916, 31 Ky. L. Rep. 229 (1907). Indicating that a certain fact is entitled to consideration is not objectionable. Crosby v. Wells, 73 N. J. L. 790, 67 Atl. 295 (1907).

2. Arnd v. Aylesworth, (Iowa 1907) 111 N. W. 407; Brazis v. St. Louis Transit Co., 102 Mo. App. 224, 76 S. W. 708 (1903).

3. Duncan v. St. Louis & S. F. R. Co., (Ala. 1907) 44 So. 418. This prohibition extends to an announcement that there is no evidence on a given point. Patten v. Town of Auburn, 41 Wash. 644, 84 Pac. 594 (1906).

1. *Alabama.*—Birmingham Ry., Light & Power Co. v. Hayes, 44 So. 1032 (1907); Birmingham Ry., Light & Power Co. v. Moore, 43 So. 841 (1907); Fletcher v. Prestwood, 43 So. 231 (1907).

*Arkansas.*—Western Coal & Mining Co. v. Burns, 84 Ark. 74, 104 S. W. 535 (1907).

*California.*—Matteson v. Southern Pac. Co., 92 Pac. 101 (1907); Lyons v. United Moderns, 83 Pac. 804 (1906); Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521 (1905).

*Connecticut.*—Kelley v. Town of Torrington, 80 Conn. 378, 68 Atl. 855 (1908).

*Florida.*—Lewter v. Tomlinson, 54 Fla. 215, 44 So. 935 (1907).

The degree of prejudice is intensified where a fact is assumed of which there is no evidence.<sup>2</sup> It is equally objectionable to give an instruction assuming, as part of a hypothesis, facts not shown to exist;<sup>3</sup> or giving to certain facts an undue prominence as factors in the case.<sup>4</sup> Nor will he assume as matter of law, at the request of counsel, that which is a matter of fact for the jury.<sup>5</sup> He cannot be asked, for the same reason, to rule that there is no evidence on a given point.<sup>6</sup>

*Georgia*.—Augusta Naval Stores Co. v. Young, 124 Ga. 261, 52 S. E. 898 (1905).

*Illinois*.—Illinois Cent. R. Co. v. Johnson, 221 Ill. 42, 77 N. E. 592 (1906); Papineau v. White, 117 Ill. App. 51 (1904); Chicago & A. Ry. Co. v. Bell, 111 Ill. App. 280 (1903).

*Indiana*.—Beery v. Driver, 76 N. E. 967 (1906).

*Louisiana*.—Muscarelli v. Hodge Fence & Lumber Co., 45 So. 268 (1907).

*Massachusetts*.—Clark v. American Express Co., 83 N. E. 365 (1908); Hayes v. Moulton, 80 N. E. 215 (1907).

*Missouri*.—Christian v. McDonald, 127 Mo. App. 630, 106 S. W. 1104 (1908); Ghery v. Zey, (Mo. App. 1908) 107 S. W. 418; Garner v. Metropolitan St. Ry. Co., (Mo. App. 1908) 107 S. W. 427.

*Montana*.—Stephens v. Elliott, 36 Mont. 92, 92 Pac. 45 (1907); Lindley v. McGrath, 34 Mont. 564, 87 Pac. 961 (1906).

*North Carolina*.—Horton v. Seaboard Air Line Ry., 145 N. C. 132, 58 S. E. 993 (1907); Williams v. Atlantic, etc., R. Co., 140 N. C. 623, 53 S. E. 448 (1906).

*Ohio*.—Cleveland, C. C. & St. L. Ry. v. Sivey, 27 Ohio Cir. Ct. R. 248 (1905); Northern Ohio Ry. Co. v. Rigby, 69 Ohio St. 184, 68 N. E. 1046 (1903).

*Oklahoma*.—Chicago, R. I. & P. Ry. Co. v. Stibbs, 17 Okla. 97, 87 Pac. 293 (1906).

*Pennsylvania*.—Baker v. Moore, 29 Pa. Super. Ct. 301 (1905); McHenry v. Bulifant, 207 Pa. St. 15, 56 Atl. 226 (1903).

*South Dakota*.—Richardson v. Dybedahl, (S. D. 1904) 98 N. W. 164.

*Texas*.—Houston & T. C. R. Co. v. Gyeck, 103 S. W. 703 (1907); May v. Hahn, 97 S. W. 132 (1906); Houston & T. C. R. Co. v. Burns, 90 S. W. 688 (1905).

*West Virginia*.—Cobb v. Dunlevie, (W. Va. 1908) 60 S. E. 384. Requests intimating to the jury the inference to be drawn from the facts therein carefully set out in detail are properly refused. Insurance Co. of North America v. Leader, 121 Ga. 260, 48 S. E. 972 (1904); Picard v. Beers, (Mass. 1907) 81 N. E. 246; Brady v. Kansas City, St. L. & C. R. Co., 206 Mo. 509, 102 S. W. 978 (1907); St. Louis, I. M. & S. Ry. Co. v. Stewart, 201 Mo. 491, 100 S. W. 583 (1907); Weaver v. Southern Ry. Co., 76 S. C. 49, 56 S. E. 657 (1907).

2. Karl v. Juniata County, 206 Pa. St. 633, 56 Atl. 78 (1903).

3. Elliott v. Howison, (Ala. 1906) 40 So. 1018.

4. Weil v. Fineran, (Ark. 1906) 93 S. W. 568.

5. Central of Georgia Ry. Co. v. Hyatt, (Ala. 1907) 43 So. 867.

6. Montgomery St. Ry. Co. v. Smith (Ala. 1905) 39 So. 757; Montgomery St. Ry. v. Rice, (Ala. 1905) 38 So. 857; Dietrich v. City of Lancaster, 212 Pa. 566, 61 A. 1112 (1905).

**§ 284. (Comment on Facts; American Majority); Uncontroverted Facts.**—The administrative reason why a judge is not at liberty to instruct the jury on the basis of an assumption of the existence of a disputed fact, is that so doing implies an intimation to the jury as to what effect the evidence on that point has had on his mind. This makes such an instruction a comment upon the evidence within the prohibition of the substantive or procedural law in the majority of the American states.<sup>1</sup> An instruction, however, may properly assume the existence of facts where the evidence with respect to them is conclusive and uncontroverted.<sup>2</sup> The same result follows where a fact is admitted.<sup>3</sup> The court may even

1. *North Georgia Milling Co. v. Henderson Elevator Co.*, 130 Ga. 113, 60 S. E. 258 (1908).

2. *Alabama*.—*Birmingham Ry., Light & Power Co. v. Jones*, 41 So. 146 (1906); *Emrich v. Gilbert Mfg. Co.*, 138 Ala. 316, 35 So. 322 (1903).

*Georgia*.—*Georgia S. & F. Ry. Co. v. Stanley*, 1 Ga. App. 487, 57 S. E. 1042 (1907); *W. A. Greer & Co. v. Raney*, 120 Ga. 290, 47 S. E. 939 (1904); *Eagle & Phenix Mills v. Heron*, 119 Ga. 389, 46 S. E. 405 (1904).

*Illinois*.—*Reed v. Manierre*, 124 Ill. App. 127 (1906); *Illinois Cent. R. Co. v. Becker*, 119 Ill. App. 221 (1905); *Chicago Union Traction Co. v. Newmiller*, 116 Ill. App. 625 (1904).

*Indiana*.—*Indianapolis Traction & Terminal Co. v. Smith*, 77 N. E. 1140 (1906); *Terre Haute Electric Co. v. Kiely*, 72 N. E. 658 (1904).

*Iowa*.—*Ryan v. Incorporated Town of Lone Tree*, 98 N. W. 287 (1904).

*Kentucky*.—*Henning v. Stevenson*, 26 Ky. L. Rep. 159, 80 S. W. 1135 (1904).

*Missouri*.—*Holton v. Cochran*, 208 Mo. 314, 106 S. W. 1035 (1907); *Cahill v. Chicago & A. Ry. Co.*, 205 Mo. 393, 103 S. W. 532 (1907); *Stoeber v. St. Louis Transit Co.*, 203 Mo. 702, 102 S. W. 651 (1907); *McManus v. Metropolitan St. Ry. Co.*, 116 Mo. App. 110, 92 S. W. 176 (1906).

*Nebraska*.—*First Nat. Bank v. Bower*, 98 N. W. 834 (1904); *Oelke v. Theis*, 97 N. W. 588 (1903).

*South Carolina*.—*Wilson v. Moss*, 79 S. C. 120, 60 S. E. 313 (1908); *Murdough v. Tuten*, 76 S. C. 502, 57 S. E. 547 (1907); *Jennings v. Edgefield Mfg. Co.*, 72 S. C. 411, 52 S. E. 113 (1905).

*Texas*.—*Western Cottage Piano & Organ Co. v. Anderson*, 101 S. W. 1061 (1907); *Heisig Rice Co. v. Fairbanks, Morse & Co.*, 100 S. W. 959 (1907); *San Antonio & A. P. Ry. Co. v. Wood*, 92 S. W. 259 (1905).

*Washington*.—*Lownsdale v. Gray's Harbor Boom Co.*, 36 Wash. 198, 78 Pac. 904 (1904).

*Wisconsin*.—*Seivert v. Galvin*, 113 N. W. 680 (1907). Where, in an action for the price of goods sold, the documentary evidence constitutes a clear contract, it is not error so to instruct the jury. *McCullough Bros. v. Armstrong*, 118 Ga. 424, 45 S. E. 379 (1903). At least a *prima facie* case should be established. *Chicago City Ry. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087 (1903) [*affirming* 102 Ill. App. 202 (1902)]. A fact judicially known to the court will be taken as proved. *Spiking v. Consol. Ry. & Power Co.*, (Utah 1908) 93 Pac. 838.

3. *Georgia*.—*Cooley v. Bergstrom*, 3 Ga. App. 496, 60 S. E. 220 (1908); *Fitzgerald Cotton Oil Co. v. Farmers' Supply Co.*, 3 Ga. App. 212, 59 S. E. 713 (1907).

*Illinois*.—*Shults v. Shults*, 229 Ill. 420, 82 N. E. 312 (1907); *Compher*

legitimately assume that a fact exists where it has been proved beyond the range of controversy.<sup>4</sup> Where the undisputed facts clearly and necessarily establish a legal conclusion, the court may so instruct the jury. To do so is not a violation of provisions of law forbidding a judge to express or intimate his opinion as to what has or has not been proved, such inhibition applying only where the evidence is conflicting.<sup>5</sup> A fact is not to be assumed as proved merely because it is alleged in the pleadings and not referred to in the evidence by either party.<sup>6</sup>

*The elements of damage* universally recognized by the courts may be stated where the fact of injury is not disputed.<sup>7</sup> It is, however, prejudicial error for the court, in a personal injury action, to state to the jury, in his charge, his calculation of the amount of damages sustained by plaintiff by loss of employment.<sup>8</sup>

**§ 285. (Comment on Facts; American Majority); Weight and Credibility.**—The judge will not, in these jurisdictions, be permitted to give the jury his impression as to the probative force of the testimony given by a witness, or any set of witnesses,<sup>1</sup> the

*v. Browning*, 219 Ill. 429, 76 N. E. 678 (1906).

*Kentucky*.—*Louisville & N. R. Co. v. Crow*, 107 S. W. 807 (1908).

*Missouri*.—*Cramer v. Nelson*, 107 S. W. 450 (1908); *Dee v. Nachbar*, 106 S. W. 35 (1907).

*New York*.—*Smith v. New York Anti-Saloon League*, 106 N. Y. S. 251, 121 App. Div. 600 (1907).

*South Carolina*.—*Latour v. Southern Ry.*, 71 S. C. 532, 51 S. E. 265 (1905).

*Washington*.—*Lownsdale v. Gray's Harbor Boom Co.*, 36 Wash. 198, 78 Pac. 904 (1904).

4. *Shafer v. Russell*, (Utah 1905) 79 Pac. 559; *Halverson v. Seattle Electric Co.*, 35 Wash. 600, 77 Pac. 1058 (1904).

5. *Colorado*.—*Craig v. Leschen & Sons Rope Co.*, 87 Pac. 1143 (1906).

*Georgia*.—*Georgia Ry. & Electric Co. v. Cole*, 1 Ga. App. 33, 57 S. E. 1026 (1907); *Southern Ry. Co. v. Chitwood*, 119 Ga. 28, 45 S. E. 706 (1903).

*Illinois*.—*Hartford Life Ins. Co. v.*

*Sherman*, 223 Ill. 329, 78 N. E. 923 (1906) [*affirming judgment*, 123 Ill. App. 202 (1905)].

*Indiana*.—*Town of Sellersburg v. Ford*, 79 N. E. 220 (1906).

*Iowa*.—*Murphy v. Hiltbridle*, 109 N. W. 471 (1906).

*Missouri*.—*Deschner v. St. Louis & M. R. R. Co.*, 200 Mo. 310, 98 S. W. 737 (1906).

*Texas*.—*Commercial Telephone Co. v. Davis*, 96 S. W. 939 (1906); *Texas & N. O. Ry. Co. v. Moers*, 97 S. W. 1064 (1906).

6. *Harrison v. Western Union Tel. Co.*, 136 N. C. 381, 48 S. E. 772 (1904).

7. *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435 (1904); *Longan v. Weltmer*, 180 Mo. 322, 64 L. R. A. 969, 79 S. W. 655 (1904); *Jennings v. Edgefield Mfg. Co.*, 72 S. C. 411, 52 S. E. 113 (1905).

8. *Heller v. Donellan*, 90 N. Y. Suppl. 352, 45 Misc. Rep. 355 (1904).

1. *Lingle v. Scranton Ry. Co.*, 214 Pa. 500, 63 Atl. 890 (1906); *Coulter v. B. F. Thompson Lumber Co.*, (Tenn.



probability of their story<sup>2</sup> or the general weight of the evidence,<sup>3</sup> including the credibility of those who testify.<sup>4</sup> He cannot intimate to the jury as to what inference he draws from the evidence

1906) 142 Fed. 706. An instruction that preponderance of evidence is that which carries conviction with it, depends on the character of the witness, his intelligence, his opportunity for knowledge, and not necessarily on the number of witnesses, is not a charge on the facts. *Montgomery v. Seaboard Air Line Ry.*, 73 S. C. 503, 53 S. E. 987 (1906).

2. *Norman Printers' Supply Co. v. Ford*, 77 Conn. 461, 59 Atl. 499 (1904); *Belt Ry. Co. of Chicago v. Confrey*, 111 Ill. App. 473 (1903); *Hayes v. Moulton*, (Mass. 1907) 80 N. E. 215; *Imboden v. Imboden's Estate*, (Mo. App. 1905) 86 S. W. 263. It is for the jury to say whether the testimony of a witness that he did not hear the ringing of a bell or the blowing of a whistle at the crossing, although he listened, shall be given equal credit with the testimony of a witness, similarly situated, that he did hear. *McLean v. Erie R. Co.*, (N. J. 1904) 57 Atl. 1132.

The judge cannot announce an irreconcilable conflict in the testimony. The jury should be allowed to harmonize it if they can. *Segaloff v. Interurban St. Ry. Co.*, 102 N. Y. Suppl. 509 (1907).

3. *Alabama*.—*Morris v. McClellan*, 45 South. 641 (1908); *Louisville & N. R. Co. v. Higginbotham*, 44 South. 872 (1907); *Fletcher v. Prestwood*, 43 So. 231 (1907).

*Colorado*.—*Diamond Rubber Co. v. Harryman*, 92 Pac. 922 (1907).

*Georgia*.—*Proctor v. Pointed*, 127 Ga. 134, 56 S. E. 111 (1906).

*Illinois*.—*Chicago Union Traction Co. v. Lowenrosen*, 222 Ill. 506, 78 N. E. 813 (1906) [*affirming judgment*, 125 Ill. App. 194 (1905)].

*Iowa*.—*In re Knox's Will*, (Iowa 1904) 98 N. W. 468.

*Kentucky*.—*City of Covington v.*

*Whitney*, 99 S. W. 337, 30 Ky. L. Rep. 659 (1907).

*Maryland*.—*Orem Fruit & Produce Co. of Baltimore City v. Northern Cent. Ry. Co.*, (Md. 1907) 66 Atl. 436.

*Massachusetts*.—*United Shoe Machinery Co. v. Bresnahan Shoe, etc., Co.*, 83 N. E. 412 (1908).

*Missouri*.—*Zander v. St. Louis Transit Co.*, 206 Mo. 445, 103 S. W. 1006 (1907); *Connelly v. Illinois Cent. R. Co.*, 120 Mo. App. 652, 97 S. W. 616 (1906).

*North Carolina*.—*Hancock v. Western Union Tel. Co.*, 142 N. C. 163, 55 S. E. 82 (1906).

*South Carolina*.—*McGrath v. Piedmont Mut. Ins. Co.*, 74 S. C. 69, 54 S. E. 218 (1906).

*Texas*.—*International, etc., R. Co. v. Howell*, 105 S. W. 560 (1907); *Texas & P. Ry. Co. v. Coggin*, 99 S. W. 431 (1907); *Hotel Cliff Ass'n v. Peterman*, 98 S. W. 407 (1906).

*Utah*.—*Loofborrow v. Utah Light & Ry. Co.*, 88 Pac. 19 (1907).

*Washington*.—*Schneider v. Great Northern Ry. Co.*, 91 Pac. 565 (1907).

*West Virginia*.—*Harman & Crockett v. Maddy Bros.*, 49 S. E. 1009 (1905). The same provision has been made by statute. *Universal Metal Co. v. Durham & C. R. Co.*, 145 N. C. 293, 59 S. E. 50 (1907). Where the testimony, if believed, is sufficient to be submitted to the jury, the court should not state that the evidence is not strong, clear, and convincing. *Jones v. Warren*, (N. C. 1904) 46 S. E. 740. Where the court refuses to charge that there is no evidence that the acts in question were willful, it is not an expression of opinion for him to say that there is some evidence of such acts, if there be such evidence. *Thomasson v. Southern Ry.*, 72 S. C. 1, 51 S. E.

as to the truth of any issue in the case.<sup>5</sup> Nor can he express, directly or indirectly, his views as to the good faith of the parties.<sup>6</sup>

443 (1905). Nor is it contrary to good administration to say that there is no evidence to sustain a given claim, if there is none. *Feitl v. Chicago City Ry. Co.*, 113 Ill. App. 381 (1904).

**Prima facie cases.**—A statement as to the existence of a *prima facie* case is obviously a ruling on the weight of the evidence. *Parks v. St. Louis Southwestern Ry. Co.*, (Tex. Civ. App. 1902) 69 S. W. 125.

4. *Alabama.*—*Roe v. Doe ex dem. Delage*, 43 So. 856 (1907); *Holman v. Calhoun*, 40 So. 356 (1906).

*Illinois.*—*Elgin, J. & E. Ry. Co. v. Lawlor*, 229 Ill. 621, 82 N. E. 407 (1907) [*affirming* judgment 132 Ill. App. 280 (1907)]; *Kozlowski v. City of Chicago*, 113 Ill. App. 513 (1904).

*Indiana.*—*Muncie Pulp Co. v. Keesling*, 76 N. E. 1002 (1906).

*Maryland.*—*Western Maryland R. Co. v. Shivers*, 101 Md. 391, 61 Atl. 618 (1905).

*Michigan.*—*Butler v. Detroit, Y. & A. A. Ry.*, 11 Detroit Leg. N. 539, 101 N. W. 232 (1904).

*New York.*—*Durst v. Ernst*, 91 N. Y. Suppl. 13, 45 Misc. Rep. 627 (1904).

*North Carolina.*—*Dobbins v. Dobbins*, 53 S. E. 870 (1906); *Smith v. Cashie & Chowan R. & Lumber Co.*, 140 N. C. 375, 53 S. E. 233 (1906).

*Oklahoma.*—*City of Newkirk v. Dimmers*, 17 Ok. 525, 87 Pac. 603 (1906).

*Pennsylvania.*—*Lingle v. Scranton Ry. Co.*, 214 Pa. 500, 63 Atl. 890 (1906); *Colonial Trust Co. v. Getz*, 28 Pa. Super. Ct. 619 (1905).

*Texas.*—*Tyler Ice Co. v. Tyler Water Co.*, 95 S. W. 649 (1906).

*Washington.*—*Smith v. City of Seattle*, 33 Wash. 481, 74 Pac. 674 (1903).

*United States.*—*Beaumont v. Beaumont*, 152 Fed. 55, 81 C. C. A. 251 (1907).

There is no presumption of law that an unimpeached witness has testified truly, and an instruction to that effect is erroneous, as infringing on the province of the jury. *Chicago Union Traction Co. v. O'Brien*, 219 Ill. 303, 76 N. E. 341 (1905).

5. *California.*—*Wyckoff v. Southern Pac. Co.*, 87 Pac. 203 (1906).

*Georgia.*—*Holland v. Williams*, 126 Ga. 617, 55 S. E. 1023 (1906); *Standard Cotton Mills v. Cheatham*, 125 Ga. 649, 54 S. E. 650 (1906).

*Illinois.*—*Wood v. Olson*, 117 Ill. App. 128 (1904).

*Indiana.*—*Home Ins. Co. v. Gagen*, 76 N. E. 927 (1906).

*New York.*—*Douglas v. Metropolitan St. Ry. Co.*, 119 N. Y. App. Div. 203, 104 N. Y. Suppl. 452 (1907).

*North Carolina.*—*Ruffin v. Atlantic & N. C. R. Co.*, 142 N. C. 120, 55 S. E. 86 (1906).

*Tennessee.*—*Louisville & N. R. Co. v. Bohan*, 116 Tenn. 271, 94 S. W. 84 (1906).

*Texas.*—*Thompson v. Fitzgerald & Ray*, 105 S. W. 334 (1907); *Dallas, C. & S. W. Ry. Co. v. Langston*, 98 S. W. 425 (1906).

*Wisconsin.*—*Kamp v. Coxe Bros. & Co.*, 99 N. W. 366 (1904). But see *St. Louis, M. & S. E. R. Co. v. Continental Brick Co.*, (Mo. 1906) 96 S. W. 1011. A statement in an instruction that "You have the testimony as to that," is not a charge on the facts. *Pickett v. Southern Ry. Co.*, *Carolina Division*, 69 S. C. 445, 48 S. E. 466 (1904). A statement as to the judges opinion or estimate as to the value of the evidence in some other connection, e. g., in another tribunal, is not objectionable. *Montgomery v. Delaware Ins. Co.*, 67 S. C. 399, 45 S. E. 934 (1903).

6. *Rondinella v. Metropolitan Life Ins. Co.*, 24 Pa. Super. Ct. 293 (1904); *Rich v. Victoria Copper Min. Co.*, 147 Fed. 380, 77 C. C. A. 558 (1906).

**§ 286. (*Comment on Facts; American Majority*); When Comment is Permitted.**—Practical convenience has established certain limitations upon the scope of the administrative or procedural rule which forbids, in a majority of American jurisdictions, a judge to comment on the evidence. However far the American legislator may think fit to go in elevating the jury as the central figure of a court room, or the average American lawyer may seek to have the judge “keep his hands off” from his own attempts to bring the jury around to his way of thinking, certain unavoidable requirements of a trial practically preclude the elimination of general suggestions by the presiding judge. He must, at least, hold the scales and tell the jury how to strike a balance and recognize one when struck. While the judge is restrained from intimating to the jury an idea of how, were he a jurymen, he would apply the reasoning faculty to the evidence or the law to the facts, no objection exists to his leading the jury up to their task of logical or legal reasoning and suggesting its nature to them. Not telling them what is to be done, but directing them what to do<sup>1</sup> is regarded as the objectionable course.

**§ 287. (*Comment on Facts; American Majority*); When Comment is Permitted); Customary Cautions.**—While, as is said elsewhere,<sup>1</sup> a presiding judge is restrained in a majority of American state jurisdictions from commenting on the weight of the evidence in the case on trial or as to the credibility of the witnesses by which it is given, it would be an error to conclude that, even in these states, judges are absolutely prevented from commenting upon the evidence. It is, naturally, difficult to draw a precise line between commenting on the weight of various classes or species of facts and the effect of these criticisms in dealing with the weight of evidence in any particular case which affords illustration for the application of these comments; or to differentiate with entire precision general criticisms of a class or type of witnesses from comment upon the credibility of the story told in a particular case. In truth, no such line has been or can be drawn, and the fact is an illustration, were one needed, of the disadvantages to the cause of justice involved in imposing a peremptory rule of procedure upon a matter so largely in essence one of ad-

1. *Central of Georgia Ry. Co. v. Harper*, 124 Ga. 836, 53 S. E. 391 (1906).  
1. *Supra*, § 281.

ministration. The most which an appellate court can well do, under such circumstances, is to require that the trial judge should act *reasonably* in view of the existence of the legal inhibition against comment. The fact shows the entirely administrative character of the judge's action. For, where the presiding justice would, under such a prohibition scarcely be at liberty to indicate to the jury in what way the cautions which he is giving them affect his own mind when applied to the facts of the particular case, he is quite at liberty and is, indeed, reasonably required to state to them the informative suggestions which the experience of mankind, especially those concerned with litigation, has established with regard to certain classes of evidence, usually those secondary in their nature;<sup>2</sup> or with regard to the subjective or objective considerations which affect the probative force of the testimony of certain witnesses. Among the more frequent suggestions of a trial judge are those relating to the following classes of evidence or witnesses.

**§ 288. (*Comment on Facts; American Majority; When Comment is Permitted; Customary Cautions*); Admissions.**—

General cautions as to the relative probative weight to be given oral admissions would seem legitimate, and even, occasionally, necessary. Such expressions, however, have been regarded as objectionable under the procedural inhibition now under consideration.<sup>1</sup> So, where an instruction as to the relative probative value of admissions as contrasted with that of self-serving statements by a party as a witness would amount to a comment on the evidence, it is to be refused.<sup>2</sup>

**§ 289. (*Comment on Facts; American Majority; When Comment is Permitted; Customary Cautions*); *Falsus in Uno*.**

—A judge may properly caution a jury against one whom they shall find has willfully attempted to deceive them. It is probable that the strength of this inference has been overestimated in the past. But the caution is still regarded as of value to the jury. An instruction that, if the jury believe that a witness has willfully sworn falsely to any material fact, they may in their discretion

2. *Infra*, § 339.

2. *Brown v. Quincy, O., etc., R. Co.*,

1. *Goss v. Steiger Terra Cotta & Pottery Works*, (Cal. 1905) 82 Pac. 681.

127 Mo. App. 614, 106 S. W. 551 (1908).

disregard his testimony, is proper.<sup>1</sup> It has even been said that whether the rule of *falsus in uno, falsus in omnibus* applies to the consideration of the evidence in a case is primarily a question for the court, and not for the jury.<sup>2</sup>

**§ 290. (Comment on Facts; American Majority; When Comment is Permitted; Customary Cautions); Hearsay.—**

The infirmative suggestions attending the use of unsworn statements used as evidence of the truth of the facts asserted, i. e., as "hearsay," are referred to in another place.<sup>1</sup> In instructing a jury it is not objectionable to inform the jury that testimony concerning verbal statements of others should be received with great caution; that the repetition of oral statements is subject to imperfection and mistake; that such kind of testimony should be scanned closely; and that, where a witness can only give what he thinks was the substance of what was said, the weight to be given to such testimony depends largely upon the strength of memory and intelligence of the witness. This does not invade the province of the jury.<sup>2</sup>

**§ 291. (Comment on Facts; American Majority; When Comment is Permitted; Customary Cautions); Opinion Evidence.—**

The court may properly instruct the jury as to the mental attitude in which properly to approach the consideration of "expert" evidence<sup>1</sup> or the inference of observers.<sup>2</sup> The judge may, for example, suggest giving them the same probative force as other evidence.<sup>3</sup> While it is customary for the court to charge regarding the general value of expert or opinion evidence,<sup>4</sup> the request to do so may properly be declined.<sup>5</sup> Where administrative action in this particular is reasonable, it will not be revised in an appellate court.

**§ 292. (Comment on Facts; American Majority; When Comment is Permitted; Customary Cautions); Photographs.—**

1. *Sanders v. Davis*, (Ala. 1907) 44 So. 979; *Alabama Steel & Wire Co. v. Griffin*, (Ala. 1907) 42 So. 1034.

2. *Pumorlo v. City of Merrill*, (Wis. 1905) 103 N. W. 464.

1. *Infra*, §§ 2711 *et seq.*

2. *Ellis v. Republic Oil Co.*, (Iowa 1906) 110 N. W. 20.

1. *Infra*, §§ 2371 *et seq.*

2. *Infra*, §§ 1836 *et seq.*

3. *Pritchett v. Moore*, 125 Ga. 406, 54 S. E. 131 (1906).

4. *Infra*, §§ 2568 *et seq.*; *Cosgrove v. Burton*, (Mo. App. 1904) 78 S. W. 667.

5. *Wood v. Los Angeles Traction Co.*, 1 Cal. App. 474, 82 Pac. 547 (1905).

Facts established by experience affecting the probative value of photographic copies may properly be stated by the judge. In referring to such representations introduced in evidence, a statement by the judge warning the jury not to be misled by them in estimating distance, that they are unavoidably misleading, and that it is in the nature of photography, is one within the legitimate right of comment by the trial court.<sup>1</sup>

**§ 293. (Comment on Facts; American Majority; When Comment is Permitted; Customary Cautions); Positive and Negative Evidence.**—It is not error to instruct that positive testimony is rather to be believed than negative, with the qualification that other things shall be the same and the witnesses of equal credibility.<sup>1</sup> That proper qualifications should be given is, however, essential.<sup>2</sup> The court cannot, for example, instruct the jury that the positive evidence of one witness is more to be credited than the negative evidence of another.<sup>3</sup>

**§ 294. (Comment on Facts; American Majority; When Comment is Permitted; Customary Cautions); Witnesses.**—

Calling attention of the jury to certain considerations affecting the probative force of the testimony of witnesses,<sup>1</sup> as their experience or lack of it,<sup>2</sup> probable bias or its absence,<sup>3</sup> is not deemed objectionable, *provided* the jury are informed that the question of the deliberative weight, if any, to be attached to these considerations is entirely for them to determine.

1. *McLean v. Erie R. Co.*, (N. J. 1904) 57 Atl. 1132.

1. *Southern Ry. Co. v. O'Bryan*, 119 Ga. 147, 45 S. E. 1000 (1903).

2. *Central of Georgia Ry. Co. v. Sowell*, 3 Ga. App. 142, 59 S. E. 323 (1907).

3. *Cleveland, C., etc., Ry. Co. v. Schneider*, 40 Ind. App. 38, 82 N. E. 538 (1907).

1. *Strickler v. Gitchel*, 14 Okl. 523, 78 Pac. 94 (1904).

2. *Indianapolis Northern Traction Co. v. Dunn*, (Ind. App. 1905) 76 N. E. 269.

3. *Kirkpatrick v. Allemanna Fire Ins. Co.*, 92 N. Y. Supp. 466, 102 App. Div. 327 (1905); *Kavanaugh v. City of Wausau*, (Wis. 1904) 98 N. W. 550; *Strasser v. Goldberg*, (Wis.

1904) 98 N. W. 554. An instruction that in weighing the testimony of the witnesses any interest on their part may be considered, but in the same connection cautioning the jury against drawing an unfair inference because the witnesses are in defendant's employ, does not invade the province of the jury. *Lovely v. Grand Rapids & I. Ry. Co.*, (Mich. 1904) 11 Detroit Leg. N. 424, 100 N. W. 894 (1904).

The practice has been spoken of as permissible but not to be commended. *Hofacre v. City of Monticello*, (Iowa 1905) 103 N. W. 488. And the course has even been deemed erroneous. *Himrod Coal Co. v. Clingan*, 114 Ill. App. 568 (1904); *Simons v. Mason City & Ft. D. R. Co.*, (Iowa 1905) 103 N. W. 129.

*Number v. Probative Force.*—Neither is it improper for the court to instruct the jury that “this preponderance is not necessarily determined by the number of witnesses testifying on either side,” where the judge refrains from telling them wherein the preponderance in the particular case consists.<sup>4</sup> An instruction that the weight of evidence is not necessarily on the side of a fact as to which the greater number of witnesses have testified, or on which the greater amount of evidence is produced, but is with that evidence which convinces the jury most strongly of its truthfulness; that “preponderance of evidence” means the weight of evidence; that the evidence given on any fact which convinces most strongly of its truthfulness is of the greater weight, irrespective of the number of witnesses or the amount of evidence on the other side, is not objectionable.<sup>5</sup>

**§ 295. (Comment on Facts; American Majority; When Comment is Permitted; Customary Cautions);** Written and Oral Evidence.—A presiding judge may properly call the attention of the jury to the relative probative value of written and oral evidence.<sup>1</sup> He may show them the greater permanence, probably increased deliberativeness, the conventional aspect of the document as compared with the slippery tenure of memory. Much must depend, however, on the circumstances of each particular case. The court, for example, may in its discretion tell the jury that they are not bound to believe the testimony of a witness because it is contained in a deposition any more than they would if he testified from the witness stand.<sup>2</sup>

**§ 296. (Comment on Facts; American Majority; When Comment is Permitted);** Hypotheses of Fact.—The jury may properly be informed for what purpose evidence is received.<sup>1</sup>

4. *Kozlowski v. City of Chicago*, 113 Ill. App. 513 (1904); *Hammond, etc., Electric Ry. Co. v. Antonia*, (Ind. App. 1908) 83 N. E. 766. See *W. H. Stubbings Co. v. World's Columbian Exposition Co.*, 110 Ill. App. 210 (1903).

5. *Indianapolis St. Ry. Co. v. Schomberg*, (Ind. App. 1904) 71 N. E. 237.

1. *Lee v. Williams*, 30 Pa. Super. Ct. 349, 357 (1906).

2. *Johnson County Sav. Bank v.*

*Walker*, 79 Conn. 348, 65 Atl. 132 (1906).

1. *McClure v. Lenz*, (Ind. App. 1907) 80 N. E. 988.

**Elements of damage.**—An instruction which simply advises the jury as to the elements to be considered in determining the preponderance of the evidence, and after enumerating such elements, directs them to determine the same from all the evidence, facts, and circumstances shown on the trial, was proper. *Miller v. John*, 208 Ill. 173, 70 N. E. 27 (1904).

In the same way, it is reasonable administration when objections to testimony are being persistently made for trial judge to inform counsel what he considers is or is not proper testimony on an issue.<sup>2</sup> The effect is to expedite the trial, to eliminate an element of friction and, in general, to simplify the situation.

*In much the same way*, the court may properly place before the jury the issue upon which they are to pass formulated hypothetically in terms of fact. That is, he may charge that if they find certain facts to exist, they are to find in one way; if they find they do not exist or that certain other facts do exist, they are to find the other way.<sup>3</sup> This is always allowable where the conclusion is the only rational one from the facts hypothetically assumed;<sup>4</sup> for

2. *D. H. Fleming & Son v. Pullen*, (Tex. Civ. App. 1906) 97 S. W. 109.

3. *Alabama*.—*Birmingham Ry., Light & Power Co. v. Rutledge*, 39 So. 338 (1904).

*Arkansas*.—*St. Louis, I. M. & S. R. Co. v. Price*, 104 S. W. 157 (1907); *Eureka Stone Co. v. Knight*, 100 S. W. 878 (1907).

*Illinois*.—*Pronskevitch v. Chicago & A. Ry. Co.*, 232 Ill. 136, 83 N. E. 545 (1908).

*Indiana*.—*Indianapolis Traction & Terminal Co. v. Miller*, 40 Ind. App. 403, 82 N. E. 113 (1907); *Indianapolis St. Ry. Co. v. Fearnought*, 40 Ind. App. 333, 82 N. E. 102 (1907); *Baltimore & O. S. R. Co. v. Kleespies*, 78 N. E. 252 (1906).

*Iowa*.—*Christy v. Des Moines City Ry. Co.*, 102 N. W. 194 (1905).

*Kansas*.—*Haines v. Goodlander*, 84 Pac. 986 (1906).

*Kentucky*.—*Carmical v. Carmical*, 32 Ky. Law Rep. 171, 104 S. W. 1037 (1907); *Fidelity & Casualty Co. of New York v. Southern Ry. News Co.*, 101 S. W. 900, 31 Ky. L. Rep. 55 (1907); *Craft v. Barron*, 28 Ky. L. Rep. 98, 88 S. W. 1099 (1905).

*Michigan*.—*Harker v. Detroit United Ry.*, 150 Mich. 697, 114 N. W. 657, 14 Detroit Leg. N. 870 (1908).

*Missouri*.—*Flaherty v. St. Louis Transit Co.*, 207 Mo. 318, 106 S. W.

15 (1907); *Carp v. Queen Ins. Co.*, 203 Mo. 295, 101 S. W. 78 (1907); *Abbitt v. St. Louis Transit Co.*, 106 Mo. App. 640, 81 S. W. 484 (1904).

*South Carolina*.—*Mitchell v. Cleveland*, 76 S. C. 432, 57 S. E. 33 (1907); *Sentell v. Southern Ry.*, 70 S. C. 183, 49 S. E. 215 (1904).

*Texas*.—*Paris & G. N. Ry. Co. v. Calvin*, 103 S. W. 428 (1907) [*affirmed in* (Sup. 1908) 106 S. W. 879].

*Wisconsin*.—*Banderob v. Wisconsin Cent. Ry. Co.*, 133 Wis. 249, 113 N. W. 738 (1907). The proper province of an instruction is to submit questions of fact, and not propositions of law. *Barton v. City of Odessa*, 109 Mo. App. 76, 82 S. W. 1119 (1904). A charge stating the legal conclusions which would result from the establishment of certain facts is not subject to objection as a charge on the evidence. *Kean v. Landrum*, 72 S. C. 556, 52 S. E. 421 (1905).

4. *Hot Springs St. Ry. Co. v. Hildreth*, 82 S. W. 245 (1904). The court should never assume an issue proven, unless the evidence is so conclusive one way that the minds of reasonable men could reach but one conclusion as to the result. *Security Mut. Life Ins. Co. v. Calvert*, (Tex. Civ. App. 1907) 100 S. W. 1033 [*reversed in* 105 S. W. 320].



as the necessity of correct reasoning is a legal requirement,<sup>5</sup> such a ruling is really one of law. This course of stating alternative propositions of fact with the correlated logical or legal results is not objectionable, if the judge fails to indicate in any way to the jury what facts, simple or complex, he thinks they ought to find. A party has a right to have his theory of the case as made out by his proofs submitted to the jury under suitable instructions.<sup>6</sup> But the judge is not at liberty to single out a particular isolated fact or set of facts, and direct the jury to determine the issue in accordance with their findings as to these.<sup>7</sup> Nor, in general, should he give undue prominence to any particular aspect of the case.<sup>8</sup> Especially, is a judge forbidden to assume that the jury find a fact, and then state to them what the proper inference from it would be.<sup>9</sup>

**§ 297. (*Comment on Facts; American Majority; When Comment is Permitted*); Illustrations of Fact.**—A judge, moreover, may properly make such use of illustrations of fact as will enable him to state clearly and intelligibly the rules of law which he has occasion to announce to the jury.<sup>1</sup> It is not error for a trial court, in its instruction to a jury, to state so much of the admitted facts as may be necessary to illustrate and apply the law to the case on trial.<sup>2</sup>

**§ 298. (*Comment on Facts; American Majority; When Comment is Permitted*); Meaning of Terms.**—In like manner,

5. *Infra*, §§ 385 *et seq.*

6. *Lansing v. Wessel*, (Neb. 1903) 97 N. W. 815; *El Paso Electric Ry. Co. v. Ruckman*, (Tex. Civ. App. 1908) 107 S. W. 1158.

7. *Arkansas*.—*McDonough v. Williams*, 92 S. W. 783 (1905).

*Georgia*.—*Wrightsville & T. R. Co. v. Lattimore*, 118 Ga. 581, 45 S. E. 453 (1903).

*Illinois*.—*Jones & Adams Co. v. George*, 227 Ill. 64, 81 N. E. 4 (1907) [*reversing* 125 Ill. App. 503 (1906)].

*Maryland*.—*Calvert Bank v. J. Katz & Co.*, 61 Atl. 411 (1905).

*Missouri*.—*Morrell v. Lawrence*, 203 Mo. 363, 101 S. W. 571 (1907); *Page v. Roberts, Johnson & Rand Shoe Co.*, 78 S. W. 52 (1903).

*New York*.—*Wagner v. Metropolitan St. Ry. Co.*, 176 N. Y. 610, 68 N. E. 1125 (1903).

*Texas*.—*International & G. N. R. Co. v. Jackson*, 90 S. W. 918 (1905).

*Wisconsin*.—*Northern Supply Co. v. Waugard*, 100 N. W. 1066 (1904).

8. *Galveston, etc., Ry. Co. v. Wallis*, (Tex. Civ. App. 1907) 104 S. W. 418.

9. *Central of Georgia Ry. Co. v. McNab*, (Ala. 1907) 43 So. 222; *Atlanta & B. A. L. Ry. v. McManus*, 1 Ga. App. 302, 58 S. E. 258 (1907).

1. *Feddeck v. St. Louis Car Co.*, 125 Mo. App. 24, 102 S. W. 675 (1907); *Stangair v. Roads*, (Wash. 1907) 91 Pac. 1.

2. *Williams v. Alaska Commercial Co.*, 2 Alaska 43 (1903).

the judge may, without transgressing this rule against comment to the jury on matter of fact, explain to them the meaning of scientific, technical or legal terms.<sup>1</sup> Should it appear, however, that the term is one which implies the application of reason as a rule of law to particular facts, the judge will not be justified in making the application of the rule of law to the facts of the case under the guise of merely making a definition. In a case proper for submission to a jury, it is reversible error for the court to instruct them as to what constitutes negligence in terms of the facts of that particular case.<sup>2</sup> No necessity, however, exists that the judge, unless specially requested to do so, should explain the meaning of ordinary words, terms or phrases.<sup>3</sup>

**§ 299. (*Comment on Facts; American Majority; When Comment is Permitted*); Misrepresentation or Mistake Corrected.**

— Where counsel,<sup>1</sup> or any other person during the course of a trial misrepresents the evidence, the judge may properly correct him.

**§ 300. Subordination of Judge to Jury.**— The American tendency to subordinate the power and prestige of the judge to the supremacy of the jury, by clothing them with power to apply the law to the facts, without comment by the court as to the facts; and to exercise other powers of judicial administration, seems of extremely doubtful value to the cause of jurisprudence. Were all other difficulties in making profitable use of the jury in administering the law as well as in ascertaining the constituent facts removed, the very bulk of the tribunal from which concerted, purposeful and yet unanimous action is expected and required, might well cause hesitation. But still more serious considerations suggest themselves in such a connection. Among these, are (1) The fact that the mental operations of a jury are largely guided by *emotion* while those of the judge are dominated by *reason*; (2) That while the jury have special experience of life in general, the judge has a valuable technical knowledge of the psychology

1. *Union Traction Co. v. Biek*, (Ind. App. 1907) 81 N. E. 617 ("car plant").

2. *Chicago B. & Q. R. Co. v. Appell*, 108 Ill. App. 516 (1903).

3. *Georgia Southern & F. Ry. Co. v. Young Inv. Co.*, 119 Ga. 513, 46

S. E. 644 (1904) ("preponderance of evidence;" "ordinary care"); *Harper v. Fidler*, (Mo. App. 1904) 78 S. W. 1034 ("agent").

1. *State v. Lane*, (Or. 1906) 84 Pac. 804.

of the courtroom which would materially assist the correction of the jury's action; and, in view of the judge's right to set aside a verdict if, in his opinion, unreasonable or against the weight of the evidence, helpful also in procuring a speedy termination of litigation; (3) That the jury, as a general rule, adopt the personal interests of litigation, as the basis of their action, while the judge represents the higher and more valuable interests of society in the efficient, correct and speedy attainment of justice through the administration of law.

**§ 301. (*Subordination of Judge to Jury*); (1) *Emotion versus Reason*.**—To the juror, as to the party, a particular case in court is a special experience which he naturally considers in and by itself, disassociated from other cases, even when of a similar nature and from litigation in general. He recognizes that he is part of a perfectly casual tribunal. He may never have sat in judgment on a case before. As he very well knows, he may never sit on another. The judge and the lawyers are, as he at once observes, using a language of their own, unintelligible to him. They are influenced by considerations with which he is unfamiliar. He has no time in which to learn these things. It is not surprising, therefore, that he should be attracted by the *human* interests before him which he does understand and which, on one side or the other arouse his sympathy. To him each case is a little block of human life, disassociated in his mind from any other.<sup>1</sup> This presents a problem, more or less intricate, which he is appointed to help solve, according to his idea of what constitutes "a fair thing under the circumstances." To the properly-minded judge, and, therefore, to most judges, this same case has come before him for trial, because he is the particular member of society to whom has been committed the protection of the general interest of the state in the attainment of a speedy, just and impartial trial. He recognizes that it is for the attainment of this end that the community has established the expensive machinery of the judicial proceedings over which he presides, to which he gives direction,

1. "There they have to sit in the box supposed to know by intuition that which has cost trained lawyers a lifetime to acquire, the faculty of sifting evidence, of dealing with complicated points of law, of discerning what is false and what true, what is

relevant and what is irrelevant, but susceptible in the highest degree to what appeals to their imagination and generally blown about by every wind of sentiment." 20 Jurid. Rev. p. 135.

and upon which he, to a certain extent, exercises control. As a lawyer and judge, he has grown familiar with the vital importance of the certain and orderly administration of the judicial office; he knows the traditions of a continuous tribunal. To him, therefore, the case has definite relations, legal and social. It exhibits itself as part of a system of jurisprudence and controlled by a number of legal provisions of which, for the purposes of the trial, he is the exponent.

*It follows* that the juror and the judge are prepared to exercise, and will probably employ throughout the trial, in predominance, different faculties of the mind. The jurymen, in his everyday life, largely determines his action by his emotions, sympathies or prejudices. In connection with any case on which he sits, unless he is overruled and guided, he will be very apt to emulate the parties by giving reins to his feelings — his hatred of corporations, his instinct to relieve physical suffering without personal expense, the desire to aid female beauty in distress. If the case be a criminal one, e. g., for murder, he must guard himself lest his action should be determined, not by the evidence as to the killing or by the arguments of the state's attorney regarding the social danger involved in the lawless righting of wrongs, real or fancied, by the taking of human life; but by considering whether, after all, the deceased was not a pretty bad man, and it is just as well for society to be rid of him; whether, since hanging the accused will not bring the deceased back to life, even were it desirable, it is really worth while, under the circumstances, to make that very interesting young woman who is so loyal to her husband a widow, and make fatherless those pretty children, with the fair hair and blue eyes. The judge's attitude is that of organized society. He is seeking to use his reason. He has probably found by experience, that when a painful duty is to be done the promptings of the heart rather confuse than supplement the work of the brain. His training has familiarized him with the arts of advocacy by which it is hoped the emotional nature of the juror may be so worked upon, either through the public press or by more direct personal appeal, as to swerve him from the path pointed out by reason. The judge represents the domination of intellect above the play of emotion. He has an appetency for truth, and the carefully geared and grooved intelligence which enables him to detect it. He possesses a discriminating taste between fact and rhetoric. His ear is alert

to detect the difference in the ring of probative gold and irrelevant brass.

**§ 302. (*Subordination of Judge to Jury*); (2) General *versus* Technical Experience.**— This necessary predominance of the element of emotion in the jury's action renders it of the most crucial importance that the calm reasoning employed by the court should be used as a modifying, steadying and guiding force. Yet this is precisely what the present tendency most earnestly seeks to prevent. It is not denied that the jury, fresh from the community, are, in the ascertaining of facts, able to bring a valuable element of common sense and practical experience of life to the joint deliberations of a tribunal which, without it, must run danger of adopting purely technical view points.<sup>1</sup> The judge may not have the standards and facts of common experience which it is in the power and province of the jury to contribute. But to assist the latter in the exercise of the *reasoning faculty* to the evidence as modified by these facts and standards, the judge has also a most valuable element to supply. That the average "man on the street," as the phrase goes, should be able, by the unaided light of nature, to apply logical or legal reasoning to a complicated set of controverted facts, and do it in unison with eleven others, under the unwonted and confusing conditions of a trial in court, is not shown to be uniformly feasible. A well-read and observant judge of experience will have, almost of necessity, a mind stored with illuminating analogies in dealing with particular situations of fact which cannot fail to prove helpful to any jury in its search for truth. Situations are apt to recur. The judge knows what other judges have said, what previous juries have done. If he has observed carefully, a presiding justice experienced in practical litigation is no mean psychologist—especially of morbid mental or emotional pathology. A very varied current of human life has passed before him over the witness stand. Devoid of any interest except that truth may prevail, what reason exists, in the average case, for believing that to permit the judge to comment on the evidence before the jury would affect the search for truth in any other manner than to render material assistance toward the desired end? In what aspect of the matter is it really preferable

1. For some suggestions as to a suitable limitation of the function of the jury by which to gain the benefit

of their experience without the dangers incident to emotionalism, see *supra*, §§ 95 *et seq.*

to compel the judge to sit passively by and see the jury misled by sophisticated argumentation, which he could have exposed in a word or two, and thus compel him to set aside the tainted verdict?

**§ 303. (*Subordination of Judge to Jury*); (3) Personal versus Social Interests in Litigation.**—Above all, it is to be observed that grave dangers to important social interests are clearly involved in any attempt to subordinate the function and office of the judge by extending and exalting those of the jury. All litigation presents a double aspect, the personal and the social. In each case there are the two elements of the individual and the community. These are, as it were, respectively the litigious and the social aspects of any case.

*The objects* which these two aspects of litigation propose to themselves for attainment are as diverse as are the characteristic features of these elements themselves. The objective of the parties is success. Each desires that the litigation should end in his own favor. The interest of society is that right should prevail, that justice should be done, that the litigation should end right. Almost equally earnest is its wish that general respect for the orderly administration of law be increased in the community by the popular recognition that justice has prevailed, and the confidence of society in the administration of justice strengthened to a proportionate extent. The litigant often cares little for the ulterior social consequences of the outcome of his suit. The immediate results to himself stand so much nearer his vision as entirely to obscure them. Immediate success by the not over scrupulous employment of every advantage of delay, suppression or concealment which the rules of the game place in his hand seems to him not only justified but imperative. From the social standpoint, every miscarriage of justice which these devices make possible, every skillful evasion of the decrees of society as expressed in its laws, is a serious injury — in that it tends to shake general trust in the possibility of obtaining speedy and impartial justice through judicial administration; and points to the necessity for self-help, individualistic or by mob violence. All this, indeed, is nothing to the average litigant whose personal fortunes bound his vision. Anything further, he feels, is the concern of society. If advantages have been given him he will use them. His business is to win that case, to beat his antagonist, to get revenge, money, im-

munity from punishment. Law is war and all is fair that is not forbidden. To put the same thing in a slightly different form, the litigant regards the case as something personal, peculiar, isolated and for the gratification of emotion. Society looks at the same case as part of its general effort at doing a conventionalized form of justice under settled and dependable rules of law; not as a matter for emotion, but for the application of experience and reason rather than of force or cunning, to the determination of disputes arising between its citizens.

*Little doubt should exist* as to which of these positions is ethically superior or the more generally beneficial. It is the special danger of subordinating the judge to the jury that the jury are apt to adopt the position of the litigant; while it is the characteristic and appropriate duty of the judge to keep steadily in view the interests of society.

**§ 304. (*Subordination of Judge to Jury*); Reasons for Inversion.**—The gain enuring to the cause of public justice from permitting a trained mind to exert its natural influence over untrained thinkers is so clear; the wisdom of giving some adequate power of guidance to one in whose keeping are the social interests involved in the creditable administration of justice over those to whom litigation presents itself mainly, if not solely, in its personal aspect, is apparently so obvious, that such an inversion of the normal relations between judge and jury as these existed at common law, invites some scrutiny of the reasoning upon which the change made by a majority of American jurisdictions has been based. Historically, the reason is political. Three hundred years ago, more or less, certain of our ancestors, then subjects of the realm of England, were in heart and purpose — frequently by overt act — political rebels against the English government as then constituted. That rebellion in its ultimate issue was completely successful and the social aspirations upon which it was based are generally approved, having been in accordance with the “rights of man.” In its effort to detect and punish these rebels against its authority, the government of England relied upon its judges — representing the law as it then stood. Under that law the property, the liberty and even the life of these political malcontents was in many instances forfeited to the offended crown. A not unnatural distrust and hatred accentuated by fear, arose in the minds of the anti-government party as against these judges. They

were felt to be enemies of freedom, representatives of tyranny; friends of those who sought to control the liberties and take away the rights of their fellow-men.

*On the other hand*, these opponents of government always anticipated and usually received great comfort, assistance and consolation in any legal emergency from the jury. Juries were their friends. It would almost be permissible to say that they were themselves the jury, for they were the popular party. These recalcitrants furnished the body of citizens from which juries were drawn. It taxed in vain the ingenuity of crown lawyers to devise a method of drawing a panel which should include no member of the party of freedom, no one who sympathized with its principles or admired the fortitude of its adherents. The jury came, therefore, to represent in the popular mind the cause of liberty. The judge was the visible embodiment of tyranny and privilege seeking to carry out their mandates. Small wonder, then, that the interference of that judge and his supervision of the jury were resented and opposed in a temper and with a warmth of feeling by no means calculated to reach the wisest conclusions in the matter of judicial administration. While this temper remained, little of calm deliberation was to be expected.

**§ 305. (*Subordination of Judge to Jury; Reasons for Inversion*); Later Developments.**—In England herself, the situation did not remain a settled one. The fever was allayed by much blood-letting in her civil war, between Roundhead and Cavalier. On the final expulsion of the Stuarts, the liberties of the subject were established on a basis the solidity of which was entirely independent of any administrative relation between the court and the jury. That received attention later; for in England legal reform followed that in politics. Abuses were remedied, anachronisms lopped off. Sound sense devised a flexible, easily intelligible judicial system, conferring on or retaining in the trial judge, large powers, limiting appeals only to matters of substance and securing to the community the benefit of the jury's practical and the judge's technical experience. It leaves the jury free to act in their appropriate field under the guidance of a judge firmly holding their emotionalism in check and pointing out the safer and surer paths dictated by experience. It is a system which, while not above just criticism, is giving England the benefit of speedy, impartial and, in most cases, accurate justice.



*In America, on the contrary*, popular feeling engendered under the Tudors and Stuarts regarding the position of the jury in trials at law has shown a tendency not only to continue but to intensify. The American colonists, especially those of New England, were flung off, as it were, on a tangent and at a high rate of velocity from the body of English political life, while these feelings of antipathy to judges were at their very bitterest and blackest. Cherishing these sentiments, and smarting under the sting of religious persecution in which crown judges had played an important part, hatred and distrust of the judiciary were wrought into the very fabric of the governments which such men founded. The isolation of these English colonies made their institutional development chiefly from within; and inside were only these unabated and unappeased feelings irresistibly forcing into a successful revolt against the old authority of the Mother country. Without much consideration, as a part of the traditional wisdom of the fathers, exaltation of the jury as the palladium of liberty was embodied and enforced by state constitutions and statutes. With almost parrot-like fidelity, each new state, as it came into existence, embodied the same principle of jurisprudence; exalt the jury, subordinate the judge.

*This sacramental value* of the jury's intervention in judicial administration is perhaps our chief judicial heritage from the turmoil of English politics prior to 1688. But it did not stand alone then; nor does it do so now. Certain other procedural rules, all survivors of this period, all resting on the same basis, all tending, therefore, to curb the power of the state to deal effectually with those in opposition to it — then its citizens rebellious for greater freedom, now its criminal classes of all kinds — were transplanted to America at the same time and are regarded with much the same feelings of general unthinking veneration, as something of ancient wisdom mysteriously valuable. Among these are: The exclusion of confessions not shown to be voluntary,<sup>1</sup> the privilege against self crimination,<sup>2</sup> the right not to be placed twice in jeopardy and the like.

*Little, if any, impediment of public opinion* has developed during most of this period the friction against which might diminish the strength and force of such three-hundred-year-old impulse and bring it to a state of rest. The basic value of this apotheosis of the juridical worth of the uncontrolled judgment of twelve men

1. *Infra*, §§ 1472 et seq.

2. *Infra*, §§ 1472 et seq.

chosen by lot from the community at large, giving a verdict for which they assign no reasons and falling back into the body of the community without responsibility for their conduct has been accepted. It has been received as axiomatically true, one of the propositions on which profitable argument was impossible. While little has occurred to check the growth of this sentiment, other independent causes have, on the contrary, conduced to give vitality to it. The steady enjoyment of political liberty by the American citizen has naturally, for example, made popular the enlargement of any judicial function associated in the public mind with the cause of freedom. The constant expansion, moreover, of the population by immigration of citizens from other countries where oppression or punishment came to them by way of judges, has not lessened in certain quarters the feeling of apprehension from which the popular attitude took its rise.

*Yet the time is certain to arrive* when the jurisprudence of America will stop long enough to take a full look over its shoulder for the purpose of determining whether the danger from which it is so persistently running away is a real one or a memory to which no present reality corresponds; to decide calmly whether a judge elected under universal suffrage by a popular vote at short intervals presents the same danger to popular liberty that was threatened by Mr. Justice Buller or the Court of High Commission; and whether society has not a vital interest under, above and beyond the interest of the litigants themselves that law should be speedily and justly administered. When that time comes, it may not be found difficult in any quarter to realize that the power of the state to deal with its internal enemies is of value to society even when framed and administered in accordance with the aims and purposes of these inharmonious citizens of seventeenth century England; that curbing the aspirations of men for a wider freedom to live and serve God according to the dictates of their consciences is quite a different matter from exerting an effective restraint on those who are seeking by force or fraud to defy the laws of a perfectly free people; and that a system entirely congenial to truth and justice under the first set of circumstances may be absolutely opposed to the interests of society in the second.

**§ 306. Granting of New Trials.**— A significant comment on the efficiency of the present jury system as commonly established in America is that it settles little, as a finality. In every case fit

for judicial determination, there is a central point, or pivot, on which the case turns. To find it, consider it, adjudge as to it, is the work of an intelligent tribunal. The composite emotionalism of a many-minded jury is not exceptionally adapted to reach and hold to this point. Even where counsel perceive this issue, cunning may imagine that its interest lies in calling attention to something else. Quite frequently, however, the crucial point, the *crux* of the case, is not recognized. To discover the pivot of a case and utilize it, is a work, primarily, of a trained and conscientious intelligence. The success with which, as a whole, American jury trials reach this result may be gauged by the number of instances in which the *adjudicated* case must be retried. Applying this test, the results are not gratifying whether as determined by the action of an appellate court in ordering a new trial or of the trial judge in doing so. Probably it would be hard to devise a method of trying cases which should be less satisfactory in ending litigation than to try a case all through before a judge and a jury, to restrain the judge from expressing any opinion on the effect of the evidence and then, when the parties have spent their money and the court has used the public time and money, and the jury have reached a conclusion, to permit and indeed require the judge to order it all done over again, unless and until the jury, who do not know the judge's opinion and cannot by law find it out, shall succeed in reaching a decision in accordance with that opinion. Yet this is practically what happens. However great the confidence of the public may be in jury trials, it never has extended so far as to make their work final, except in case of a verdict of not guilty in a criminal prosecution.<sup>1</sup> The judge is able to make his views effective through this veto power while he is deprived of opportunity to warn the jury against what he feels is likely to mislead them. He is equally impotent to bring to their attention considerations which he feels are essential to their ability to do justice. Not being able to warn them of the existence of these considerations, a very natural inference is that they were disregarded. So feeling, the easy course is to set aside the verdict. Could the judge have spoken, the same verdict might have stood.<sup>2</sup>

1. See valuable article by William Hamill Cowles, Esq., of Topeka, Kans. in the "Green Bag" for June, 1907, entitled "Has trial by jury in civil actions been abolished?" to whom the

author desires to express his obligation in this connection.

2. "The frequency of our new trials is not at all a common law phenomenon and it is not a system upon

**§ 307. (*Granting of New Trials*); Verdicts Against Reason.—**

Normally and properly, the presiding judge should set aside a verdict rendered in a trial before him where he finds that the jury have failed to exercise the reasoning faculty, where their verdict cannot be defended as the act of rational men. Since the substantive law has prescribed that reason should be exercised in the ascertainment of facts and the application of the rules of law to them — as in all other use of the judicial powers of the court — such a ruling is, in reality, one on a matter of law. It is an exercise of administrative power similar to that of awarding a nonsuit or ordering a verdict on the ground that the jury could not reasonably, i. e., legally, act in any other way than as he has ordered. In such a case, i. e., where the verdict is contrary to reason, the court, therefore, as matter of law<sup>1</sup> is bound to set aside the verdict.<sup>2</sup> Such is also the rule in England.<sup>3</sup>

which trial by jury can be defended. The whole theory of the jury trial rests upon the proposition that *recenti facto* the witnesses, are called, give their evidence, the jury see the witnesses, hear their story and then pass upon the facts." Report of Special Committee of American Bar Association to Meeting of 1909. 34 Reports Am. Bar. Assoc., p. 582.

1. *Connecticut*.—Birdseye's Appeal, 77 Conn. 623 (1905).

*District of Columbia*.—Stewart v. Elliott, 2 Mackey 307 (1883).

*Illinois*.—Simmons v. R. R. Co., 110 Ill. 340 (1884).

*Kansas*.—Backus v. Clark, 1 Kan. 303 (1863).

*United States*.—Met. R. R. Co. v. Moore, 121 U. S. 558 (1887).

*England*.—Hodges v. Ancrum, 11 Exch. 218 (1855).

2. *Arkansas*.—St. L. S. W. Ry. Co. v. Byrne, 73 Ark. 377 (1904).

*California*.—Amsby v. Dickhouse, 4 Cal. 102 (1854).

*Connecticut*.—Bishop v. Perkins, 19 Conn. 300 (1848).

*Delaware*.—Burton v. R. R. Co., 4 Harr. 252 (1844).

*District of Columbia*.—Stewart v. Elliott, 2 Mackey 307 (1883).

*Georgia*.—Spurlock v. West, 80 Ga. 306 (1887).

*Illinois*.—Chicago City Ry. Co. v. McClain, 211 Ill. 589 (1904).

*Iowa*.—Muldowney v. R. R. Co., 32 Iowa 178 (1871).

*Kansas*.—R. R. Co. v. Matthews, 58 Kan. 447 (1897).

*Maine*.—Griswold v. Lambert, 89 Me. 534 (1897).

*Massachusetts*.—Cunningham v. Magoun, 18 Pick. 13 (1836).

*Minnesota*.—Hicks v. Stone, 13 Minn. 434 (1868).

*Missouri*.—Kansas, etc., Ry. Co. v. Dawley, 50 Mo. App. 489 (1892).

*New York*.—Layman v. Anderson, 4 App. Div. (N. Y.) 126 (1896).

*Ohio*.—McGatrick v. Wason, 4 Ohio St. 566 (1855).

*Pennsylvania*.—Campbell's Lessee v. Sproat, 1 Yeates 327 (1794).

*Texas*.—Gibson v. Hill, 23 Tex. 77 (1859).

*Virginia*.—Morien v. N., etc., Co., 102 Va. 622 (1904).

*United States*.—Pringle v. Guild, 119 Fed. 962 (1903); Pleasants v. Fant, 22 Wall, 116 122 (1874).

3. Carstairs v. Stein, 4 M. & S. 192 (1815); R. v. Poole, Lee's Cas. t. Hardwicke, 23 (1734). The court

**§ 308. (*Granting of New Trials*); Verdicts Contrary to the Weight of Evidence.**—The legal right and practise of the courts, however, in setting aside verdicts is by no means limited to cases where the jury's decision is found to be an irrational one. For it will be noted that this conceded power of the presiding judge to set aside the verdict of a jury and award a new trial is the more wide sweeping in its effect in that it is not confined, as it well might be, in point of principle, to the extreme case where the verdict is indefensible in point of reason; i. e., as matter of law. Trial courts have been sustained in going further and setting aside verdicts as against the weight of the evidence,<sup>1</sup> because the testimony and other proofs, while they might justify, in point of reason, the verdict of the jury, would, in the opinion of the presiding judge, with greater reason, have warranted the opposite conclusion. In granting a motion for a new trial based upon the ground that the verdict is "against the evidence and the weight of the evidence" the judge acts on his own view of what the verdict ought to have been,<sup>2</sup> and will endeavor to avoid giving effect to any decision which amounts to a failure on the part of the jury, as he views it, to award substantial justice to the parties.<sup>3</sup> This process may be repeated until some jury renders a verdict in which the trial judge feels himself able to concur.<sup>4</sup> For while the presiding

probably passes on the precise question that the jury have passed upon. *Dublin, etc., Ry. Co. v. Slattery*, 3 App. Cas. 1155 (1878).

1. This power not being conferred by the common law as prescribed in the Seventh Amendment to the Constitution of the United States is denied to the federal courts of appeal. *Metropolitan R. R. Co. v. Moore*, 121 U. S. 558, 573 (1887). But see, to the effect that this power of the judge to set aside a verdict because against the weight of the evidence was part of the common law procedure, dating as far back as Lord Mansfield, *Felton v. Spiro*, 47 U. S. App. 402 (1897). See also, as sustaining the right of the court to adopt this course, as part of the common law, *Ingraham v. Weidler*, 139 Cal. 588 (1903); *McDonald v. Met. St. Ry. Co.*, 167 N. Y. 66 (1901); *Bird v. Bradburn*, 131 N. C.

488 (1902); *Capital Traction Co. v. Hof*, 174 U. S. 1 (1899).

2. *Green v. Soule*, 145 Cal. 96 (1904); *Coal, etc., Co. v. Stoop*, 56 Kan. 426 (1896); *Ulman v. Clark*, 100 Fed. 183 (1900). "The maxim at present adopted [is] this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another." 1 Black. Comm. 387.

3. *Dewey v. R. R. Co.*, 31 Iowa 373 (1871).

4. *Iowa*.—*Slocum v. Knosby*, 80 Iowa 368 (1890).

*Massachusetts*.—*Clark v. Jenkins*, 162 Mass. 397 (1894).

*Michigan*.—*Hyde v. Haak*, 132 Mich. 364 (1903).

*Minnesota*.—*Van Doren v. Wright*, 65 Minn. 80 (1896).

*Missouri*.—*Haven v. R. R. Co.*, 155 Mo. 216 (1899).

justice, in this conception of his duty, may well hesitate to disturb a verdict based on a doubtful question of fact, the right and propriety of intervening to remedy wrong action by the jury taken against a clear preponderance of evidence is well settled.<sup>5</sup>

*A judge may, indeed, be justified in allowing a verdict to stand though he himself would not have reached it on the evidence;*<sup>6</sup>

*United States.*—Milliken *v.* Ross, 9 Fed. 855 (1881).

*England.*—Foster *v.* Steele, 3 Bing. N. C. 892 (1837).

5. *Alabama.*—Lee *v.* DeBardeleben C. & I. Co., 102 Ala. 628 (1893).

*California.*—Schnittger *v.* Rose, 139 Cal. 656 (1903).

*Connecticut.*—Birdseye's Appeal, 77 Conn. 623 (1905).

*Georgia.*—McCullough *v.* Ry. Co., 97 Ga. 373 (1895).

*Illinois.*—Wetherell *v.* R. R. Co., 104 Ill. App. 357 (1902).

*Indiana.*—Rarick *v.* Ulmer, 144 Ind. 25 (1895).

*Iowa.*—Werthman *v.* R. R. Co., 128 Iowa 135 (1905).

*Kansas.*—Buoy *v.* Milling Co., 68 Kan. 443 (1904).

*Kentucky.*—Hurt *v.* R. R. Co., 116 Ky. (App.) 545 (1903).

*Massachusetts.*—Reeve *v.* Dennett, 137 Mass. 315 (1884).

*Michigan.*—Hyde *v.* Haak, 132 Mich. 364 (1903).

*Minnesota.*—McKenzie *v.* Banks, 103 N. W. 497 (1905).

*Missouri.*—Levenhart *v.* Ry. Co., 190 Mo. 342 (1905).

*Montana.*—Murray *v.* Heinze, 17 Mont. 353 (1895).

*Nebraska.*—Sang *v.* Beers, 20 Nebr. 365 (1886).

*Nevada.*—Treadway *v.* Wilder, 9 Nev. 67 (1873).

*New Hampshire.*—Wendell *v.* Saford, 12 N. H. 171 (1841).

*New Jersey.*—Dickerson *v.* Payne, 66 N. J. L. 35 (1901).

*New York.*—McDonald *v.* Met. St. Ry. Co., 167 N. Y. 66 (1901).

*North Carolina.*—McCord *v.* R. R. Co., 134 N. C. 53 (1903).

*North Dakota.*—Ross *v.* Robertson, 12 N. D. 27 (1903).

*Ohio.*—Dean *v.* King, 22 Ohio St. 118 (1871).

*Oklahoma.*—Yarnell *v.* Kilgore, 15 Okla. 591 (1905).

*Pennsylvania.*—Dinan *v.* Supreme Council, etc., 213 Pa. St. 489 (1906).

*South Carolina.*—Robert Buist Co. *v.* Lancaster Merc. Co., 73 S. C. 48 (1905).

*South Dakota.*—Rochford *v.* Albaugh, 16 S. D. 628 (1903).

*Tennessee.*—Spoke & Handle Co. *v.* Thomas, 114 Tenn. 458 (1904).

*Utah.*—White *v.* Ry. Co., 8 Utah 56 (1892).

*Virginia.*—Brugh *v.* Shanks, 5 Leigh 598 (1833).

*Washington.*—Clark *v.* Gt. North. Ry. Co., 39 Am. & Eng. Annot. Cas. 860 (1905); Welever *v.* Advance Shingle Co., 34 Wash. 331 (1904).

*West Virginia.*—Distilling Co. *v.* Bauer, 56 W. Va. 249 (1904).

*Wisconsin.*—Collins *v.* Janesville, 117 Wis. 415 (1903).

*United States.*—Met. R. R. Co. *v.* Moore, 121 U. S. 558 (1887); Felton *v.* Spiro, 47 U. S. App. 402 (1897).

*England.*—Dublin, etc., Ry. Co. *v.* Slattery, 3 App. Cas. 1155 (1878); Davies *v.* Roper, 33 Eng. L. & Eq. 511 (1856); Wood *v.* Gunston, Style 466 (1655).

6. *Connecticut.*—Daley *v.* R. R. Co., 26 Conn. 591 (1853).

*Kansas.*—R. R. Co. *v.* Matthews, 58 Kan. 447 (1897).

*Massachusetts.*—Reeve *v.* Dennett, 137 Mass. 315 (1884).

*Michigan.*—Rohde *v.* Biggs, 108 Mich. 446 (1896).

and the same rule may be applied in an appellate court to the action of the trial judge.<sup>7</sup> It would seem, on principle, that if the verdict is a reasonable one, it would be his duty to allow the result to stand, though he himself would have reached a different conclusion. But it is, as has been seen, quite fully settled in many jurisdictions, that the presiding judge may set aside a rational verdict of a jury, if, in his opinion, it should be contrary to the weight of the evidence,—as well as allow it to stand, the occasions when he will and when he will not order a new trial being left, apparently, to his own administrative selection. This may be defined as trial by jury with a nullification power on the part of the court.<sup>8</sup>

**§ 309. (*Granting of New Trials*); Judge not an Appellate Tribunal.**—The court, while imposing upon the jury the observance of the rules of sound reasoning,<sup>1</sup> does not act as an appellate tribunal as to what inferences should properly be drawn by them from the evidence. If the jury have drawn an induction or deduction which is logically tenable, their action should be allowed

*New Hampshire*.—Wendell v. Saford, 12 N. H. 171 (1841).

*New Jersey*.—Dickerson v. Payne, 66 N. J. L. 35 (1901).

*New York*.—Fleming v. Smith, 44 Barb. 554 (1865).

*North Carolina*.—McCord v. R. R. Co., 134 N. C. 53 (1903).

*Ohio*.—French v. Millard, 2 Ohio St. 53 (1853).

*United States*.—Davey v. Aetna L. I. Co., 20 Fed. 494 (1884).

7. "It is the constant practice of the courts to refuse to disturb an order granting a new trial even where it would have done the same thing had a new trial been denied." Ruffner v. Hill, 31 W. Va. 428 (1888).

8. A mere conflict in the testimony does not excuse him from the obligation of acting.

*California*.—Curtiss v. Starr, 85 Cal. 376 (1890).

*Georgia*.—Thompson v. Warren, 118 Ga. 644 (1903).

*Illinois*.—C. & A. R. R. Co. v. Klaybolt, 112 Ill. App. 406 (1903).

*Iowa*.—Tathwell v. City, 122 Iowa 50 (1903).

*Kansas*.—Coal & Mining Co. v. Stoop, 56 Kan. 426 (1896); Kansas City, etc., R. R. Co. v. Ryan, 49 Kan. 1 (1892).

*Missouri*.—Herndon v. Lewis, 175 Mo. 116 (1903).

*Nevada*.—Treadway v. Wilder, 9 Nev. 67 (1873).

*New York*.—McDonald v. Walter, 40 N. Y. 551 (1869).

*Oklahoma*.—Linderman v. Nolan, 16 Okla. 352 (1905); Yarnell v. Kilgore, 15 Okla. 591 (1905).

*Pennsylvania*.—Dinan v. Supreme Council, etc., 213 Pa. St. 489 (1906).

*Virginia*.—Brugh v. Shanks, 5 Leigh 598 (1833).

*Washington*.—Clark v. Ry. Co., 37 Wash. 537 (1905).

*West Virginia*.—Miller v. Insurance Co., 12 W. Va. 116 (1877).

*United States*.—Felton v. Spiro, 78 Fed. 576 (1897).

1. *Infra*, §§ 385 et seq.

to stand,<sup>2</sup> although the judge himself could have reached a different conclusion.<sup>3</sup> It is only when a rule of law has been ignored or wrongly applied that the action of the jury should be set aside. Among these rules of law, as has been so often made the subject of insistence, is that which requires that the jury should fairly exercise the reasoning faculty upon the facts before them. It is not alone in dealing with the bearing of evidence upon the issue that the law thus requires the use of reason. As has been happily said,<sup>4</sup> "to the hungry furnace of the reasoning faculty, the law of evidence is but a stoker." The requirement is a pervasive one, insisted upon by all charged with the administration of judicial practice at every turn, not only as a standard for their own conduct, but to be enforced upon all others over whose acts they have supervision or responsibility.<sup>5</sup>

2. "If reasonable men might find the verdict which has been found I think no court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges. . . . If their finding is absolutely unreasonable, a court may consider that that shows that they have not really performed the judicial duty cast upon them; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal." Metropolitan Ry. Co., Wright L. R. 11 App. Cas. 152, per Lord Halsbury (1886).

3. *Stackus v. Ry. Co.*, 79 N. Y. 464 (1880); *Stevenson v. U. S.*, 162 U. S. 313 (1896).

4. Thayer, Prelim. Treat. 271.

5. The fact that the use of reason is one required by law, and so is to be enforced by the presiding judge while its exercise to a particular effect is a question of fact for the jury and quite within their province seems well brought out in an opinion rendered in the supreme court for the District of Columbia. "By a loose use of language, it may be said that a verdict '*contrary to the evidence*,' or '*against the weight of evidence*,' was rendered upon '*insufficient evi-*

dence;' and, on the other hand, that a verdict upon insufficient evidence is one contrary to or against the weight of evidence. But we are dealing with legal expressions in their technical meaning; and it is familiar to all lawyers that evidence offered to a jury in a cause has a twofold sufficiency, *i. e.*, sufficiency in law and sufficiency in fact; that of its sufficiency *in law* the court is the exclusive judge; its sufficiency *in fact* is a question exclusively for the jury. The court, in considering the legal sufficiency of the evidence to sustain the case of a suitor, or to establish any particular fact essential to his recovery, must examine the proof with respect to its quality and quantity; and this determination by the court is a question of law. And if the court can see that the proof offered is of such a character and volume that it might well satisfy a rational mind of the truth of the position it is introduced to maintain, then it is declared to be *legally sufficient* for the purpose; and it must be submitted to the jury, who are the exclusive judges of its sufficiency *in fact*, whether others may differ from them in their conclusions or not." *Stewart v. Elliott*, 2 Mackey



**§ 310. (*Granting of New Trials*); Action of Appellate Courts.**

—Trial judges have been sustained and even encouraged<sup>1</sup> by appellate tribunals in setting aside verdicts distasteful to them because contrary to what they regarded as the weight of the evidence, even where the legal right of thus setting aside a verdict is limited to the ground of the insufficiency of the evidence to sustain it;—a provision which, on its face, would seem to apply only when the jury could not *reasonably* do as they have done. In an appellate court the question of the propriety of the trial judge's action commonly assumes not the form of asking whether the verdict of the jury can be sustained, in point of reason, which was the question presented to the trial judge; but takes the form of asking; Can the action of the trial judge be sustained in point of reason?<sup>2</sup> This seems entirely correct, as a matter of principle. The question is, in reality, one of law.<sup>3</sup> The appellate court, not having heard the evidence or seen the witnesses, will not reverse the action of the trial judge if there is evidence on which it can reasonably be sustained.<sup>4</sup> It is felt that reason has not been exercised by him if the weight of the evidence is "clearly and palpably" against his action and in favor of that of the jury.<sup>5</sup>

**§ 311. (*Granting of New Trials; Action of Appellate Courts*); Palpable Confusion.**—The effort to reconcile these antagonistic conceptions, that of a jury whose finding is conclusive as to matters of fact, and to whose wisdom a very marked deference is continually paid,<sup>1</sup> with an autocratic power of the judge to set the results of this wisdom aside, practically at his option, as the only condition which will make trial by jury even "tolerable,"

307, 315 (1883); *Griffith v. Dffen-derfer*, 50 *Mary.* 466 (1878); *Halpin v. Third Avenue R. Co.*, 40 *N. Y. Super. Ct.* (8 *Jones & Spencer*) 181 (1875); *McDonald v. Walter*, 40 *N. Y.* 551 (1869); *Algeo v. Duncan*, 39 *N. Y.* 313, 316, (1868); *Metropolitan R. Co. v. Moore*, 121 *U. S.* 558, 567 (1886); *Randall v. Baltimore & Ohio R.*, 109 *U. S.* 478 (1883).

1. *Clark v. Ry. Co.*, 37 *Wash.* 537 (1905).

2. *Bishop v. Perkins*, 19 *Conn.* 300 (1848); *Capital and Counties Bank v. Henty*, 7 *App. Cas.* 776 (1882).

3. *Infra*, § 394.

4. *Ruffner v. Hill*, 31 *W. Va.* 428 (1888).

5. *Georgia*.—*Cleckley v. Beall*, 37 *Ga.* 607 (1868).

*Iowa*.—*Moran v. Harris*, 63 *Iowa* 390 (1884).

*Kansas*.—*Anthony v. Eddy*, 5 *Kan.* 129 (1869).

*Minnesota*.—*Hicks v. Stone*, 13 *Minn.* 434 (1863).

*Missouri*.—*Bank v. Wood*, 124 *Mo.* 72 (1894).

*New York*.—*Kummer v. R. R. Co.*, 21 *N. Y. Suppl.* 941 (1893).

1. *Capital Traction Co. v. Hof*, 174 *U. S.* 13 (1899).

naturally leads to some conflict in statement on the part of the courts.<sup>2</sup> Certain tribunals state the scientific rule, of permitting a rational verdict to stand, with great precision.<sup>3</sup> On the other hand, the position of an arbiter as to where the preponderance of the evidence rests has been authoritatively assigned to the trial judge;<sup>4</sup> in other words, where two courses, both rational, are open to the jury, it is the right of the court to compel them by vetoing the other, to adopt the one which he, rather than they, may happen to prefer.

*This confusion can mean nothing else* than that, however solicitous the legislatures or constitutional conventions may have been that the action of the jury should be unfettered by the judge, there are practical social dangers involved in giving the rights of the parties and the interests of society into the uncontrolled power of a casual, emotional, many-headed body which, in fact, absolutely prohibit sensible men, having a responsibility for the results of litigation,<sup>5</sup> from conceding such a right. With this make-weight of judicial common sense, it will not be necessary to proceed to the extreme length humorously suggested in an early Illinois case.<sup>6</sup> "If a verdict is to be overthrown because it does not entirely correspond with the judgment of the court, we had better abolish the trial by jury altogether, or at least require the judge to tell the

2. *R. R. Co. v. Ryan*, 49 Kan. 1 (1892); *Williams v. Townsend*, 15 Kan. 563 (1875); *Agnew v. Adams*, 26 S. C. 105 (1886).

3. "It is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor—that is the business of the jury—but conceding to all the evidence offered the greatest probative force, which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict to set it aside and grant a new trial." *Pleasants v. Fant*, 22 Wall. 116, 122 (1874).

4. "The trial court labored under an entire misapprehension as to its

powers and duties. Our statute provides that a new trial may be granted, among other grounds, for insufficiency of the evidence to justify the verdict, and this power must be exercised by the trial courts, if at all. These courts should take care not to invade the legitimate province of the jury, but if, after giving full consideration to the testimony in the light of the verdict, the trial judge is still satisfied that the verdict is against the weight of the evidence, and that substantial justice has not been done between the parties, it is his duty to set the verdict aside." *Clark v. Ry. Co.*, 37 Wash. 537 (1905).

5. *Bishop v. Busse*, 69 Ill. 403 (1873); *McDonald v. Walter*, 40 N. Y. 551 (1869).

6. *Kincaid v. Turner*, 7 Ill. 618 (1845).

jury precisely and distinctly what his opinion of the case is, and require them to find accordingly, and thus save the expense of a second trial."

*This constant setting aside* of the work of the jury is undoubtedly rendered necessary by existing conditions and, however distasteful to those who have won, in what they would treat as the game of litigation, is, on the whole, in the public interest, as has early<sup>7</sup> and often<sup>8</sup> been observed by the courts.

*But the inevitable question arises;*— If it is in the public interest that the court should supervise and correct the verdict of the jury, why should we be certain that a supervisory function on the part of the judge over the action of the jury at the preliminary stages leading up to the verdict is a public danger? If a judge may with perfect propriety set aside a verdict because, in his opinion, the jury failed to give due consideration to an aspect of the case which perhaps counsel have intentionally or ignorantly concealed

7. *Wood v. Gunston*, Style 466 (1655); *Earl of Mount Edgecombe v. Symons*, 1 Price 278 (1815). "It is frequent in our books for the court to take notice of miscarriages of juries, and to grant new trials upon them, and it is for the people's benefit that it should be so, for a jury may sometimes by indirect dealings be moved to side with one party, and not to be indifferent betwixt them, but it cannot be so intended of the court, wherefore let there be a new trial at the next term." *Wood v. Gunston*, Style 466 (1655).

8. *Spears v. Smith*, 7 Ga. 436 (1849); *Cunningham v. Magoun*, 18 Pick. 13 (1836); *England v. Burt*, 4 Humph. (Tenn.) 399 (1843). "The district court cannot shirk their responsibility by saying that the jury are the exclusive judges of all questions of fact. For, while this is true as long as the jury have the case under their consideration, yet, when the jury have rendered their verdict — then the judge himself becomes the exclusive judge of all questions of fact." *Williams v. Townsend*, 15 Kans. 563 (1875). To render such a mode of trial safe and tolerable, there

must exist a power somewhere to re-examine verdicts with some freedom, and when it is manifest that juries have been warped from the direct line of their duty, by mistake, prejudice, or even by an honest desire to reach the supposed equity contrary to the law of the case, it will be the duty of the court to set the verdict aside." *Cunningham v. Magoun*, 18 Pick. (Mass.) 13 (1836). "While the general rule should be preserved, it would not be safe to assert the uncontrollable supremacy of the jury. Both in England and in this country, therefore, the court has always exercised the power of reviewing the evidence on a case made for the purpose, and of granting a new trial where, upon a cool and deliberate examination, the ends of justice seemed to require it." *McDonald v. Walter*, 40 N. Y. 551 (1869). "The facts of a case and the force and effect of testimony to support said alleged facts belong exclusively to the jury under the constitution, subject to no control — except the circuit judge, whose judgment is final." *Agnew v. Adams*, 26 S. C. 105 (1886).

from them, what good reason exists why the expense and trouble of another trial could not have been avoided by the suggestion of the judge while yet there was time? In other words, if the "pound of cure" is so essential to the public good, how does it happen that the "ounce of prevention" is so greatly to be dreaded?

*In criminal cases*, the interests of society in the enforcement of criminal penalties suffer in a marked degree from this absence of control or effective suggestion by the court. The jury, indeed, are equally able to acquit where they have been advised to convict; and to convict where they have been advised to acquit.<sup>9</sup> But only when they have attempted to exercise undue severity by a conviction does the court have the power to set aside the verdict. The more frequent miscarriage of justice by the interposition of ill-judged emotionalism between crime and its deserts is without remedy under the present system;—though right to direct a verdict of guilty has also been claimed and exercised.<sup>10</sup> Permitting a more active and authoritative intervention by the presiding judge, might, at least, be a palliative of the mischief so created. The danger apprehended in ante-Commonwealth times in England, lest innocent persons should be punished, is a rather remote one. The question whether, under our present system, it is possible to punish, with satisfactory speed and accuracy, a *guilty* person whose means enable him to employ all possible expedience for blocking the machinery of justice is, on the contrary, a question of immediate and pressing public interest.

**§ 312. (*Granting of New Trials; Action of Appellate Courts*); Technical Errors as to Evidence.**—The same duty of enforcing the rules of correct reasoning which presses upon the trial judge in his administrative relation to the jury<sup>1</sup> rests upon all revising or appellate tribunals in passing upon the action of trial judges or inferior courts. Sound reasoning is the legal standard of proper conduct, whether in a court of any relative position or outside, in the world of affairs. The need for it is, in reality, a requirement of law.<sup>2</sup> That a verdict will not be disturbed where sound reason has been exercised, truth ascertained, and substantial

9. *People v. Knutte*, 111 Cal. 453 (1896).

10. *U. S. v. Taylor*, 11 Fed. 470 (1882).

1. *Infra*, §§ 385 *et seq.*

2. *Infra*, § 394.

justice done, is the rule of administration adopted in England. In the United States the more technical rule is frequently observed that error in law, departure from precedent, being shown, a verdict will be set aside and a new trial granted;—regardless of whether substantial justice has or has not been done. If the game has not been correctly played, the fact that it turned out as it should is not material. It must be played over.

**§ 313. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence*); Substantive Law.—**

Wherever, under the confusion and blending of the rules of substantive law with those of procedure or practice to which reference is elsewhere made<sup>1</sup> a ruling of a trial court, though apparently one as to a question of evidence, really involves a decision as to substantive law, a more technical rule may properly be applied to the action of the trial judge. Wherever the admissibility of a fact is conditioned, not upon its logical effect to prove a given fact, but upon whether the ultimate *factum probandum* which it is offered as tending to prove is, as matter of law, constituent of the right or liability asserted in the action, obviously the court is dealing with a question of substantive law, however disguised by the phraseology in which it is stated. The reasoning regarding it is legal<sup>2</sup> rather than logical; and a ruling as to the admission of the evidence is clearly as to matter of law. It is practically a ruling as to what constitute the elements of the right or liability asserted, and would fall under the operation of the rules of practice or administration adopted in that jurisdiction for dealing with legal reasoning;—not under that applied to questions simply relating to matters of evidence.

In discussing the administration of appellate courts in dealing with technical error as to evidence, acts of the trial judge which amount to rulings on substantive law are, therefore, to be distinguished and excluded.

**§ 314. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence*); English Rule; Harmless Error.—** Where it appears that substantial justice has been done, or, as the phrase goes, the [trial] judge “is satisfied with the verdict,” no reversal will be had, on account either of the erroneous admission or rejection of evidence;—especially where it

1. *Supra*, § 267.

2. *Supra*, § 63.

appears that adding or subtracting the evidence in question would not alter, or should not alter, the result.

**§ 315. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; English Rule*); Admissions.**— Thus, a new trial will not be granted in England on account of the admission of objectionable testimony where unexceptional evidence to the same effect, sufficient to sustain it,<sup>1</sup> has been given. As was reported in *R. v. Ball*,<sup>2</sup> “Whether the judges on a case reserved would hold a conviction wrong on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was of itself sufficient to support the conviction, the judges seemed to think must depend on the nature of the case and the weight of the evidence. If the case were clearly made out by proper evidence, in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought that as there could not be a new trial in felony, such a conviction ought not to be set aside because some other evidence had been given which ought not to have been received. But if the case without such improper evidence were not clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise.” In like manner, an improper admission of cumulative evidence, as where, to quote Lord chief justice Mansfield,<sup>3</sup> “there be sufficient without it to authorize the finding of the jury,” no new trial will be awarded.<sup>4</sup>

**§ 316. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; English Rule*); Exclusions.**— In a similar way, where an English appellate court feels that a correct result has been reached, reason has been exercised and justice done, no new trial will be granted on account of a rejection of evidence, however competent in itself, which, under the exercise of sound reasoning, would not have altered the result.<sup>1</sup>

1. *R. v. Treble*, R. & R. 164 (1810).  
“The judges did not think themselves bound to stop the course of justice.”  
*Tinkler’s Case*, R. & R. 133 (1781).

2. R. & R. 133 (1907).

3. *Horford v. Wilson*, 1 Taunt. 12, 14 (1807).

4. *Doe v. Tyler*, 6 Bing. 561 (1830) (account).

1. “If the evidence had been admitted, it could have made no difference, at least it ought not to have made any in the verdict.” *R. v. Teal*, 11 East 311 (1809) per Lord Ellenborough, C. J.

*A fortiori*, in a civil case, the proponent of evidence which has been rejected in a trial court must, in order to secure a new trial on that account, affirmatively show at least a probability that the result would have been otherwise had the evidence been received and, indeed, that it ought to have been different. Simply to show an improper rejection will not, as chief justice Abbott said,<sup>2</sup> "be sufficient, for it must be further shown and substantiated that, if they [facts rejected] had been received, they would have led to a probable conclusion in favor of the offering party."

**§ 317. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; English Rule*); Equity Causes.**— In dealing with issues directed out of chancery for trial at law, the same rule was originally adopted in England by the equity judges in passing upon the admissions and exclusions of evidence. "If, upon the whole," said Lord Eldon,<sup>1</sup> "he [the chancellor] is satisfied that justice has been done, though he may think that some evidence was improperly rejected at law, he is at liberty to refuse a new trial."<sup>2</sup>

**§ 318. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; English Rule*); A More Technical Rule.**— A rule as to the granting of new trials for errors in regard to the admission of evidence was for a time adopted in England. Under the lead of the hair-splitting technicality-loving court of exchequer in the days of Baron Parke, the work of the jury no longer stood if the court could see that substantial justice had been done and reason exercised. A new trial was to be awarded if the error discovered by the appellate court could possibly have influenced the effectual action of the jury, although the court was entirely unable to see how this could properly be done.<sup>1</sup> The right of a litigant to mislead the jury in a way

2. *Tyrwhitt v. Wynne*, 2 B. & Ald. 554, 559 (1819).

1. *Pemberton v. Pemberton*, 11 Ves. 50, 52 (1805).

2. *Barker v. Ray*, 2 Russ. 76 (1826); *Bullen v. Michel*, 4 Dow 297, 319, 330 (1816). "The true consideration always is whether upon the whole there appears to be such a case as enables the judge in equity satisfactorily to administer the equities between the parties without the assist-

ance of another trial." *Lorton v. Kingston*, 5 Cl. & F. 269, 340 (1838) per L. C. Cottenham.

1. *Rutzen v. Farr*, 4 A. & E. 53 (1835). "The losing party has a right to a new trial." *Wright v. Tatham*, 7 A. & E. 313, 330 (1837), per Denman, C. J.

For an early anticipation of the more technical rule see *Edwards v. Evans*, 3 East 451, 455 (1803).

which might give him a verdict was entitled, it was thought, to the protection of the court. Even the more technical ruling in England did not, however, go so far as to protect the right to have a game at which he could not possibly win played correctly. A new trial will not be granted in favor of a party where, were the evidence improperly rejected admitted, or *vice versa*, a verdict in his favor "would have been clearly and manifestly against the weight of evidence and certainly set aside upon application to the court as an improper verdict."<sup>2</sup> In the same way, the court will decline to set aside a verdict where the fact which the rejected evidence was offered to prove is admitted,<sup>3</sup> not disputed, or sufficiently proved by other evidence.<sup>4</sup> The result of all this is thus stated by chief justice Coleridge:<sup>5</sup> "Until the passing of the judicature acts, the rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial."

**§ 319. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; English Rule*); Under the Judicature Act.**—The correct administrative principle for dealing, in an appellate court, with the improper admissions or rejections of evidence is that formulated by Mr. Justice Stephen in the Indian Evidence Act of 1872<sup>1</sup>—"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision." This was endorsed by the judges of England under the judicature act of 1875. A rule of court, passed by the supreme court of judi-

2. *Crease v. Barrett*, C. M. & R. 919, 932 (1835). "No evidence was improperly rejected but such as was immaterial and if admitted would not have prevented a nonsuit." *Doe v. Langfield*, 16 M. & W. 497, 515 (1847), per Parker B.

3. *Crease v. Barrett*, 1 C., M. & R. 919, 939 (1835). "The court will not grant a new trial if with the evidence rejected a verdict given for

the party offering it would be clearly against the weight of evidence, or if without the evidence received there be enough to warrant the verdict." *Hughes v. Hughes*, 15 M. & W. 701 (1846), per Alderson, B.

4. *Crease v. Barrett*, 1 C., M. & R. 919, 939 (1835).

5. *R. v. Gibson*, L. R. 18 Q. B. D. 537, 540 (1887).

1. Indian Evidence Act, § 167.



cature in England under the provisions of the judicature act,<sup>2</sup> provides as follows: "A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence . . . unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been thereby occasioned on the trial." This practice, it will be observed, brings the administration on this point back to the old position<sup>3</sup> from which it was dislodged by the adoption of the more technical, or as Professor Wigmore<sup>4</sup> happily terms it, the "exchequer rule."<sup>5</sup>

*England has seen no cause* to be dissatisfied with the practical operation of its present rule on this subject in giving speedy and complete justice. After commenting upon the remarkable and alarming extent to which reversals attain under the American rule,<sup>6</sup> when compared with the total number of trials, 46 per cent. of all verdicts being reversed, 60 per cent. of these new trials being based upon alleged errors in procedural matters, Mr. Justice Amidon, in a very helpful address,<sup>7</sup> proceeds to say: "For the purpose of comparison, and of seeing whether this condition is a necessary evil, I have examined the law reports of England for the period extending from 1890 to 1900, and I find that of all the causes that were brought under review on appeal in that country, new trials were granted in less than three and one-half per cent."

*The courts of Canada*,<sup>8</sup> New Brunswick,<sup>9</sup> Nova Scotia<sup>10</sup> and British Columbia<sup>11</sup> have adopted similar rules with regard to the granting of new trials.

**§ 320. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence*); American Majority.**

— In a majority of the American jurisdictions the more technical

2. 1875, Judicature Act, 1883, Rules of the Supreme Court, Order 39, rule 6.

2. *Supra*, §§ 314 *et seq.*

4. Wigmore, *Evid.*, § 21.

5. *Pearce v. Lansdowne*, 69 L. T. Rep. 316 (1893).

6. *Infra*, §§ 320 *et seq.*

7. Address of Amidon, D. J., Dist. N. Dak., before Minnesota State Bar Association, N. Y. Outlook, July, 1906 at p. 601.

8. *Merritt v. Hepenstal*, 25 Can.

Suppl. 150, 152 (1895); Can. Crim. Code, 1892, § 746.

9. N. Brunsw. St. 1894, c. 8, § 47; *Doe v. Gilbert*, 22 N. Brunsw. 576, 587 (1883); *Wilmot v. Vanwart*, 17 N. Brunsw. 456, 462 (1877); *Key v. Thomson*, 1 Han. N. Brunsw. 295, 2 Han. N. Brunsw. 224, 228 (1867).

10. Nova Scotia Rules of Court 1900, Ord. 37, R. 6.

11. *R. v. Woods*, 5 Brit. Col. 585, 590 (1897).

rule adopted by the English court of exchequer,<sup>1</sup> to the effect that every improper ruling regarding the admissibility of evidence should be ground for a new trial, was at once adopted and steadily maintained.<sup>2</sup> These courts, however, have out-Heroded Herod, as it were, by throwing away many of the safe-guards against social injury which even the exchequer rule retained. The majority practice is enforced even where the social interests involved are fully protected by a just verdict, where reason has been used, and even where the court recognizes the fact that the ruling on evidence should not reasonably have altered the issue of the trial.<sup>3</sup>

**§ 321. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; American Majority*); Federal Courts.**— The early rule announced by the Supreme Court of the United States in dealing with the granting of new trials for technical error of the trial court in the admission or rejection of evidence was entirely unexceptionable; — endorsing, as it did, the sound rule, that the use of reason by lower courts is the standard of requirement to be imposed by an appellate tribunal. “In such cases,” says Judge Story,<sup>1</sup> “the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it are adopted by the court itself; if therefore upon the whole case justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial.” In later years, however, few, if any, courts have applied the erroneous rule of administration adopted in this matter by state tribunals with greater relentlessness and indifference to social consequences than the Supreme Court of the United States.<sup>2</sup>

1. *Supra*, § 318.

2. *Louisville & N. R. Co. v. Miller*, 109 Ala. 500, 19 So. 989 (1896); *Louisville & N. R. Co. v. Malone*, 109 Ala. 509, 20 So. 33 (1896); *State v. Faulkner*, 75 So. W. 116 (1903); *Carpenter v. Lingenfelter*, 42 Neb. 728, 60 N. W. 1022 (1894) (material contradiction); *Cutler v. Skeels*, 69 Vt. 154, 37 Atl. 228 (1897) (improper remark of counsel on his argument).

3. *Murphy v. Backer*, 67 Minn. 510, 70 N. W. 799 (1897) (contradiction on immaterial point). “While I do

not think that the books would have proved any fact of the least value in the case had they been properly admitted, yet the party presenting them would scarcely be permitted to escape the consequence of an erroneous ruling on that ground.” *Masters v. Marsh*, 19 Neb. 467, 27 N. W. 438 (1886), per Cobb, J.

1. *M'Lanahan v. Ins. Co.*, 1 Pet. 170, 183 (1828).

2. *Carver v. U. S.*, 160 U. S. 553, 16 Suppl. 388 (1896) (reversed 164 U. S. 694, 17 Suppl. 228); *Allen v. U. S.* (1893) (reversed 150 U. S.

**§ 322. (Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; American Majority); Criminal Cases.**— If the action of American courts of last resort in dealing with rulings on evidence deemed improper is devoid of scientific justification, still more impressive is their practice in criminal matters. The rule is carried so far that even where the error is clearly immaterial, having had, as the court admit, “no reference whatever to the guilt or innocence of the defendant;”<sup>1</sup> or where the verdict was warranted by the other evidence,<sup>2</sup> a reversal is granted, or, as the significant phrase is, “worked.” Many courts which are prepared to ignore the effect of technical error in cases where substantial justice has been done, shrink from maintaining a criminal conviction where any error, however technical, has been committed in admitting or excluding evidence. The implied term in the reasoning, of course, is that a person accused of crime has a right to circumvent justice if he may do so legally — a proposition apparently contrary to every principle of sound judicial administration and fraught with obvious and very grave social dangers. It has proved easy to overlook the fact that indulgence to the guilty may be, and often is, inhuman cruelty to the innocent. Setting aside a just verdict on a technicality<sup>3</sup> is a clemency extended, it will be observed, not to the person accused of crime — for which there might, indeed, be a *pseudo* justification; but to one shown *guilty* of the crime charged. Society is placed in the anomalous position of waging war with its enemies, while imposing a heavy handicap upon itself. If a sympathetic jury brings in an unjust verdict of acquittal induced by error of any kind, in law or fact, the verdict stands. If a just verdict is rendered upon a technical error regarding evi-

551), (reversed again 157 U. S. 675), (affirmed 164 U. S. 627, 17 Suppl. 154) (1896); *Starr v. U. S.* (1894), 153 U. S. 614 (1894), 164 U. S. 627, 17 Suppl. 223 (1897); *Brown v. U. S.*, 150 U. S. 93, 159 U. S. 100, 164 U. S. 221.

“It is elementary that the admission of illegal evidence over objection necessitates a reversal.” *Waldron v. Waldron*, 156 U. S. 380, 15 Suppl. 383 (1894).

The United States Supreme Court shows a later tendency to adopt the

sounder view. *Motes v. U. S.*, 178 U. S. 458, 20 Suppl. 993 (1899).

1. *People v. Bell*, 53 Cal. 119 (1878) (contradicting proof that a murderer’s victim was habitually profane).

2. *State v. Jefferson*, 125 N. C. 712, 34 S. E. 648 (1899).

3. It is the administrative objection to a technicality, not that it is not legal, but that it has no substantial merits. The case presented here, is therefore, almost typical.

dence, the verdict will be set aside. Such a state of affairs adds, of course, to the interest and professional profit of playing the game of litigation. Socially, however, criminals themselves could scarcely frame a rule more beneficial to their class or more in harmony with its purposes.<sup>4</sup>

*The Right of Legally Outwitting.*—This implied right of the criminal to outwit the law, by any legal expedient, is widely recognized by the American courts. A certain majesty doth hedge the criminal. A typical statement of this view is that of Judge Miller of Louisiana:<sup>5</sup> "The admission of illegal evidence in a civil case is comparatively unimportant. . . . But in a criminal case . . . it is for the jury to convict, and it is presumed to act on all the evidence submitted. . . . It is the right of the accused to be tried on legal evidence alone. . . . The conviction must be by legal evidence only." Perhaps the oddest feature of this administrative situation is, however, the sense of compulsion, constraint, even of *quasi* automatism which the judges show;—as if it were entirely beyond their power to protect society by declining to reverse a just verdict on technical grounds. "Upon the whole," says Sewall, J., in an early Massachusetts case,<sup>6</sup> "although the other facts appearing in this case leave very little doubt of the justice of the verdict, yet as the competency of the evidence excepted to is not supported by any of the authorities we have examined, we think the verdict *must* be set aside."<sup>7</sup> "Some of the evidence objected to," says Morton, J., for the supreme judicial court of Massachusetts,<sup>8</sup> "was not only clearly irrelevant, but might have prejudiced the jury against the plaintiff. We therefore find ourselves constrained to grant a new trial. We regret that we find it necessary to do this; because the action involves

4. "The administration of the criminal law has nearly broken down in America under the application of this rule. After an experience of one hundred and twenty-five years, we have not that swiftness and certainty of legal action, that respect for law, which ought to characterize a civilized people; on the contrary, this principle has brought inefficiency in legal administration, a pestilence of refinements and new trials, and such a reign of disregard for law among both high and low, rich and poor, as

has seldom been seen in civilized nations." Address of Amidon, D. J., Dist. N. Dak., before Minnesota State Bar Association, N. Y. Outlook, July, 1906 at p. 604.

5. *State v. Callahan*, 47 La. Ann. 497, 15 So. 50 (1895).

6. *Bartlet v. Delprat*, 4 Mass. 708, (1808).

7. *Com. v. White*, 162 Mass. 403, 38 N. E. 707 (1894).

8. *Ellis v. Short*, 21 Pick. 142, 144 (1838).

no principle of law, is attended with an expense disproportionate to its importance, has been fully and elaborately tried, and been brought to a result, which was entirely satisfactory and which there is very little reason to suppose will be changed on another trial, by the exclusion of the evidence which was improperly admitted." <sup>9</sup>

Clearly such technicality is merely a recrudescence of the old formalism in another phase. The game must be played with every rule observed; no stitch may be dropped; no act omitted; a false step is fatal. A trial is, as it were, a sacramental incantation to law where no word may be added, none subtracted, none misplaced. Else the spell fails, all is naught.

The reason frequently assigned for this reversal of judgments for technical error is that under some undefined rule of law or logic the error is not in reality technical;—because, as is said, prejudice will be *presumed* from error in passing upon questions of evidence.

**§ 323. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; American Majority*); A Purely Voluntary Situation.**—Yet it seems clear that this sense of legal compulsion on the action of the court, forcing it as by *vis major*, to reverse a verdict for technical error in dealing with evidence, whatever the justice and propriety of the verdict,<sup>1</sup> or however improbable it may be that the action of the trial court could have affected the result, is purely imaginary. More than this, it arises from a palpable confusion between the *presumption* of law and the *assumption*<sup>2</sup> of administration. Judges speak of a "presumption" of prejudice from an erroneous admission or rejection of evidence. The term "presumption" connotes the idea of logic enforced by procedural law;—that, by a rule of law an inference of fact is given a *prima facie* effect in the absence of

9. "The refusal of the court to permit the witness to answer the question deprived the accused of a clear legal right. How far his defence may have been prejudiced by it, we can not say. It is sufficient to know that it was his right to have the question answered by the witness, and that it was relied on as material to his defence." *Pigg v. State*, 43 Tex. 112 (1875), per Devine, J.

1. "It may be shown by the most irrefragable proof that the defendant is guilty of the offence charged against him; but this does not justify the violation of well settled rules of evidence in order to secure his conviction." *Schaser v. State*, 36 Wis. 434 (1874), per Cole, J.

2. *Infra*, §§ 1184 *et seq.*

evidence to the contrary. In point of fact, neither law nor logic, legal or logical reasoning,<sup>3</sup> are in the least involved in this so-called presumption of prejudice from error. There is no "presumption," properly speaking; at most there is but a pure "assumption" of administration.<sup>4</sup> With the observation of this fact, the entire theory of the "rule" falls. As a matter of administration, which is based on and tested by reason alone,<sup>5</sup> the assumption is entirely indefensible. A court of justice cannot within the bounds of reason, so administer legal rules as to recognize and protect the right to commit injustice. Viewed from the standpoint of administration, the desired end is already attained, the verdict is a *just* one. Should the court consent to set it aside, one of *four* things may happen: (1) One of the parties in a civil or either the prosecution or defense in a criminal proceeding, may find that the expense or delay is too ruinous to continue and the litigation on this account, may stop; (2) the second jury may disagree, or one of the parties may de cease; (3) the jury may return the same verdict; (4) they may return an opposite one. In all but the third (3) event — where the jury return the same verdict — an injustice has been done. In that case justice has been sold to the litigant who has been right from the beginning at a greatly enhanced price. In no case is there a gain to the cause of legal administration; in all, there has been a loss. Such an assumption precisely reverses all the recognized general canons of administration. This function of the judge exists primarily for the attainment of justice.<sup>6</sup> This confessedly sets aside a just result. Moreover, this assumption, of prejudice from error, is in precise reversal of all other administrative assumptions. These, as is more fully considered elsewhere,<sup>7</sup> are in favor of regularity, propriety of official conduct, that persons charged with a duty have correctly and conscientiously discharged it. This assumption alone is in favor of irregularity, improper conduct, neglect of duty; i. e., that if the jury had received the evidence as the appellate court thinks it should have gone to them, they would have returned an unjust verdict. The reversal is only explainable on the theory that the appellate court (a) contemplates the possibility of the jury's doing this, and (b) regards the appellant's right to persuade them, if

3. *Supra*, § 63.

4. *Infra*, § 1083.

5. *Supra*, § 716.

6. *Infra*, § 172.

7. *Infra*, §§ 1193 *et seq.*

possible, to do so, as a valuable legal right, the deprivation of which constitutes "prejudice."

**§ 324. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; American Majority*); Futile Legislation.**— Even the legislature has found itself impotent to control the insistence of the appellate judges upon reversals for technical error in matters of evidence. So deep-rooted is the feeling that a new trial should follow any slip, however slight, in this connection, that statutes providing a sounder rule have been customarily disregarded by the courts.

*New York.*— Thus, for example, a New York statute provides<sup>1</sup> that a verdict shall be set aside only where "the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial." This proved entirely inoperative<sup>2</sup> to affect the paramount influence of technicality. New York law on the subject was in this condition when the legislature of that state, in its code of criminal procedure<sup>3</sup> made a provision in which the correct principle of administration was excellently stated. Appellate courts were ordered to "give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." This rule was unambiguous and was at first correctly interpreted.<sup>4</sup> A few years later, however, formalism suddenly again leaped into the saddle. In spite of the plain language of the statute, the New York court of appeals, in 1897, said,<sup>5</sup> referring to the statute,<sup>6</sup> "neither that rule nor the statute affects the well-established principle that the rejection of competent and material evidence, which is harmful to the defendant and excepted to, presents an error requiring a reversal. Such a ruling affects a 'substantial right,' even though the appellate court, with the rejected evidence before it, would still come to the same conclusion reached by the jury; the defendant

1. N. Y. St. 1855, c. 337.

2. *Stokes v. People*, 53 N. Y. 174 (1873) (cumulative evidence); *Cancemi v. People*, 16 N. Y. 507 (1858), (character evidence).

3. N. Y. C. Cr. P. 1881, § 542.

4. *People v. Conroy*, 153 N. Y. 174, 185, 47 N. E. 258 (1897); *People v. Burgess*, 153 N. Y. 561, 47 N. E. 889 (1897). "The spirit of this legislation as is its letter, is that if the

accused has had a fair trial upon his accusation, and if this court is satisfied that the conviction is sufficiently supported by competent evidence, that conviction shall stand. *People v. Hoch*, 150 N. Y. 299, 301, 44 N. E. 976 (1896), per Gray, J.

5. *People v. Strait*, 154 N. Y. 165, 47 N. E. 1090 (1897).

6. C. Cr. P., § 542.

has the right to insist that material and legal evidence offered by him shall be received, and submitted to the jury." Such continues to be the law with occasional leanings in the right direction.<sup>7</sup>

*New Jersey.*—In New Jersey the history of legislative efforts in this matter has been much the same as it has been in New York. The legislature of New Jersey seems to have had a commendable desire to curb the propensity of its judges for reversals on technical grounds. In 1894 an act<sup>8</sup> was passed which permitted appellate courts to reverse verdicts only when "manifest wrong or injury" had been committed. Under this, the court has deemed it "manifest wrong or injury" where, on an indictment for murder, and in order to show a motive for the homicide, the prosecution was permitted to prove that deceased, who was an inmate of defendant's household, had \$800. The objection to the evidence was that it was given in contradiction of a statement by the defendant's mother, as a witness on his behalf, to the effect that deceased had showed no money and only earned \$1 per week; that, as this was not strictly contradiction of the statement of the witness, that the mother was made the government's witness because the strict limits of cross-examination had been exceeded by eliciting evidence which was part of the government's case. On this, the judge delivering the opinion of the court said: "For that reason alone, the judgment, in my opinion, should be reversed and a new trial granted."<sup>9</sup> The legislature thereupon passed a second act<sup>10</sup> to the effect that "no judgment shall be reversed . . . for any error except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits."

*The change, however, can be made.*—This is shown by the courts of the commonwealth of Kentucky. In its code of criminal procedure the legislature of Kentucky enacted the following satisfactory provision,<sup>11</sup> that "a judgment of conviction shall be reversed for any error of law to the defendant's prejudice appearing on the record." In 1880,<sup>12</sup> the provision was amended, in the same direction, by adding at the end thereof the words: "Wherever, upon the consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been preju-

7. *People v. Conklin*, 175 N. Y. 333,

67 N. E. 624 (1903).

8. N. J. St. 1894, c. 163.

9. *Kohl v. State*, 59 N. J. L. 445,

37 Atl. 73 (1897).

10. St. 1898, c. 237, § 136.

11. Ky. Cr. C. 1877, § 340.

12. St. 1880, March 4.



diced thereby." A very rational interpretation has been given to these statutes. In a case where the trial court erroneously declined to permit the defendant to be present at a view, the appellate court, in refusing to reverse, say:<sup>13</sup> "If all the evidence that the jury could have received on the view . . . had been excluded, it is clear that the verdict must have been 'guilty of murder'; under such circumstances, we are authorized in saying that the record affirmatively shows that the error complained of was not 'prejudicial' to the defendant."

**§ 325. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; American Majority*); Basis of Majority Rule.**—A rule of administration as that which sets aside a just verdict by reason of a technical error in the admission or rejection of evidence, savors so strongly of medieval formalism, the social consequences in congestion of judicial business, delay and denial of justice, increase of expense<sup>1</sup> and other evils which are directly attributable to its adoption, have been so widespread and deplorable,<sup>2</sup> as to warrant some scrutiny of the juridical value of the reasoning upon which it is based. As it arose in the versatile and technicality-loving mind of Baron Parke, it seems proper that the reasoning be stated in his words. "It is obvious," said that learned judge,<sup>3</sup> "that if it [the sound principle of administration previously announced by the common pleas and other courts, and since reinstated by the rules adopted under the judicature act of 1875] were acted upon to that extent, the court would in a degree assume the province of the jury; and

13. *Rutherford v. Com.*, 78 Ky. 639, 643 (1880).

1. "There is no scourge in the hands of the strong against the weak like the scourge of new trials. It can wear out the strength and endurance of the weak, and it has been used for that purpose." Address of Amidon, D. J., Dist. N. Dak., before Minnesota State Bar Association, N. Y. Outlook, July, 1906 at p. 604.

2. "In 1887 a committee of the American Bar Association reported to that body, after a careful investigation of the subject, that new trials were granted in forty-six per cent. of all causes that were brought under review in appellate courts in this

country. It was further found that in sixty per cent. of these cases the appeal turned upon questions of pleading and practice. I myself have recently looked into this subject with respect to seven representative states of the union, for the period extending from 1895 to 1900, and find that the conditions reported to the Bar Association have not improved, but, on the contrary, have in some respects grown worse." Address of Amidon, D. J., Dist. N. Dak., before Minnesota State Bar Association, N. Y. Outlook, July, 1906 at p. 601.

3. *Crease v. Barrett*, I. C. M. & R. 919, 932 (1835).

besides, its frequent application would cause the rules of evidence to be less carefully considered." It must be confessed that there is a rather conspicuous vagueness about this language. It is rather unfortunate that it seemed so "obvious" to the court of exchequer; for it is, on the surface, difficult to see how an appellate court could possibly "assume the province of the jury" to any greater degree or in any more obnoxious way than by setting aside a just verdict upon a technical ground; nor has it proved quite clear precisely to what end, with any gain to legal administration, the more careful consideration of the rules of evidence which are designed for the ascertainment of truth, should be cultivated, if the truth, when ascertained, is to be disregarded. Be this as it may, such is the reasoning, on which the majority practice in the United States, has at all times been based. (1) It involves the province of the jury to allow a just verdict to stand if technical error has been committed in admitting or rejecting evidence; (2) not to do this violates the right of a party to have his case *legally* tried, and, if the law is disregarded, endless mischief will follow.

*Province of the Jury.*—Learned courts, other than the exchequer under the guidance of Baron Parke,<sup>4</sup> have experienced a fear lest declining to disturb a just verdict because of a technical error regarding the admission of evidence might be deemed to invade the province of the jury. "The English courts," declare the supreme judicial court of Massachusetts,<sup>5</sup> "and those of some of our sister states exercise a much broader discretion in relation to the granting of new trials than we do. Their practice is to refuse new trials for the improper admission or rejection of evidence, whenever, in their opinion, such erroneous admission or rejection of evidence, whether material or immaterial, ought not to have affected the verdict, or substantial justice has been done. This seems to us to trench upon the province of the jury. How can the court know how much influence each particular piece of evidence had upon the minds of the jury, or that the illegal evidence was not the weight, however small it may be, which turned the balance, and that without it the opposite scale would not have preponderated? To sustain a verdict, under such circumstances, may be to make a decision contrary to the convictions, which the legal evidence would have produced upon the minds of the jury." It would

4. *Supra*, § 318.

5. *Ellis v. Short*, 21 Pick. 142, 144 (1838), Morton, J.

seem that there must be something here more than appears on the surface. Judges are not, in other connections, reduced to the necessity of conjecturing as to what the jury would or would not have done, when the record discloses the entire evidence in the case. The court will employ its own reasoning faculty. This individual judges are also doing in the exercise of a continuous function. Where a demurrer is filed to evidence<sup>6</sup> a trial judge will dispose of it as a question of law, and the appellate court will treat it in the same way. Where the judge is asked to rule that there is no evidence on which a jury may properly find a certain fact, he does not hesitate to rule on the matter. Should a trial judge feel that the verdict of a jury is contrary to law, i. e., not justified by reason,<sup>7</sup> or even when it is against the fact, i. e., contrary to the weight of evidence, he does not hesitate to set it aside, and is sustained by appellate courts in so doing. Presiding judges and appellate courts have always exercised this supervisory jurisdiction over the action of the jury.<sup>8</sup> If, to set aside an unjust verdict is not to invade the province of the jury, on what principle of administration is it that the judge feels himself unable to abstain from intervening to upset a just one? On what argument is it shown that it is perfectly proper, in an administrative point of view, to weigh every particle of the evidence for the purpose of setting aside a verdict, and, at the same time, impossible to estimate the probative force of the particular piece of evidence improperly admitted or excluded, for the purpose of seeing that it is not necessary to nullify the verdict?

*Apparently, when the facts appear on the record, no necessity exists for making administrative assumptions;—here, as frequently, spoken of as “presumptions.”* But if assumption be needed, why should the court assume that the evidence in question would be used by the jury improperly? Why should it assume that if the evidence rejected had been admitted the jury would improperly have disturbed and altered a verdict conceded to be just; or, would if the evidence erroneously admitted had been rejected, have rendered any different verdict? It is the precise object of judicial assumptions to import into a case an element of regularity—proper and orderly performance of duty.<sup>9</sup> Why should the court, in this connection alone, assume that the jury would have acted wrongly—have neglected to do their duty? It

6. *Supra*, § 139.

7. *Supra*, § 307.

8. Thayer, *Prelim. Treat.*, 202, 253.

9. *Infra*, §§ 1193 *et seq.*

would seem fairly to be said that if this assumption were sound, the reversal would amount, practically, to substituting a wrong verdict for a right one by action of the court itself.<sup>10</sup>

*Fair Trial Alone Secured.*—In the same confused way, it seems to be assumed that the sacred right of trial by jury is vindicated by upsetting their work, even when just, if technical error has been committed. But the constitutional right applies only to the trial by jury as it existed at common law. American states did not invent this mode of trial; their founders merely took the institution with them. It seems, therefore, pertinent to observe that England, the home of the jury, finds no difficulty in reconciling the right to sustain a just verdict against technical error with preservation of the institution itself. Neither at common law nor under the judicature acts has a party been regarded as entitled to anything more than a fair trial before a jury, with all the incidental and accidental slips in the matter of strict legal precision. If the verdict reaches a just and reasonable conclusion, the matter at common law was regarded as at an end. Commenting on this claim that a party has a right to insist that the jury shall receive absolutely unimpeachable testimony and all the legal evidence that he may have offered, Judge Amidon very forcibly inquires: "Is there any provision in any constitution that you know anything about that secures to a man the right of several trials by jury? Is there any provision in any constitution that you know anything about that secures to any citizen an absolutely infallible trial by jury? Trial by jury with us means just what it means in England—that a party shall have a right to have controverted questions of fact passed upon in the trial court by a jury. It does not hamper the power of the appellate court here any more than it does

10. The distinction taken by the supreme judicial court of Massachusetts seems scarcely valuable. Judge Morton says: "It is the province of the court to guard the decisions of the jury from the influence of foreign or irrelevant matter and preconceived opinions and prejudices; and this imposes upon it the duty, on proper occasions, of giving to the jury an opportunity to revise its decisions; but never authorizes it to weigh the evi-

dence or to determine how they should ultimately decide upon matters of fact." *Ellis v. Short*, 21 Pick. 142, 144 (1838). A case involves one of two possible issues. The proper one has already been reached. Setting it aside, does not, indeed, direct the jury how they shall decide; but neither does allowing the verdict to stand do so. So far as reversal operates, it merely affords the jury an opportunity to decide wrongly.

there.”<sup>11</sup> The speaker’s conclusion seems warranted: “The English have had the good sense to keep trial by jury on earth as an instrument for doing justice between man and man here in this world; whereas, we in America have worked it up into the thin air of presumption and metaphysics.”<sup>12</sup>

**§ 326. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; American Majority*); Technical Inerrancy Required.**—The impressive feeling of the American appellate courts that they *must* reverse if error, however far from the substantial merits, has occurred, has been elsewhere noticed.<sup>1</sup> It all apparently proceeds on the theory that certain rules of law *must* be followed, regardless of consequences. It involves a requirement of absolute inerrancy on the part of a trial judge. He must, at the peril of justice, comply absolutely with every technical requirement of the law of evidence — working out, in the hurry and other embarrassments of a *nisi prius* trial, a result to which the greater calm and leisure of an appellate court will not enable them to find any possible exception. When the number of administrative problems, accentuated by the desire of counsel to “get error into the record,” is considered, the unfairness of this to a trial judge is obvious. A practically impossible standard is erected. Penalty, reversal. Result, delay and expense to litigants; disrespect for law.

*The subordinate position of the trial judge to which this demand of literal inerrancy in rulings consigns him has been resented by some courts. Thus, e. g., on a criminal case, where the defendant’s counsel objected to the phrase “incriminating circumstances” in connection with the evidence against his client,<sup>2</sup> the supreme court of Nebraska fitly observes: “It never was the intention of the law that the district judges of the state should abdicate their reason because a man was on trial charged with the commission of a crime; nor does the law of the land place the district judges in a strait-jacket in criminal trials, nor make of them mere machines to repeat certain general propositions of law in their instruc-*

11. Address of Amidon, D. J., Dist. N. Dak., before Minnesota State Bar Association, N. Y. Outlook, July, 1906 at p. 603.

12. Address of Amidon, D. J., Dist. N. Dak., before Minnesota State Bar

Association, N. Y. Outlook, July 1906 at p. 603.

1. *Supra*, §§ 322 nn. 6 *et seq.*

2. *Davis v. State*, 51 Nebr. 301, 70 N. W. 984 (1897).

tions.”<sup>3</sup> Nor does grave social danger fail to lurk behind this gross perversion of the dignified position of a presiding judge. As has elsewhere been intimated,<sup>4</sup> judicial power and responsibility for results, opportunity for the doing of duty and the enhancement of reputation in the rendering of a high grade of social service, are needed to attract to the bench those best calculated to advance the cause of jurisprudence. Whatever minimizes this attraction to judicial service tends to degrade the standards of legal administration. The idea that a strong-handed, clear-headed, resolute judge is a social menace — that he may, in some occult way, impair the liberty of the citizen, might have had some justification of fact from the view point of a defendant, before Lord Jeffries, Chief Justice Eyre or Mr. Justice Buller. At present, the need for virile magistrates is urgent. In present American systems of jurisprudence, “the danger rather to be dreaded is making the judges men of straw, and thus stripping the courts of popular reverence, and annihilating the popular estimate of the power and sanctity of the law.”<sup>5</sup> The view of the proper function of a judge, expressed by Baron Smith on the trial of Mr. Justice Johnson,<sup>6</sup> is quite as applicable to the United States as to England. “There may, indeed,” said the learned Baron, “be a tame and creeping and tradesmanlike mode of administering the law conceived; but it is not one which meets my ideas of the duties or station of a judge. Laws are but means; and though it be not our province to legislate but to interpret, yet we should not forget or fail to further the end and object of those laws which we are called upon to construe, namely, the preservation of public morals, the promotion of social order, and the establishment of good government, of our liberties, and of the constitution.”

*Rule not Anomalous.*—The rule of administration which “presumes” or, more properly, *assumes*, prejudice from technical error, while widely at variance from sound principles of administration, must not be regarded as anomalous in the system of which it forms a part. The very distinguished judges who established and are, at present, administering appeals under such a rule of presumption, or assumption, are entirely consistent with many analogies

3. *Davis v. State*, 51 Nebr. 301, 70 N. W. 984 (1897).

4. *Supra*, § 95.

5. *Cook v. State*, 11 Ga. 53, 57 (1852), per Nisbet, J.

6. *Johnson's Trial*, 29 How. St. Tr. 353 (1805).

in American jurisprudence, most often seen in criminal cases. These, however dissimilar in certain respects from each other, present the common feature of causing the reversal even of just verdicts on account of some technical legal right of one or other of the parties. The American judge is familiar with the idea that correct results are not entitled to his approval, unless no false procedural step shall have been taken in reaching them. In other words, the litigant has a right not only to justice but to the observance of certain safeguards or guarantees placed, for his protection, in the procedure of trials. No correctness in result will excuse the nonobservance of these safeguards. The cause of justice has not, indeed, been prejudiced; but the individual has. If the emphasis of the court's interest be placed upon the individual rather than on society a reversal naturally ensues. It is formalism, technicality, sanctification of the *means* rather than of the *ends* of litigation. Yet in preferring the interests of the individual to those of society courts are occupying precisely the attitude which the men who founded the American commonwealth occupied to the government of the Tudors and Stuarts. Organized society, as then controlled, was represented by royal judges, anxious to vindicate the laws as they then stood. The separate rights of the individual were represented by the party of democracy — then, for higher social ends, occupying the position of rebels against authority. Justice, conventionalized by laws of political and religious oppression, as matters then stood, was precisely what these men did *not* want. Confessedly guilty, their hope of escape lay in obstructing the efforts of government to get at the truth. Truth was nothing which could assist them. By a curious historical coincidence, these men, often of the highest religious principles, occupied the same mental position and made practically the same claims which were urged in favor of the criminal classes of England, then brutalized by the bloodiest penal code which ever disgraced<sup>7</sup> a Teutonic people. Insistence upon strictest legal proof,

7. "To go back to the beginning of the century is to go back, so far as the Criminal Law is concerned, to an age of barbarism. Look at the punishments which were inflicted on convicted prisoners. The sentence on a traitor was that he must be drawn on a hurdle from the gaol to the place of execution, and when he came there he must be hanged by the neck, but

*not till he be dead, for he must be cut down alive, then his bowels must be taken out and burnt before his face, then his head must be severed from his body, and his body divided into four quarters, and these must be at the king's disposal."* Century of Law Reform (Macmillan & Co., 1901), p. 43.

clinging to what a sympathetic jury might see fit to regard as the "rights of Englishmen," and properly resent when invaded; such was the reliance, in sixteenth and seventeenth century England, alike of the Dissenter, the Roundhead, or the Poacher. A confession, however rationally trustworthy, or shown to be true by facts discovered in connection with it, could not be used against the accused if made to one in authority.<sup>8</sup> If such a confession were used, and a verdict obtained, it must, though obviously correct, nevertheless, be set aside. The accused was guilty, no doubt; but it had not been legally shown to be so. Again; no one could be required to furnish evidence against himself. Obviously, he might be telling the truth; but the truth was to be rejected if obtained in this way. Transparently just though the verdict might be, clear as it might appear that, if the court did its duty, no change in result would occur, even where the same facts obtained from the accused were satisfactorily proved by other witnesses, the verdict must be reversed.<sup>9</sup> Similar causes have assigned a unique importance to the right of confrontation, double jeopardy and the like, and, above all, to the fundamental right of trial by jury itself.<sup>10</sup> The feeling has so far extended through the entire field of procedure as to give sacramental importance to the rules of evidence and probably is the basis of Baron Parke's solicitude for their observance;—in much the same way that Blackstone regarded the jury as the palladium of English liberty. It was glorifying and sanctifying the *means* for attaining justice, while sacrificing justice itself. It was an apotheosis of technicality, i. e., of formalism. But, when viewed from a historical standpoint, it can scarcely be said to be unintelligible.

*A Disastrous Consequence.*—When democracy in America assumed the functions and responsibilities of government, the limitations which, in a position of rebellion against authority, it had sought to impose upon the right of the state to punish its offenders, returned to plague it. Involved as these limitations were claimed to be with the most sacred and fundamental rights of the citizen, democracy has long clung to them and, without great consideration, as of something having once for all been settled, has extended rather than checked their scope and application. Changes in social conditions or in the character and objects of those who

8. *Infra*, §§ 1472 *et. seq.*

10. *Supra*, §§ 411 *et seq.*

9. *Infra*, § 322.



are in opposition to the decrees of society are not, in all quarters, fully noticed. The result is a general breakdown in the effectiveness of criminal procedure to deal with crime, general lawlessness and popular contempt for the work of the courts. Happily England, where democracy is not without an enormous influence in government, has wisely escaped much of this.<sup>11</sup> In America, justice steadily awarding injustice rather than sacrifice a jot or tittle of the legal formality by which it is hampering itself is by no means an impressive spectacle.

**§ 327. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence*); American Minority.**

— In a minority of the American jurisdictions the rule, originally adopted and finally established in England, that the improper admission or rejection of evidence would not be permitted to set aside a verdict which did substantial justice, has been employed. Many valiant protests against the majority rule have been registered by dissenting judges, whose opinions normally carry weight.<sup>1</sup>

*A correct administrative ruling* is thus stated in a minority opinion in Mississippi;<sup>2</sup> "The practical inquiry is the true inquiry and the practical inquiry must always be . . . that [if] substantial justice has been done, and the right result has been reached on competent testimony under the law applicable to

11. "During the last seventy-five years nowhere in the British Empire has a man been snatched from the custody of the law and sacrificed to mob violence. That, gentleman, is to me the sublimest legal fact of the past seventy-five years. Nowhere in the British Empire, including South Africa, Australia, and British America, has a single human life been snatched from the custody of the law and sacrificed to mob violence. That is respect for law organized into human character. Let me place before you our own experience. Suppose what has repeatedly happened in some of the oldest states of this Union, when a man under arrest, charged with crime, has been snatched from the custody of the law, taken to a public place, tied to a post, acid poured in his ears and eyes, his

fingers and toes cut off as mementoes of the event, and the torch then applied by women in his execution—suppose that had occurred in the Philippine Islands, what would we have said about the fitness of the Filipinos for self-government? I say that our administration of the criminal law has broken down. It is an unworkable machine." Address of Amidon, D. J., Dist. N. Dak., before Minnesota State Bar Association, N. Y. Outlook, July, 1906 at p. 604.

1. *People v. Stanley*, 47 Cal. 113, 119, (1874), per Wallace, J.; *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730 (1897), per Haight, J.; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813 (1897), per Brannon, J.

2. *Lipscomb v. State*, 75 Miss. 559, 23 So. 210, 228 (1898).

the case, and no other reasonable verdict could be rendered than the one which was rendered, a reversal should not follow. The administration of justice is a practical thing. It should be administered in a practical way, so as, while not denying to any defendant any substantial right to which he is entitled by the law of the land, to protect society from violators of the law, and to secure the punishment of guilty men properly convicted." Against the conception that there exists some constraining rule of law or principle of administration in the grip of which a court is forced to act; or that by a definite and inevitable automatic action, a technical error in dealing with evidence "works," *proprio vigore*, a reversal, strenuous voices have been raised in remonstrance. "It must thus be clear beyond all cavil," says Judge Whitfield, in dissenting,<sup>3</sup> "that this appellate tribunal is not a helpless prisoner, bound in the fetters of some supposed hard and fast rule requiring it to reverse cases where, first, erroneous instructions have been given; or, second, proper instructions have been refused; or third, competent testimony has been excluded; or, fourth, incompetent testimony admitted; or, fifth, improper argument has been allowed; or, sixth, the trial court has erred in its rulings on the pleadings, on the ground, merely, that such action of the court, of the one kind or the other, constitutes error in law merely. Every one of these propositions is laid down as settled law. . . . With all deference, it seems to me that my brethren have clearly confounded the primary function of the jury to pass on the evidence and find the defendant guilty, if satisfied beyond a reasonable doubt, and the power which this appellate tribunal exercises in reviewing that finding of the jury. When the court so reviews the finding of a jury in a criminal case, and reverses, as it repeatedly has done, on the sole ground that the evidence was manifestly insufficient to warrant the verdict of guilty, or affirm the jury's finding of guilt when that verdict is clearly right on the law applicable to the case and the competent testimony in the case, as it has also repeatedly done, this court is not usurping the jury's primary function, and passing originally upon the guilt or innocence of the defendant, but is manifestly exercising its undoubted appellate power of reviewing and upholding or vacating the finding of the jury, as the case made may demand, in

3. *Lipscomb v. State*, 75 Miss. 559, 23 So. 210, 228 (1898), per Whitfield, J.

accordance with settled rules of law governing appellate jurisdiction."

**§ 328. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; American Minority*); Prejudice from Error.**—In these jurisdictions, the so-called "presumption" of prejudice from error does not obtain. When the verdict is a just one, these courts naturally fail to see either (1) why there should be any need of presumption in the matter; or, (2) why, if presumption is to be indulged at all it should be assumed or presumed that a party is *prejudiced* by a just verdict.

(1) If the record shows all the facts, the reasonableness of the decision is a matter of law.<sup>1</sup> It is this question of law which is the appropriate duty of the appellate court to resolve. The verdict reached being the correct one, reason clearly has been used and the verdict should stand.<sup>2</sup> Where the facts thus appear, it would seem that the necessity for assumption or presumption as to what should be taken to be the case *in the absence of evidence*, does not arise.

But (2) conceding that assumption or presumption is proper, why should it be concluded that the excepting party has been *prejudiced*? Of what right has a party against whom a just verdict has been rendered been deprived by a ruling on evidence which should not, under the rules of reason, have affected the result? The only conceivable right of any value is the chance of tiring out his opponent by delay, reaping a benefit from his death or that of his witnesses, or of inducing a jury to give him a verdict to which he is not justly entitled. The minority of American jurisdictions do not regard these as suitable objects for judicial administration. The end which administration proposes to itself is the attainment of justice; it does not place as its object the use of particular means in attaining it. It follows that where the end reached is correct, it will not be thrown away merely because of some criticism as to the means.

**§ 329. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; American Minority*); Equity Practice.**—In general, where a court of equity has

1. *Supra*, § 394.

2. "The judgment was manifestly for the right party; and where such is the case, the judgment will not be

reversed because some incompetent testimony was admitted." *Gardner v. R. Co.*, 135 Mo. 90, 36 S. W. 214 (1896).

sent an issue for trial by jury to a court of law, the chancery judge will not order a new trial simply because of improper admissions or rejections of evidence where he feels that the result reached is, on the whole, correct and such as to enable him to administer the equities before him.<sup>1</sup>

**§ 330. (*Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; American Minority*); Criminal Cases.**—In certain American jurisdictions, while the so-called “presumption” of prejudice from error is still spoken of as a rule of law rather than as an assumption of administration, the irrationality of the administration does not, as in many of the states holding the majority rule,<sup>1</sup> extend so far as to apply to cases where the record itself demonstrates the falsity of the assumption; i. e., where the record shows that there has, in point of fact, been no prejudice. Where the verdict is not only a just one but it also affirmatively appears that no harm has been done by it to the guilty person;<sup>2</sup> e. g., where absolutely conclusive and entirely unobjectionable evidence establishes the point on which the illegal evidence was admitted;<sup>3</sup> or where, assuming the fact which the rejected evidence tended to establish, to have been proved, it could not have availed the defendant, these courts will allow the verdict to stand. It would seem as if the impulse of sympathy for criminality as it suffered under the undue severity of the English penal code of the early days, prior to the reforms of the nineteenth century, might with propriety be deemed to have spent its force and attained its purpose. Because

1. *Dowie v. Driscoll*, 203 Ill. 480, 68 N. E. 56 (1903).

1. *Supra*, § 320.

2. Where the ruling “could not properly have changed the result, then he [defendant] was not aggrieved by the ruling.” *State v. Beudet*, 53 Conn. 536, 539, 4 Atl. 237 (1885). “The reception of illegal evidence is presumptively injurious to the party objecting to its admission; but where the presumption is repelled, and it clearly appears, on examination of the whole record, beyond the possibility of rational doubt, that the result would have been the same, if the objectionable proof had been rejected,

the error furnishes no ground for reversal.” *People v. Fernandez*, 35 N. Y. 49, 59 (1866), per Porter, J.

3. “In such a case as this, where the prisoner’s guilt is very manifest

I think it would exhibit unnecessary squeamishness to say he has not been legally convicted on abundant evidence.” *State v. Ford*, 3 Strobb. 528 (1839), per Earle, J. “The courts will not set aside a verdict on account of the admission of evidence which ought to have been rejected, provided there be sufficient without it to authorize the finding.” *McCleskey v. Leadbetter*, 1 Ga. 551, 556 (1846).

men were hanged for grand larceny or patriots under the Stuarts suffered by means of the law of criminal libel furnishes, apparently but slight reason why the state should exhaust its treasury or its judges their ingenuity to save hardened, brutalized criminals from their just deserts.<sup>4</sup>

*It may fairly be said* that however great may have been the influence of the overstrained technicality of appellate courts in dealing with questions of evidence, in promoting the escape of criminals and the spread of contempt for law, that the most pungent critics of the present system, are to be found among the judges themselves. "We have," says the supreme court of Georgia,<sup>5</sup> "no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist upon mercy to society, upon justice to the poor woman whose blood cries out against her murderers. That criminals go unpunished is a disgrace to our civilization; and we have reaped the fruits of it in the frequency with which bloody deeds occur." As was succinctly declared by Judge Freeman,<sup>6</sup> the day has gone by "when it is possible to punish an innocent man; we are now struggling with the problem whether it is any

4. As Dean Wigmore intimates, Wigmore, Ev., § 21, affixing the penalty of death for larceny was no more monstrous in England of the Georges than it is, at the present time, to attach the penalty of a new trial to every technical violation of the law of evidence. "I know we convict men and send them to the penitentiary; but I state it here as a fair statement of the administration of the criminal law in America that if a man has the means to employ able counsel, so as to make a fight, as we say, in the great majority of cases he can escape punishment for crime.

The trial can be so protracted and enmeshed in such a complication of pleading and evidence as to result—not in every case, oh, no, but in the majority of cases—in error which, under this pernicious doctrine of presumed prejudice, will nullify a conviction." Address of Amidon, D. J., Dist. N. Dak., before Minnesota State Bar Association, N. Y. Outlook, July, 1906 at p. 605.

5. Eberhart v. State, 47 Ga. 598, 610 (1873), per McCoy, J.

6. Roper v. Territory, 7 N. Mex. 272, 33 Pac. 1014 (1893), per Freeman, J.

longer possible to punish the guilty." The extent to which the venerated Constitution of the United States is used as the last resort of desperate criminals to escape the just consequences of their acts would be farcical if it were not so serious. One of the most striking aspects of the entire situation is the seriousness with which the Supreme Court of the United States treats such appeals. "I do not understand," says Judge Cooley,<sup>7</sup> "that the constitution is an instrument to play fast and loose with in criminal cases, any more than in any other; or that it is the business of courts to be astute in the discovery of technical difficulties in the punishment of parties for their criminal conduct."

**§ 331. Taking Jury's Opinion.**—The judge, in discharging his own duty, may take the opinion of the jury; giving it such weight as he deems proper. He may, in like manner, ask their view as to the meaning of a document.<sup>1</sup> Where a trial by jury is not a constitutional or statutory right, but the court seeks the aid of the jury in determining questions of fact, it may adopt, modify or disregard their findings.<sup>2</sup> This convenient practice has the sanction of statute in certain jurisdictions.<sup>3</sup> The judge may, however, prefer the shorter procedure of leaving the entire question to the jury under appropriate instructions as to what rule of law they should apply in the event of their contingent findings of fact.<sup>4</sup>

*On glancing back* from the closing sections of the present chapter to those with which it opens, a feeling akin to mortification may well come to the student of juridical institutions noticing how much of the technicality and formalism of the twelfth century has persisted into the twentieth. It may well appear to such an observer that, while the precise manifestation of this judicial dependence upon a pre-existing formulary or rule in open contravention of substantial justice or even of logical reasoning, may have changed with the passing centuries, the essential vigor of the feeling itself continues without material abatement. He might perhaps suggest, in support of such a view, that although

7. *People v. Murray*, 52 Mich. 291 (1883).

1. *Stewart v. Merchant, etc., Ins. Co.*, 16 L. R. B. D. 619, 627, 34 W. R. 208, 210 (1885).

2. *Kelly v. Home Sav. Bank*, 92 N. Y. Suppl. 578, 103 App. Div. 141 (1905).

3. *Willeford v. Bell*, (Cal. 1897) 49 Pac. 66, 7; *Maier v. Lillebridge*, (Mich. 1897) 70 N. W. 1032.

4. *Hawes v. Forster*, 1 M. & R. 368 (1834).

it is no longer customary to subject alleged witches to the ordeal by water,<sup>5</sup> the most characteristic anomaly of the English law of evidence, that excluding hearsay<sup>6</sup> however probative and essential to the case of the proponent it may be, is still in large measure defended and maintained upon the ground that the declarant has failed to comply with an ancient form of ordeal;— that by oath.<sup>7</sup> It may, moreover, not escape his attention that while the ordeal by battle<sup>8</sup> itself has been long abandoned, the ethics of the typical modern trial are even now substantially those of war, everything being permitted which is not preventable under the rules; and the result of the proceedings determined by the ordeal of the mental, financial and even physical endurance of the respective parties. He may even be impressed by the fact that though ancestor worship does not at the present time extend so far as to follow the customs of the tribe in doing the same thing over again regardless of modifying considerations, the fact that our ancestors of the sixteenth and seventeenth centuries at a particular period of their political evolution found it convenient to turn the institution of the jury from an administrative instrumentality for ascertaining the truth as to disputed issues of fact into a cord by which to tie the hands of those charged with the administration of law, still continues to confer upon the jury a sanctity and imputation of wisdom which daily experience might well have long ago disproved. Probably, it would, in part at least, answer the objections of such a critic to point out to him that much of the rational and ethical growth of the past eight hundred years lies just beneath the surface of judicial administration, and is to be best discerned not so much in the procedural rules which constitute, as it were, the framework of the law of evidence, as in the canons or principles of judicial administration which form the motive power and guiding spirit of this branch of the law. To these, it now seems appropriate to give our attention.

5. *Supra*, § 269k.

6. *Infra*, § 2702.

7. *Supra*, § 269b.

8. *Supra*, § 269n.

## A. PROTECT SUBSTANTIVE RIGHTS.

### CHAPTER VI.

#### PRINCIPLES OF ADMINISTRATION; PROTECT SUBSTANTIVE RIGHTS.

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§ 332. **Principles of Administration.**—The exercise by judges of the broad and somewhat ill-defined powers of administration connected with the judicial office is necessarily governed rather by principles than by rules. These principles in turn are naturally somewhat indeterminate, eluding complete and definite statement. They grow out of and are guided by the accurate judicial instinct, the appreciation of highly intellectual skilled observers as to what should be the ultimate results of litigation. While general similarity, on broad lines, may be traced through the decisions, the elasticity characteristic of a principle as distinguished from a rule is distinctly observable, and makes the action of a particular judge, in view of his individual characteristics, the “personal equation,” a matter of some uncertainty. But the difficulty lies deeper than differences in temperament or training. It is increased by the consideration that it seldom chances that well-balanced administrative action is obtained by implicitly following the dictate of any one principle. More often, it is reached by a judicious compromise between conflicting canons. The rights of one liti-

gant are constantly conditioned by those of his opponent, the claims of justice are incessantly offset by the insistence of rules of municipal law, substantive or procedural; the wish to reach abstract truth is checked by the absolute necessity of finishing cases within a reasonable time, and so on. It is not, therefore, to be regarded as surprising that the approved principles of administration should at times conflict with each other in such a manner as to make their application to the facts of a particular case difficult of adjustment; that equally competent and conscientious judges well may differ as to what should be done. More than this, it is precisely the varying facts of the individual case, not reducible to or controlled by a rule, which it is the essential characteristic of the doing of justice to observe; and administration, seeking to attain justice, deals with these constantly changing combinations of facts.<sup>1</sup> In general, however, it may be said that the court in exercising its administrative functions seeks to attain certain definite objects; — partly those to which the litigants are entitled, as a matter of substantive right; partly those which more nearly fall within the province of procedure, practice or administration. The judge will regard it as his primary duty to protect the fundamental rights of the parties in matter of substantive or procedural law; — seeing to it that, so far as possible, the parties severally receive the advantages and privileges to which the law, in either form, entitles them. He will not only formulate and announce or apply the correct rule of law affecting directly the right or liability involved in the inquiry, but will, as part of the legal as distinguished from the social element of his duty, seek to protect by his administrative powers the rights secured to the party by the law of the land. These can only be assured to litigants by discretionary rulings suitably moulding the course of the trial, i. e., by the use of his administrative function.

*But the court is not concerned merely* with the interests of the parties. When these fundamental rights of the litigants are provided for, a wider scope is given to the court's discretion in connection with the effort to further the interests of justice, both as between the immediate parties to the particular case and in the still broader aspect as affecting the community at large. As between the parties, the interests of justice makes certain demands; — that the litigants should be held to the exercise of good faith,

1. *Supra*, § 172.

that they should be protected, so far as possible, against surprise and unfair treatment. The general interests of society further require that the court, so far as consistent with the rights of the immediate parties, should expedite trials; establish, as the result of repeated judicial proceedings, probable inferences of fact in the form of presumptions; harden, under proper circumstances, these inferences of fact into rules of law.

*Conveniently epitomized*, these broad canons of judicial administration may be said to be four:

- A. Protection of Substantive Rights.
- B. Furtherance of Justice.
- C. Expediting Trials.
- D. Perfecting Substantive Law.

The operation of these canons of administration may conveniently be considered in this order.

**§ 333. (*Principles of Administration*); A. Protection of Substantive Rights.**—The primary principle of judicial administration regarding the admission of evidence is to preserve during the course of the trial the fundamental rights of the parties. This principle is justly deemed paramount to all others. Its observance is at all times distinct and prominent in a well-balanced judicial consciousness; and, in case other administrative principles or rules of expediency may chance to conflict, they must yield to the claim of considerations of this higher grade of legal importance. In other words, so far as the sovereign has conferred a right, or in any way established a rule, it must control the mere *arbitrium boni judicis*. These fundamental rights of a party so far as they relate to matters of procedure, as distinguished from substantive law, in reality are merely branches of a single right—that of having a full and impartial trial according to due course of law.

*It will be expedient*, however, to consider the right as separable. A party may claim to be entitled to insist (1) that he be given a reasonable opportunity to prove his case or establish his defense; (2) that he be accorded fair, reasonable opportunity to test the affirmative case relied on by his opponent; (3) that both branches of the tribunal shall employ, in the discharge of their respective functions, processes of correct reasoning; (4) that he be granted a trial by judge or jury, or both, according to the established

course of legal proceedings; — each branch of a mixed tribunal discharging the duty of judging imposed upon it by law; (5) that he be allowed to *confront* the witnesses against him.

**§ 334. (1) Right to Prove One's Case.**—The substantive law secures to every litigant a fair opportunity to prove, in the best method at his command, and at a designated time, the substance of his contention. In other words, the party seeking the assistance of the court should be enabled to lay his case before the appropriate tribunal; — while it is equally the right of his adversary to unfold the substantial part of his defense at an appropriate time before the same tribunal. To this end, as to the object of the entire proceedings, all rules of administration regarding the admission of evidence are subservient; — even the claims of natural or abstract justice being conventionalized or restrained by the right of the litigant to prove his case according to law. Though paramount, this administrative principle is qualified and conditioned in operation by the urgency of other valid canons of administration; — for example, the right of the other litigant to the use by all parts of the tribunal of the reasoning faculty. The court is neither required nor at liberty to receive evidence which can by no method of reasoning, either alone or in connection with other facts, justify judicial action in accordance with it. The opposing party is thus entitled to the use of reason; but, within the limits prescribed by it, the proponent has a right to prove his affirmative case.<sup>1</sup> In other words, any evidence whatever must be legally and logically probative, it must be such that reason can act pursuant to it, when fully developed and associated with the other facts offered. Subject, however, to this requirement of relevancy, the right of a litigant to prove the substance of his case overrides all minor considerations of administration; and fundamentally controls the judge, so far as he has freedom of action, in deciding how he shall apply the rules of evidence, or to which of them shall be accorded the greater influence in any given case. However many or minute may be the details offered, whatever, within the lines of relevancy, the range of remoteness in the evidence, howsoever great the danger of raising collateral issues, if the right of the party to prove the substance of his case requires that the facts be received they must be admitted.<sup>2</sup> Even evidence

1. *Infra*, § 385.

2. "There is no rule and no prin-

ciple which forbids delay, tediousness, and complication, pure and simple,

liable to mislead, embitter the tribunal against one of the parties or cause any other undesirable incidental result will be received if doing so is reasonably essential to the right of a party to prove the facts on which he relies.

**§ 335. ([1] *Right to Prove One's Case*); A Necessary Principle.**—The case actually made by the proponent in support of his contention may not be sufficient to carry conviction to the mind of the tribunal. But if the facts have reasonable weight, i. e., present such a degree of probative force that a jury could, without stultification as reasonable men, adopt it as the basis of their action, and it is not shown to be within the power of the litigant to produce a stronger case, it is the administrative duty of the court to receive and weigh the facts as he presents them. So long as this condition of logical incompleteness is the misfortune rather than the fault of the party, he is not debarred from the privilege of having the tribunal pass on his evidence. Any other principle of administration in this connection would entrust to the court the power of preventing a party from offering to the jury a case which the judge did not consider the jury should adopt as the basis of affirmative action.

**§ 336. ([1] *Right to Prove One's Case*); Subdivisions of the Right.**—The right of a party to a reasonable opportunity of proving his case<sup>1</sup> implies the right to have it tried in such a manner as to enable him to present his contention with reasonable fullness. The right may be considered, (a) as it applies to the matter as to which proof may be offered; (b) the *means* by which these matters are established; (c) as to the scope of the right; (d) the order of the stages at which it should be enforced; (e) the order of topics at each stage.

**§ 337. ([1] *Right to Prove One's Case*); Counsel as Witnesses.**—The right of a party to prove his case may fairly require that his counsel be permitted to testify. If so, this will be allowed.<sup>1</sup> The court may impose conditions, e. g., that the counsel withdraw from the case.

and always: what is forbidden is unnecessary complication, delay, and tediousness." Thayer, *Prelim. Treat.*, p. 517.

1. *Supra*, § 334.

1. *Greenfield v. Kaplan*, 52 Misc. (N. Y.) 132, 101 N. Y. Suppl. 567 (1906).

**§ 338. ([1] *Right to Prove One's Case*); Facts to Be Proved.**

—The right seems limited to proof of the *res gestæ* facts especially such of them as are constituent.<sup>1</sup> Little question can well arise as to the administration of this principle so far as the *res gestæ* are to be established by direct evidence. The testimony of an eyewitness to the occurrence of certain *res gestæ* scarcely leaves ground for an objection. As has been rather infelicitously said such facts are relevant *per se*. When, however, the attempt is made to reproduce the *res gestæ* by indirect proof, evidence of an inferior grade of probative force may be all that is within the ability of a litigant to produce. A percipient witness may be dead, and original document have been destroyed, an observer be unable to state facts seen by him except by means of an inference. Good faith to the tribunal, and fair play to his adversary require that original observers, original documents, facts rather than reasoning should be presented to the court.<sup>2</sup> But if a *necessity* for using secondary evidence is shown, the principle of administration now under consideration permits the use of evidence of that grade; — although possessing less probative force.

**§ 339. ([1] *Right to Prove One's Case*); (a) Right to Use Secondary Evidence.**— This, by far the most important in practical effect, of all aspects of the principle permitting proof of a party's case, is the permissive, indulgent portion of the "best evidence rule" which qualifies and conditions the mandatory section of that rule — also enforced as an administrative principle.<sup>1</sup> The principle of administration under consideration<sup>2</sup> is thus seen to be intimately involved with the familiar "Best Evidence Rule." As commonly stated, the "rule" contains these two distinct, though connected propositions: (1) the best evidence which the nature of the case permits must always be presented;<sup>3</sup> (2) when the best evidence of which the case is susceptible is presented it will be admitted.<sup>4</sup> The second half is the principle of administration under consideration. With the exception of the "hearsay rule" in certain of its applications,<sup>5</sup> this principle of administration appears to command general assent.

1. *Supra*, § 47.

2. *Infra*, §§ 1791 *et seq.*

1. *Infra*, § 464.

2. *Supra*, § 334.

3. *Infra*, § 464.

4. "The best proof that the nature of the thing will afford is only required." *Ford v. Hopkins*, 1 Salk. 283 (1701), per Holt, C. J.

5. *Infra*, §§ 2574 *et seq.*



§ 340. ( [1] *Right to Prove One's Case*; [a] *Right to Use Secondary Evidence*); Illustrative Instances.—It will thus be seen that the principle of administration which, in case of necessity, admits secondary proof of facts where the primary evidence is unavailable is, in substance, a necessary qualification upon the rule requiring primary evidence,<sup>1</sup> which may be conveniently restated, in the converse form, in terms of the present principle.

1. Where the primary direct evidence of a given fact is unavailable to a litigant, he will be permitted, if suitable necessity for doing so exists, to prove his case by circumstantial evidence.<sup>2</sup> If a witness who has complete knowledge of a constituent or probative fact can be produced he must be offered as a witness.<sup>3</sup> This is the requirement of good faith. Should the witness not be procurable, and his evidence cannot be obtained, the same facts, if necessary to the proponent's case, may be proved by circumstantial evidence or by the direct evidence of less credible witnesses.

2. Where the primary evidence of the percipient witness cannot be procured by a litigant, he will, under certain conditions, be allowed, if such a course is necessary to proof of his case, to establish the extrajudicial statements made by the observer with regard to it, as reported to the court. It is in accordance with this principle that exceptions to the hearsay rule, such as pedigree, dying declarations, etc., are received and the matter will be considered more fully in that connection.

3. Where a document is shown to have been lost, destroyed or otherwise rendered unavailable, so that primary evidence of its contents cannot be had, the party to whose case some evidence of such contents is necessary may introduce secondary evidence as to them. For some observations and illustrations of the application of this principle, in what is perhaps its most important and invariable aspect,<sup>4</sup> reference may be had to the more complete treatment of the subject at another place.

4. Where, for any reason, the primary original physical phenomena observed by a witness cannot be placed by him before the jury; or where the latter have not the knowledge requisite to enable them to coördinate such physical phenomena into a reason-

1. *Infra*, § 464.

3. *Infra*, § 466.

2. Circumstantial evidence is received where direct evidence is unattainable. *Com. v. Gray*, 129 Mass. 474 (1880).

4. See PROOF OF CONTENTS OF DOCUMENTS.

able act of judgment, a litigant may be permitted to place the secondary evidence of the inference, conclusion or judgment of an ordinary or skilled observer or of an expert before the jury as a secondary means of stating the phenomena from which such inference, conclusion or judgment is drawn.

This is the principle underlying the reception of "opinion" evidence and will be more fully considered in that connection.<sup>5</sup>

*To put the same matter in another form*, the demand made by good faith, that a party should present to the tribunal the most cogent evidence within his control, is necessarily satisfied by proof that the evidence actually offered is the best which the party is practically able to obtain. Under such circumstances, no objection other than lack of relevancy exists to receiving and weighing less probative modes of proof, even though it should affirmatively appear that a superior grade of evidence is actually in existence. Reasonable diligence in endeavoring to secure the primary evidence is all that is demanded; and what is thus reasonable depends on the facts of each individual case. The test is still one of good faith. The judge, in every instance, will ask himself: Is the party holding back the evidence which would show that the facts actually presented by him are false or misleading? The inferiority in grade or probative force of the evidence actually submitted when compared with more conclusive proof, may be due to a difference in some one or more of several particulars. The point of differentiation may be in permanence or certainty of form, as where oral evidence is offered of a fact which is also shown by a writing; or where a description is offered of something which may be produced in court. The inferiority may arise from a difference in closeness of connection with the *factum probandum* in point of time; as where occurrences or other facts long passed are tendered while similar facts of more recent date are neglected. The ground of objection may be in remoteness of distance — as where sales in a foreign market are offered as evidence of value, while similar transactions in local markets are ignored. Nor is this all. The essential point of inferiority may lie in a less close, logical or causal connection between the fact to be proved and the fact offered, the *factum probandum* and the *factum probans*. An instance of this difficulty is presented where it is sought to prove a fact, not by the testimony of the person who saw it, but by the

5. *Infra*, §§ 1791 *et seq.*

report to a tribunal as to what the observer had told the witness he had seen or heard. In all instances, except the last, the party is required merely to do the best he reasonably can. In the last case, that of a so-called "hearsay" statement, an anomalous rule of procedure excludes the report altogether, except under certain somewhat arbitrarily chosen sets of circumstances constituting "exceptions" to the main rule.<sup>6</sup>

**§ 341. ([1] *Right to Prove One's Case*; [a] *Right to Use Secondary Evidence*); Documents.**—Loss, destruction, inability to find, or other sufficient reason for failing to produce an original document having first been satisfactorily established,<sup>1</sup> the party's right to prove his cause<sup>2</sup> authorizes or requires, as the case may be, that he be permitted to prove its contents by parol evidence. The clearness and precision of the evidence required, in this connection, to overcome the *inertia* of the court,<sup>3</sup> will be considered elsewhere.<sup>4</sup> We are at present concerned with the *extension* of the evidence—how far the proof must cover the entire document.

*The requirements in this particular*, as it would be natural to expect, will be found somewhat to vary, according as the document in question is, or is not, a constituent fact.

**§ 342. ([1] *Right to Prove One's Case*; [a] *Right to Use Secondary Evidence*); Constituent Documents.**—Verbal precision is not required,<sup>1</sup> as a demand to that effect would be subversive of

6. *Infra*, §§ 2762 *et seq.*

1. See DOCUMENTARY EVIDENCE.

2. *Supra*, § 334.

3. *Cleavland v. Burton*, 11 Vt. 138 (1839) ("clear, satisfactory and conclusive"); *Tayloe v. Riggs*, 1 Pet. 591, 600 (1828) ("satisfactorily"); *U. S. v. Britton*, Mason 464, 468 (1822) ("pointedly and clearly"). The proof must be "such as to secure as far as possible, the safety designed to be given by the written evidence." *Shorter v. Shepard*, 33 Ala. 648, 653, (1859).

4. See DOCUMENTARY EVIDENCE.

1. "In the case of lost instruments where no copy has been preserved, it is not to be expected that witnesses can recite its contents, word for word;—it is sufficient if intelligent

witnesses who had read the paper, understood its object, and can state it with precision." *Posten v. Rassette*, 5 Cal. 467, 469 (1855), *per Heydenfeldt, J.* In a Florida case, the following ruling of the trial judge was approved; "The proof must be clear and convincing, not only that such a deed existed, but that it was a valid deed, that it had all of the essential parts which a deed should have, such as the name of the grantor, the granting clause, the land conveyed, the consideration for which conveyance was made, words of perpetuity, as we call it—that is, that the grant should be to some one and the heirs, in this instance that it should have been to W. D. J. Collins and his heirs, and that it should

have been signed by the parties who conveyed the land, in this instance by Mints; that it should have been sealed by a scroll or scrawl or some other seal; that it should have been signed in the presence of witnesses."

*Cross v. Aby*, (Fla. 1908) 45 So. 820, 823, *per* Shackelford, C. J., *citing*, *Alabama*.—*Elyton Land Co. v. Denney*, 108 Ala. 553, 18 So. 561 (1896).

*Florida*.—*Campbell v. Skinner Mfg. Co.*, 53 Fla. 632, 43 So. 874 (1907); *Edwards v. Rives*, 35 Fla. 89, 17 So. 416 (1895); *Fries v. Griffin*, 35 Fla. 212, 17 So. 66 (1895).

*Kentucky*.—*Madeira's Heirs v. Hopkins*, 12 B. Mon. 595 (1851).

*Montana*.—*Capell v. Fagan*, 30 Mont. 507, 77 Pac. 55 (1904).

*New York*.—*Metcalf v. Van Benthuysen*, 3 N. Y. 424 (1850).

*North Carolina*.—*Loftin v. Loftin*, 96 N. C. 94, 1 S. E. 837 (1887).

*North Dakota*.—*Garland v. Foster County State Bank*, 11 N. D. 374, 92 N. W. 452 (1903).

*Tennessee*.—*Tisdale v. Tisdale*, 2 Sneed 596, 64 Am. Dec. 775 (1855).

In proving the contents of a lost instrument, it is sufficient to show who executed it and to whom it was executed, the time of execution, the consideration and the property conveyed, or the subject-matter of the contract. *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538, 56 N. E. 63 (1900). "The fourth principle of evidence is that pursuant to the policy of the law 'in choosing probabilities it is wise to take the best that offers,' and consistently with the recognition of the cogency of proof of habit and custom in case of lost or destroyed instruments, the common law recognizes proof of use of a definite and conventional form as sufficiently full. In *Perry v. Burton*, 111 Ill. 138, 140 (1884), Schoefield, C. J., said: 'A witness testifying to the contents of a lost deed is not to be expected to be able to repeat it verbatim from memory. Indeed, if he were to do so, that circumstance would, in itself, be

so suspicious as to call for explanation. All that parties, in such cases, can be expected to remember, is, that they made a deed, to whom, and about what time, for what consideration, whether warranty or quitclaim, and for what property. To require more would, in most instances, practically amount to an exclusion of oral evidence in the case of a lost or destroyed deed.'" *Rogers v. Clark Iron Co.*, 104 Minn. 198, 214 (1908). To the same effect see *Kenniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803 (1903); *Shove v. Wiley*, 35 Mass. 558, 564 (1836); *Snyder v. Wertz*, 5 Whart. 162 (1839); *McCreary v. Reliance*, 16 Tex. Civ. App. 45, 41 S. W. 485 (1897); *Crain v. Huntington*, 81 Tex. 614, 17 S. W. 242 (1890). And see also, *Miller v. Texas & P. Ry. Co.*, 132 U. S. 662, 10 Sup. Ct. 206, 214, 33 L. ed. 487 (1889), *per* Bradley, J.; *Minneapolis Times Co. v. Nimocks*, 53 Minn. 384, 55 N. W. 546 (1893); *Philbrook v. Smith*, 40 Minn. 100, 41 N. W. 545 (1889). A high standard of proof will be required. *Stevens v. Fitzpatrick*, 218 Mo. 708, 118 S. W. 51 (1909). This is especially true where a motive for failing to produce the original may reasonably be inferred. *Smith v. Lurty*, 108 Va. 799, 62 S. E. 789 (1908).

If the consideration of a deed be stated in it the parol evidence of contents must include proof of that fact, as it is a material part of the deed. *Capell v. Fagan*, (Mont. 1904) 77 Pac. 55.

Due and proper execution must be affirmatively proved. A reasonable latitude, neither assenting to vagueness on the one hand, nor imposing strictness with which it is impossible to comply on the other, is observable in this connection;—as in cases involving the requirements for proof of contents of lost or otherwise unavailable instruments.

*Alabama*.—*Shorter v. Sheppard*, 33 Ala. 648 (1859).

the indulgence itself.<sup>2</sup> In case a document is constituent<sup>3</sup> i. e., is one of those which in themselves constitute or create legal results, wills, etc., proof of contents by parol testimony must be, upon natural grounds of public policy, particularly comprehensive and exact.

*Colorado*.—McDonald v. Thompson, 16 Colo. 13, 26 Pac. 146 (1891).

*Illinois*.—Hawley v. Hawley, 187 Ill. 351, 58 N. E. 332 (1900); Harrell v. Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63 (1900).

*Indiana*.—Templin v. Krahn, 3 Ind. 373 (1852).

*Iowa*.—Otten v. Laffler, 17 Iowa 576 (1864).

*Kentucky*.—Hogg v. Combs, 29 Ky. L. Rep. 559, 93 S. W. 670 (1906).

*Louisiana*.—Segond v. Roach, 4 La. Ann. 54 (1849).

*Maryland*.—Yingling v. Kohlhass, 18 Md. 148 (1861).

*Michigan*.—Holmes v. Deppart, 122 Mich. 275, 80 N. W. 1094 (1899).

*Minnesota*.—Lloyd v. Simons, 105 N. W. 902 (1906); Towle v. Sherer, 70 Minn. 312, 73 N. W. 180 (1897).

*Missouri*.—Dollarhide v. Parks, 92 Mo. 178, 5 S. W. 3 (1887).

*Montana*.—Capell v. Fagan, 77 Pac. 55 (1904).

*Nebraska*.—Hill v. Bub, 34 Neb. 524, 52 N. W. 375 (1892).

*New Jersey*.—Wells v. Flitercraft, (Ch. 1899) 43 Atl. 659; Irving v. Campbell, 56 N. Y. Super. Ct. 224, 4 N. Y. Suppl. 103 (1888).

*Oregon*.—Teller v. Brower, 14 Or. 405, 14 Pac. 209 (1886).

*South Carolina*.—Belton v. Briggs, 4 Desauss Eq. 465 (1814); Anderson v. Robson, 1 Brev. 263 (1803).

*Texas*.—Simpson Bank v. Smith, (Tex. Civ. App. 1908) 114 S. W. 445 (deed); Rushing v. Lanier, (Tex. Civ. App. 1908) 111 S. W. 1089; Grayson v. Lofland, 21 Tex. Civ. App. 503, 52 S. W. 121 (1899).

*Vermont*.—Colchester v. Culver, 29 Vt. 111 (1856).

*Virginia*.—Barley v. Byrd, 95 Va. 316, 28 S. E. 329 (1897).

*Wisconsin*.—Matteson v. Hartmann, 91 Wis. 465, 65 N. W. 58 (1895).

Where proof of execution which complies with this standard cannot be furnished, the evidence as to the lost instrument will be rejected.

*Arkansas*.—Hooper v. Chism, 13 Ark. 496 (1853).

*Colorado*.—Duncan v. Last Chance Ditch Co., 7 Colo. App. 34, 42 Pac. 171 (1895).

*Kentucky*.—Calvert v. Nichols, 8 B. Mon. 264 (1847); Arnold v. Voorhies, 4 J. J. Marsh. 507 (1830).

*Louisiana*.—Anderson v. Cox, 6 La. Ann. 9 (1851).

*Michigan*.—Hutchins v. Murphy, 146 Mich. 621, 110 N. W. 52, 13 Detroit Leg. N. 901 (1906); Seymour v. Canfield, 122 Mich. 212, 80 N. W. 1096 (1899).

*Mississippi*.—Stovall v. Judah, 74 Miss. 747, 21 So. 614 (1896).

*Missouri*.—Hendricks v. Whitecot-ton, 60 Mo. App. 671 (1894); Owen v. Crum, 20 Mo. App. 121 (1886).

*New York*.—Reimer v. Muller, 47 N. Y. Super. Ct. 226 (1881).

*North Carolina*.—Townsend v. Moss, 58 N. C. 145 (1859).

*Ohio*.—Burridge v. Geauga Bank, Wright 688 (1834).

*Oregon*.—Nessley v. Ladd, 29 Or. 354, 45 Pac. 904 (1896).

*Pennsylvania*.—Burr v. Kase, 168 Pa. St. 81, 31 Atl. 954 (1895); Rousher v. Hamm, 3 Brewst. 233 (1870).

*Texas*.—Overand v. Menczer, 83 Tex. 122, 18 S. W. 301 (1892).

*Virginia*.—Barley v. Byrd, 95 Va. 316, 28 S. E. 329 (1897).

2. Perry v. Burton, 111 Ill. 138 (1884) (deed).

3. *Supra*, § 47.

Only the substance of the contents of the instrument will be required; but this requirement covers *all its material* provisions.<sup>4</sup> Every part of the instrument which would essentially qualify its effect in any particular which is germane to the inquiry then pending, must be proved with clearness and precision.<sup>5</sup> The interdependence and correlation of the various parts of a constituent document make it, as a rule, difficult to omit or misstate any portion of such a writing without modifying it as a whole. Unless, therefore, practically the entire instrument can be stated, the court cannot well be sure that the true purport of even the part of immediate interest is before it. The formality and brevity of some constituent documents occasionally make such completeness possible.

*Illustrative Instances.*—What parts of any specific document may properly be deemed a material one and what degree of precision in recollection and statement as to the contents of these material parts will, in case of any given class of constituent instruments or other documents, be sufficient to overcome the *inertia*<sup>6</sup> of

4. *Clark v. Houghton*, 12 Gray (Mass.) 44 (1858); *Edwards v. Noyes*, 65 N. Y. 126 (1875); *Burr v. Kase*, 168 Pa. 81, 31 Atl. 954 (1895); U. S. v. *Macomb*, 5 McLean 286, 298 (1851); *Tayloe v. Riggs*, 1 Pet. 591, 600 (1828).

5. While the evidence as to amount, terms, and identity must be clear, specific, and satisfactory in an action on the instrument, it is sufficient to prove the contents in substance.

*District of Columbia.*—*Kelley v. Divver*, 6 Mackey 440 (1888).

*Florida.*—*Fries v. Griffin*, 35 Fla. 212, 17 So. 66 (1895).

*Illinois.*—*Bennett v. Waller*, 23 Ill. 97 (1859); *Osborne v. Rich*, 53 Ill. App. 661 (1894).

*Iowa.*—*McDonald v. Jackson*, 56 Iowa 643, 10 N. W. 223 (1881).

*Maine.*—*Perkins v. Cushman*, 44 Me. 484 (1858).

*Missouri.*—*Dollarhide v. Parks*, 92 Mo. 178, 5 S. W. 3 (1887).

*Michigan.*—*Holmes v. Deppert*, 122 Mich. 275, 80 N. W. 1094 (1899).

*Minnesota.*—*Lloyd v. Simons*, 97 Minn. 315, 105 N. W. 902 (1905).

*Montana.*—*Capell v. Fagan*, 77 Pac. 55 (1904).

*New York.*—*Moffat v. Moffat*, 10 Bosw. 468 (1863); *Metcalf v. Van Benthuyzen*, 3 N. Y. 424 (1850).

*North Carolina.*—*Tuttle v. Rainey*, 98 N. C. 513, 4 S. E. 475 (1887); *Loftin v. Loftin*, 96 N. C. 94, 1 S. E. 837 (1887); *Deans v. Dortch*, 40 N. C. 331 (1848).

*Pennsylvania.*—*Emig v. Diehl*, 76 Pa. St. 359 (1874); *Slone v. Thomas*, 12 Pa. St. 209 (1849).

*Tennessee.*—*McCarty v. Kyle*, 4 Coldw. 348 (1867); *Johnson v. McKamey*, (Ch. App. 1899) 53 S. W. 221.

*Virginia.*—*Thomas v. Ribble*, 24 S. E. 241 (1896).

*West Virginia.*—*Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382 (1889).

*United States.*—*Burdick v. Peterson*, 72 Fed. 864 (1896).

6. *Infra*, § 993.

the court, is essentially part of the substantive law relating to particular instruments — contracts, deeds, wills, etc. In broad outline, however, the manner in which oral evidence of the contents of special documents is dealt with by the court may well illustrate the practical application of the canon of administration under consideration.

*Bills of Sale.*—The contents of a bill of sale must be proved to a reasonable certainty by clear and satisfactory evidence as to all material parts.<sup>7</sup>

*Contracts.*—A contract originally reduced to writing may be a constituent document. Its contents should be proved with fullness and precision.<sup>8</sup>

7. *Hooper v. Chism*, 13 Ark. 496, 501 (1853); *Brown v. Hicks*, 1 Ark. 233, 243 (1838).

8. *Shouler v. Bonander*, 80 Mich. 531, 535, 45 N. W. 487 (1890) (agreement); *Ross v. Williamson*, 14 Ont. 184 (1887) (agreement).

**Records.**—Where a record has become lost or destroyed its substance at least, must be proved with substantial accuracy. *Bromberg v. People*, 136 Ill. App. 602 (1907). See also *Lowrance v. Richardson*, (Okla. 1909) 100 Pac. 529.

**Proof of the effect of a lost record** is not, however, sufficient in this connection. A witness cannot substitute his "understanding" of what was the issue in a given case in which a lost judgment was entered for a narrative of the issues shown by the pleadings. *Robbins v. Hubbard*, (Tex. Civ. App. 1908) 108 S. W. 773.

**Absence of record.**—The best evidence of the existence or nonexistence of entries in public records is the records themselves; and when, because of the voluminous character of the records, oral evidence is admissible to show the absence of a record or an entry, that fact should be given by the legal custodian after showing a diligent search. *Sykes v. Beck*,

(N. D. 1903) 96 N. W. 844. In general, the certificate of the custodian of a public document that certain facts do or do not appear on the files of his office is inadmissible. See DOCUMENTARY EVIDENCE. Thus, for example, the written statements of the register of the United States Land Office and the State Land Commissioner to the effect that the records in their respective offices show that certain entries were made are inadmissible to prove such entries; and the proper evidence of such matters, in the absence of the originals, are duly authenticated copies. *Kelley v. Laconia Levee Dist.*, (Ark. 1905) 85 S. W. 249.

**Courts have inherent power** to supply their lost or defaced records. *Montgomery v. Viers*, (Ky. 1908) 114 S. W. 251. A statute conferring such power is, therefore, merely declaratory of the existing law. *Alabama City, G. & A. Ry. Co. v. Ventress*, (Ill. 1906) 42 So. 1017.

**An appellate court** will not, as a rule, reverse the action of a trial judge in regard to accepting substituted proof of the contents of a record. *People v. Garnett*, (Cal. App. 1908) 98 Pac. 247.

**§ 343. ([1] *Right to Prove One's Case*; [a] *Right to Use Secondary Evidence*; *Constituent Documents*); *Deeds*.—**

In case of a deed, in the language of an early Indiana decision,<sup>1</sup> "The property conveyed,<sup>2</sup> the estate created,<sup>3</sup> the conditions annexed,<sup>4</sup> the signing,<sup>5</sup> sealing<sup>6</sup> and delivery, are required to be proved with reasonable certainty by witnesses who can testify clearly to its tenor and contents."<sup>7</sup> Proof will be required of the

1. *Thompson v. Thompson*, 9 Ind. 323, 333 (1857).

2. The courses of the description are not essential. *Jackson v. M'Vey*, 18 John. (N. Y.) 330, 333 (1820).

3. A lease, or surrender stand in the same position in relation to proof of contents. *Doe v. Jack*, 1 All. N. Br. 476 (1849).

4. "It should be made satisfactorily to appear what were the substantial conditions and covenants." *Rector v. Rector*, 8 Ill. 105, 122 (1846).

5. *Elyton Land Co. v. Denny*, 108 Ala. 553, 561, 18 So. 561 (1895); *Neely v. Carter*, 96 Ga. 197, 23 S. E. 313 (1895).

6. *Seals*.—For some consideration as to how far a record copy should show the existence of a seal upon an original instrument requiring a seal for its validity, see

*California*.—*Smith v. Dall*, 15 Cal. 510 (1859).

*Illinois*.—*Pease v. Sanderson*, 188 Ill. 597, 59 N. E. 425 (1900).

*Iowa*.—*Switzer v. Knapp*, 10 Iowa 72, 75 (1859).

*Kentucky*.—*Hedden v. Overton*, 4 Bibb 406 (1816).

*Michigan*.—*Starkweather v. Martin*, 28 Mich. 471 (1874).

*North Carolina*.—*Strain v. Fitzgerald*, 128 N. C. 396, 38 S. E. 929 (1901).

*Tennessee*.—*State v. Cooper*, 53 S. W. 391 (1899).

*Virginia*.—*Virginia Coal & I. Co. v. Keystone C. & I. Co.*, 45 S. E. 291 (1903) (land patent); *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347 (1895).

*Vermont*.—*Williams v. Bass*, 22 Vt. 352 (1850).

*Wisconsin*.—*Peters v. Reichenbach*, 114 Wis. 209, 90 N. W. 184 (1902).

7. *Alabama*.—*Laster v. Blackwell*, 128 Ala. 143, 30 So. 663 (1900); *Potts v. Coleman*, 86 Ala. 94, 100, 5 So. 780 (1888).

*California*.—*Kenniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803 (1903).

*Florida*.—*Edwards v. Rives*, 35 Fla. 89, 17 So. 416 (1895).

*Georgia*.—*Roe & McDowell v. Doe & Irwin*, 32 Ga. 39, 50 (1861).

*Illinois*.—*King v. Worthington*, 73 Ill. 161, 163 (1874).

*Indiana*.—*Wiggins v. Holley*, 11 Ind. 2 (1858).

*Iowa*.—*Ross v. Loomis*, 64 Iowa 437, 20 N. W. 749 (1884).

*Minnesota*.—*Wakefield v. Day*, 41 Minn. 344, 347, 43 N. W. 71 (1889).

*Mississippi*.—*Jelks v. Barrett*, 52 Miss. 315, 321 (1876).

*Ohio*.—*Gillmore v. Fitzgerald*, 26 Ohio St. 171, 174 (1875). The witness should be able to recollect whether a deed is a warranty or a quit claim. *Perry v. Burton*, 111 Ill. 138 (1884). But the mere fact that a given instrument is a warranty deed is not a sufficient statement of its "substance." *Jackson v. Benson*, 54 Iowa 665, 7 N. W. 88 (1880).

A statement that the document in question was "similar" to one produced is not stating its substance, within the rule. *South Chicago B. Co. v. Taylor*, 205 Ill. 132, 68 N. E. 732 (1903).



substance<sup>8</sup> of all material portions of the deed.<sup>9</sup> The logical or even the legal<sup>10</sup> effect of the instrument may be deemed, under special circumstances,<sup>11</sup> a compliance with the rule. This evidence has, however, been declined, and the "sense of the deed,"<sup>12</sup> that certain instruments "vested title" in a given person,<sup>13</sup> or similar language,<sup>14</sup> stating the effect or operation of the instrument in question has been rejected; even where the statement is an *admission* by a party.<sup>15</sup> The same rules apply to bonds,<sup>16</sup> releases, or other instruments under seal affecting interests in real estate.

**§ 344. ([1] *Right to Prove One's Case*; [a] *Right to Use Secondary Evidence; Constituent Documents*); Negotiable Instruments.**—Negotiable instruments<sup>1</sup> and other commercial specialties must be proved with great particularity, as, in respect practically to all parts of the paper, a close approach to verbal precision is permitted by the nature of the document.<sup>2</sup>

8. *Anniston C. L. Co. v. Edmondson*, 127 Ala. 445, 30 So. 61 (1900); *Doe v. Stiles*, 1 Kerr N. Br. 338, 346 (1841); *Metcalf v. Van Benthuyssen*, 3 N. Y. 424, 428 (1850) ("operative parts" required).

The date of a deed is not deemed, except under special circumstances, a material part of it. *Perry v. Burton*, 111 Ill. 138 (1884) ("about what time" is sufficient); *Thompson v. Thompson*, 9 Ind. 323, 333 (1857).

9. *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538, 56 N. E. 63 (1899) (that land had been "conveyed" sufficient).

10. **Admissions.**—If an admission may establish the contents of a document, it would seem proper that such a statement should be equally competent to prove its effect. *Pritchard v. Bagshawe*, 11 C. B. 459, 463 (1851); *Infra*, § 1378.

**Record abstracts of title.**—An instance of this indulgence is furnished where the public registry record of a deed is an *abstract* and not a copy of its contents. Suitable explanation being made of the absence of the original deed, the registry abstract has been received as evidence of the contents of the original instrument. *Smith v. Lindsey*, 89 Mo. 76, 80, 1 S. W. 88 (1886); *Garrigues v. Harris*,

16 Pa. St. 344, 352 (1851); *Bird v. Smith*, 3 McC. 300 (1825). Other courts have rejected the abstract when tendered for this purpose. *New Jersey R. & T. Co. v. Suydam*, 17 N. J. L. 25, 59 (1839) (mortgage).

11. *Holmes v. Deppert*, 122 Mich. 275, 80 N. W. 1094 (1899).

12. *Shifflet v. Morelle*, 68 Tex. 382, 387 (1887).

13. *Booge v. Parsons*, 2 Vt. 456, 459 (1830) ("deeded").

14. *Shorter v. Sheppard*, 33 Ala. 648, 658 (1859) (that A had "reconveyed" rejected).

15. *Rhode v. McLean*, 101 Ill. 467, 471 (1882) (bond); *Kello v. Maget*, 1 Dev. & B. 414, 424 (1835); *Boyd v. Com.*, 36 Pa. 355, 359 (1860) (docket entry of receipt of a trustee's bond admitted).

16. For authorities relating to the admissibility of record or copy of record, of deed, to prove deed under which party offering its claims, see 19 L. R. A. (N. S.) 438.

1. *Bond v. Whitfield*, 32 Ga. 215, 217 (1861) (bill of exchange); *State v. Peterson*, 129 N. C. 556, 40 S. E. 9 (1901).

2. But see *Bell v. Young*, 3 Grant (Pa.) 175 (1854) (amount of a note; about \$80; above \$70 received).

**§ 345. ([1] *Right to Prove One's Case*; [a] *Right to Use Secondary Evidence; Constituent Documents*); Public Papers.**

—Public records do not require for proof of contents by parol any other or different rule than is applied to private instruments. The substance of the contents of public documents,<sup>1</sup> in all material particulars,<sup>2</sup> must be proved when the original is lost, destroyed or is for some other reason, practically unavailable. Verbatim testimony is not necessary.<sup>3</sup>

**§ 346. ([1] *Right to Prove One's Case*; [a] *Right to Use Secondary Evidence; Constituent Documents*); Wills.**—The

maximum of strictness in requirement as to proof of contents is made in the case of wills. That the contents of a lost will may, in a proper case, be established by parol is beyond question.<sup>1</sup> The rule that the substance of all material portions of the instrument must be proved is equally applicable in the case of wills as in that of other constituent instruments. A peculiarity of this class of documents is that the complexity of provision is frequently so great and the interdependence of the several parts is so intimate that practically all parts of a will are “material,” within the meaning of the rule. To demand, indeed, that the entire intention of the testator be presented to the court before effect can be given to any of it, would be in reality a requirement of verbal precision and defeat the object of the rule.<sup>2</sup> As said by Chief Justice Cockburn,<sup>3</sup> “where the court can see its way to the essentially substantial dispositions made in a will, . . . it should give effect to them, although possibly some of the intentions of the testator may not be carried into effect.”<sup>4</sup> The difficulty in the mind of

1. *Sturtevant v. Robinson*, 18 Pick. (Mass.) 175, 179 (1836) (writ); *Cunningham v. R. Co.*, 61 Mo. 33, 36 (1875).

2. In case of familiar and formal documents, a mere abstract may suffice. *Browning v. Flanagan*, 22 N. J. L. 567, 571 (1849) (writ). So where, as in case of an execution, the “contents were prescribed either by statute or by the practice of the courts” even less extended proof may suffice. *Leland v. Cameron*, 31 N. Y. 115, 120 (1865) (attorneys entry of issuance). In general, this practice would properly be applicable in all cases “where the lost paper is of a kind which is

usually drawn up in accordance with a statute and usually follows a form devised for that kind of instrument.” *Mandeville v. Reynolds*, 68 N. Y. 528, 533 1877 (Judgment roll showing judgment docket verified by the clerk as substantially correct).

3. *Com. v. Roark*, 8 Cush. (Mass.) 210, 213 (1851).

1. *Sugden v. St. Leonards*, L. R., 1 P. D. 154 (1876).

2. *Anderson v. Irwin*, 101 Ill. 411, 414 (1882).

3. *Sugden v. St. Leonards*, L. R. 1 P. D. 154 (1876).

4. “The substance of the different devises, as to the property or interest

the court is how to know until satisfied that practically the entire will is reproduced that the court is in possession of a complete intention as to anything whatever. For, as was said in Delaware: "Proving part only of the contents of a will which is lost or destroyed, is not sufficient to establish it, even as to the part so proved, unless it satisfactorily appears that there is nothing in the preceding or subsequent part of the will which would qualify, change, or in any way alter the particular devise proved; for without knowing the certainty of the will and the language used by the testator, it would be impossible to determine what estate would pass under it."<sup>5</sup> Under these conditions, the right of a party to produce the best evidence in his power to establish his rights is harmonized with the interests of public policy for the maintenance of the rules regulating the disposition of property after death by a careful and conservative exercise of the administrative powers of the court. In general, the judge will give effect to a will upon finding that he has before him the substance of its material provisions.<sup>6</sup> It may even be sufficient to prove part of a lost will.<sup>7</sup>

devised, and to whom devised," are sufficient facts to warrant the court in acting. *Allison's Dev. v. Allison's Heirs*, 7 Dana 90, 95 (1838).

5. *Butler v. Butler*, 5 Harp. (S. C.) 178 (1849).

6. *Alabama*.—*Skeggs v. Horton*, 82 Ala. 352, 357, 2 So. 110 (1886).

*California*.—*Camp's Estate*, 134 Cal. 233, 66 Pac. 227 (1901).

*Connecticut*.—*Johnson's Will*, 40 Conn. 587, 589 (1874).

*Delaware*.—*Butler v. Butler*, 5 Har. 178 (1849).

*Illinois*.—*Anderson v. Irwin*, 101 Ill. 411, 415 (1882).

*Indiana*.—*Jones v. Casler*, 139 Ind. 382, 384, 38 N. E. 812 (1894).

*Kentucky*.—*Steele v. Price*, 5 B. Mon. 58, 65 (1844); *Allison's Dev. v. Allison's Heirs*, 7 Dana 90, 95 (1838).

*Massachusetts*.—*Davis v. Sigourney*, 8 Metc. 487 (1844).

*Missouri*.—*Dickey v. Malechi*, 6 Mo. 177, 184 (1839).

*Nebraska*.—*Williams v. Miles*, 94 N. W. 705 (1903).

*New Jersey*.—*Coddington v. Jenner*,

57 N. J. Eq. 528, 41 Atl. 874 (1898); *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401, 405 (1863).

*New York*.—*Grant v. Grant*, 1 Sandf. Ch. 235, 243 (1844) ("substantial contents").

*Tennessee*.—*McNeeley v. Pearson*, 42 S. W. 165 (1897).

*Vermont*.—*Dudley v. Wardner*, 41 Vt. 59 (1868).

*Virginia*.—*Thomas v. Ribble*, 24 S. E. 241 (1896).

*England*.—*Harris v. Knight*, L. R. 15 P. D. 170, 179 (1890); *Sugden v. St. Leonards*, L. R. 1 P. D. 154 (1876); *Foster v. Foster*, 1 Add. 462, 465 (1823).

*Canada*.—*McLeod's Estate*, 23 N. S. 154, 162 (1890) (codicil). "What is required is the substance of its material provisions." *Tarbell v. Forbes*, 177 Mass. 238, 58 N. E. 873 (1900).

A nuncupative will is necessarily established in the same manner. *Lemann v. Bonsall*, 1 Add. 389, 390 (1823).

7. *Jackson v. Jackson*, 4 Mo. 210 (1835).

The due execution of the instrument, with the formalities required by law, is, it need scarcely be said, a necessary fact to be established by the oral evidence.<sup>8</sup> Some consideration as to the degree of persuasion required to overcome the *inertia* of the court is to be found elsewhere.<sup>9</sup>

**§ 347. ([1] *Right to Prove One's Case*; [a] *Right to Use Secondary Evidence*); Probative Documents.**—The contents of other than constituent documents may be shown by any appropriate evidence,<sup>1</sup> including that of a witness who can testify directly from memory or from a recollection suitably refreshed by the use of appropriate memoranda,<sup>2</sup> including the use, as part of the testimony of the witness of a memorandum which revives no present recollection but which the maker swears to have been accurate when made.

In case of documents other than constituent, the element of interdependence of parts characteristic of formal writings is reduced or disappears entirely. It may happen, however, that little may be presented by the original document to which the memory readily attaches itself and the witness may be unable to remember more than a limited portion, even in substance, or even, unable to do so much, must limit himself merely to the *effect* which the writing produced on his mind.

*Consideration as to what intention* of evidence is properly required in proving the contents of lost documents, i. e., what precision, clearness and fullness of statement is called for on the part of a satisfactory witness, in order to overcome the *inertia* of the court, will be given in another place.<sup>3</sup>

**§ 348. ([1] *Right to Prove One's Case*; [a] *Right to Use Secondary Evidence*; Probative Documents); Illustrative Instances.**—With letters,<sup>1</sup> books of account,<sup>2</sup> and other non-constitu-

8. *Montefiore v. Montefiore*, 2 Add. Eccl. 354 (1824).

9. *Infra*, § 1009.

1. *Hardy's Trial*, 24 How. St. Tr. 681 (1794).

2. See DOCUMENTARY EVIDENCE.

See also, *Hardy's Trial*, 24 How. St. Tr. 681 (1794).

3. *Infra*, § 1010.

1. *Case v. Lyman*, 66 Ill. 229, 233 (1872); *Strange v. Crowley*, 91 Mo. 287, 294, 2 S. W. 421 (1886); *Poague v. Spriggs*, 21 Gratt. 220, 231 (1871).

Part of a letter not shown to cover completely all that was contained in it relating to the point for which it is introduced, will be rejected. *Bank v. Brown*, *Dudley* 62, 65 (1831).

2. *Mayson v. Beazley*, 27 Miss. 106 (1854) (abstract sufficient).

The right to use a summary or abstract of voluminous accounts or calculations is treated elsewhere. *Infra*, § 2709.

ent documents,<sup>3</sup> verbal precision is less requisite than in case of constituent documents;<sup>4</sup>—though, of course, highly desirable, where it may be had. The substance<sup>5</sup> of any portions relevant to the inquiry will,<sup>6</sup> as a rule, be deemed sufficient.<sup>7</sup>

3. *Camden v. Belgrade*, 78 Me. 204, 3 Atl. 652 (1886) (marriage certificate); *Wilkerson v. Allen*, 67 Mo. 502, 510 (1878) (advertisement).

4. *Tobin v. Shaw*, 45 Me. 331, 349 (1858) (letter; "So far as she recollected," sufficient).

Some real recollection, however, is requisite.—A witness who "thought he might perhaps state" the contents of a letter was held to have been properly rejected. *Graham v. Chrystal*, 2 Abb. App. C. 263 (1865).

5. *Camden v. Belgrade*, 78 Me. 204, 3 Atl. 652 (1886).

6. *People v. McKinney*, 49 Mich. 334, 336, 13 N. W. 619 (1882); *Sizer v. Burt*, 4 Den. 426, 429 (1847) (memorandum of claim). It is necessary only that a witness should be able to state the substance of lost or destroyed letters. Verbal accuracy is not essential. *Campbell v. State*, 123 Ga. 533, 51 S. E. 644 (1905). The substance of unavailable letters alone need be proved. *Brier v. Davis*, (Iowa 1903) 96 N. W. 983. To refuse a reasonable opportunity of proving the contents of a lost document is error. *Drake v. Holbrook*, 78 S. W. 158, 25 Ky. L. Rep. 1489 (1904) (schedule of corporation assets). A witness must have personal knowledge. Hearsay is not sufficient. *Bourquin v. Northwestern R. Co.*, 79 S. C. 217, 60 S. E. 521 (1908).

Ancient facts.—"The same reasoning which permits ancient documents, shown to be probably genuine, to prove themselves (see, for example, *Everley v. Stoner*, 2 Yeates [Pa.] 122 [1796]) justifies the admission of evidence concerning old transactions generally and concerning the existence and contents of old and lost originals by the best proof practically obtainable, and to leave the weight of such

testimony to be determined by the triers of fact." *Rogers v. Clark Iron Co.*, 104 Minn. 198, 213 (1908). While proof of contents or the substance of the contents of the operative part of lost instruments in re-establishment proceedings, should be clear and satisfactory, the principles of evidence should not be applied with technical nicety, as after the lapse of many years primary evidence or strict proof could not well be obtained. *Campbell v. Skinner Mfg. Co.*, (Fla. 1907) 43 So. 874. The document used in proof of ancient facts must, however, have been one valid *prima facie* for its ostensible purpose. A newspaper, for example, may be authenticated under the rule of the admission of ancient documents, and may be evidence for some purposes, as, for instance, to show prices current, the state of the market, the arrival and departure of vessels, etc., but its statements cannot be regarded as proof of the illegal acts of French privateers. The rule respecting the admissibility of ancient writings embraces no instrument not valid upon its face. *The Juno*, 41 Ct. Cl. 106 (1906).

"Proof of business habit or custom is properly received in corroboration of the defective memory of a witness with respect to a missing instrument. There can be no doubt of the probative value of such evidence." *Rogers v. Clark Iron Co.*, 104 Minn. 198, 213 (1908). And see, to the same effect:

*Minnesota*.—*Walker v. Barron*, 6 Minn. 353, 508, 512, (1861); *Mathias v. O'Neill*, 94 Mo. 527, 6 S. W. 253 (1888).

*Nebraska*.—*Gate City v. Post*, 55 Neb. 742, 76 N. W. 471 (1898).

*Letters as Contracts.*—Where letters are relied on to establish a contract, the same particularity of proof in regard to essential parts is required as in case of more formal instruments designed for that purpose.<sup>8</sup> The *effect* of a letter is to be distinguished from its substance. That a witness should be permitted to state the effect of the document would be, in certain cases, to substitute his conclusion for that of the jury in point of law,<sup>9</sup> or fact; — which will not be permitted.<sup>10</sup>

**§ 349. ([1] *Right to Prove One's Case*); (b) *Means of Communication.***—The regular and satisfactory means of communication between the witness and the tribunal is that the witness should address the judge or jury in the oral language to which they are accustomed and which they understand. It is usual and best adapted to the attainment of justice that documents should present to the tribunal the mental attitude, the subjective state,

*New Hampshire.*—State v. Manchester, 52 N. H. 528, 532 (1873).

*New York.*—Beakes v. Da Cunha, 126 N. Y. 293, 27 N. E. 251 (1890); Morrow v. Ostrander, 13 Hun 219 (1878).

For example, in connection with proof of the fact of giving notice of the protest of a negotiable instrument and as to the contents of such notice, the business habits of the notary may be proved.

*Maine.*—Union Bank v. Stone, 50 Me. 595, 79 Am. Dec. 631 (1862).

*New Jersey.*—Den v. Downman, 13 N. J. L. 142 (1832).

*New York.*—Miller v. Hackley, 5 Johns. 375, 4 Am. Dec. 372 (1810).

*Pennsylvania.*—Eureka v. Robinson, 56 Pa. St. 264, 94 Am. Dec. 65 (1867).

*United States.*—Nicholls v. Webb, 8 Wheat. 326, 5 L. ed. 628 (1823).

**Standard forms.**—The use of certain standard forms of conveyancing may assist to give adequate proof of the contents of a lost document of a specified class. Rogers v. Clark Iron Co., 104 Minn. 198 (1908); Haworth v. Haworth, 123 Mo. App. 303, 100 S. W. 531 (1907) (deed of adoption). The rule is frequently applied to

deeds. Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803 (1903) (deed of grant, bargain and sale). Thus, where a lost deed is shown to have been executed, it will be presumed, in the absence of evidence to the contrary, that the deed was sufficient to convey the land, and that all formalities necessary to make it effectual for that purpose, including the acknowledgment thereof by a married woman, were observed. Laird v. Murray, (Tex. Civ. App. 1908) 111 S. W. 780 (deed). But see South Chicago Brewing Co. v. Taylor, 205 Ill. 132, 68 N. E. 732 (1903). The existence of provisions not usual in the form of instrument employed must be affirmatively shown. Laird v. Murray, (Tex. Civ. App. 1908) 111 S. W. 780 (vendor's lien).

7. See, however, Cox v. England, 65 Pa. 212, 223 (1870) (letter).

8. Elwell v. Walker, 52 Iowa 256, 261, 3 N. W. 64 (1879) (antenuptial agreement).

9. Baltimore v. War, 77 Md. 593, 603, 27 Atl. 85 (1893) (that a letter was an "order").

10. *Infra*, § 2363.

of the declarant, in the written language to which the tribunal, counsel and witnesses are accustomed. Wherever oral testimony or documents in the vernacular can be placed before the tribunal, justice and good faith will regard them as primary and insist upon their being so placed. But should a witness not understand the vernacular, should he be a deaf mute, were it to prove that an important document, constituent or probative, is in a foreign tongue, the present right permits a party to insist upon offering interpreters, translations or any other reasonable substituted means of communication of thought between the witness or declarant and the court.

The subdivisions of the operation of the present rule may, therefore, be said to include (a) the right, if necessary, to offer secondary evidence and (b) a claim to use, so far as reasonably required, substituted means of communication between the sources of judicial evidence and the court. The branch of the right to prove one's case which (a) permits a party, in the event of establishing the existence of a suitable necessity for so doing, to introduce secondary evidence of facts on which he relies, has now been considered, in the immediately preceding sections.<sup>1</sup> It remains to examine briefly the (b) aspect of the right; — that of employing substituted means of communication between the witness and the court.

**§ 350. ( [1] *Right to Prove One's Case*; [b] *Means of Communication*); Substituted Modes of Communication.**—The party may not only present such a case as he can; he may present it through the best means within his power. If an essential witness speaks a language other than that of the jury the proponent may offer an interpreter.<sup>1</sup> Should a relevant document be in a foreign language he may submit, together with the original, a translation.<sup>2</sup> Should it happen that a witness, being a mute, is found to be incapable of using speech as a vehicle for his thought or so defective in vocal power as to be inaudible, or unintelligible to the jury, the party may present some intermediary capable of transposing the manifestations of the witness' thought into the ordinary mode of thought conveyance.<sup>3</sup>

1. §§ 339-348 *inc.*

1. *Infra*, § 351.

2. *Infra*, § 354.

3. Interpreters, see *Infra*, § 351.

**§ 351. ([1] *Right to Prove One's Case*; [b] *Means of Communication*); Interpreters.**—The use of substituted methods for the communication of thought between a witness and the tribunal will be permitted when such a course is reasonably necessary to preserve the substantial rights of the parties.<sup>1</sup> Whether such necessity has been shown by the proponent of the method suggested, is determined by the administrative function of the presiding justice.<sup>2</sup> The similar question whether he is sufficiently

1. *Alabama*.—Horn *v.* State, 93 Ala. 23, 13 So. 329 (1893).

*California*.—People *v.* Young, 108 Cal. 8, 41 Pac. 781 (1895); People *v.* Ah Wee, 48 Cal. 236 (1874).

*Illinois*.—Chicago, etc., Ry. Co. *v.* Shenk, 131 Ill. 283, 23 N. E. 436 (1890).

*Iowa*.—State *v.* Severson, 78 Iowa 653, 43 N. W. 533 (1889).

*Massachusetts*.—Norberg's Case, 4 Mass. 81 (1808).

*New York*.—People *v.* McGee, 1 Den. (N. Y.) 19 (1845).

*England*.—Reg. *v.* Entrehman, C. & M. 248, 41 E. C. L. 139 (1842). "Every expedient should be favorably regarded, and that most favorably, the tendency of which gives the strongest promise of an intelligible transmission of the evidence to the jury through a medium capable, unbiased, faithful." Kuktman *v.* Brown, 4 Rich. L. (S. C.) 479, 485 (1851).

2. *Alabama*.—Horn *v.* State, 93 Ala. 23, 13 So. 329 (1893).

*California*.—People *v.* Young, 108 Cal. 8, 41 Pac. 281 (1895). See also People *v.* Morine, 138 Cal. 626, 72 Pac. 166 (1903).

*Illinois*.—Kozlowski *v.* City of Chicago, 113 Ill. App. 513 (1904).

*Indiana*.—Skaggs *v.* State, 108 Ind. 53 (1886).

*Iowa*.—State *v.* Severson, 78 Iowa 653, 43 N. W. 533 (1889).

*New York*.—People *v.* McGee, 1 Denio (N. Y.) 19 (1845).

*England*.—R. *v.* Burke, 8 Cox Cr. 44–64 *passim* (1858).

The efficiency of cross-examination as a test of truth is greatly reduced

by the use of an interpreter. R. *v.* Burke, 8 Cox Cr. 44, 47 (1858), where the court calls attention to the spectacle of a witness "gaining time to consider his answers while the interpreter is going through the useless task of interpreting the question which the witness already understands."

More than one interpreter may be appointed to bring the evidence of a single witness to the knowledge of the jury. Skaggs *v.* State, 108 Ind. 53, 8 N. E. 695 (1886).

**Interpreters before grand jury.**—An interpreter is regarded as a witness and as such may be called by the grand jury and sworn by the foreman without special appointment by the court. State *v.* Firmatura, 121 La. 676, 46 So. 691 (1908). Where witnesses before a grand jury do not speak the language of the jury, the court may appoint an interpreter for the purpose. Fletcher *v.* Com., 29 Ky. L. Rep. 955, 96 S. W. 855 (1906). Cr. Code Prac., § 110, providing that no person except the attorney for the commonwealth and the witness under examination shall be present while the grand jury are examining a charge, and no person whatever while they are deliberating or voting on a charge, does not prohibit the admission of an interpreter before the grand jury for the examination of witnesses, whose evidence could not be otherwise made intelligible to the grand jury. Lyon *v.* Com., 29 Ky. L. Rep. 1020, 96 S. W. 857 (1906). See also People *v.* Lem Deo, 132 Cal. 199, 64 Pac. 265 (1901).



qualified by knowledge of the language involved<sup>3</sup> is also for the presiding judge; but where only one person understands the witness' method of communication he should receive the appointment.<sup>4</sup> The power to appoint interpreters is frequently conferred in express terms by statute,<sup>5</sup> though such an act is merely declaratory of the existence of a common law administrative power of the judge.<sup>6</sup> Unless this administrative power is unreasonably exercised, the result will not be revised by an appellate court.<sup>7</sup>

**§ 352. ([1] *Right to Prove One's Case*; [b] *Means of Communication*; *Interpreters*); Qualifications.**—The interpreter is subject to cross-examination as to his qualifications,<sup>1</sup> and, unless

**3. California.**—*People v. Morine*, 138 Cal. 626, 72 Pac. 166 (1903); *People v. Young*, 108 Cal. 8, 41 Pac. 281 (1895).

**Georgia.**—*City Fire Ins. Co. v. Carugui*, 41 Ga. 660, 665, 672 (1871).

**Indiana.**—*Skaggs v. State*, 108 Ind. 57, 8 N. E. 695 (1886).

**Iowa.**—*State v. Severson*, 78 Iowa 653, 43 N. W. 533 (1889).

**England.**—*R. v. Burke*, 8 Cox Cr. 44–64 *passim* (1858).

**4. People v. McGee**, 1 Denio (N. Y.) 19 (1845).

**Use by the court.**—While interpreters are, in many cases, employed to bring the evidence of a witness or the declarations of a document to the attention of the jury a judge may properly make use of them for any administrative purpose deemed by him appropriate. Thus, a witness may translate to the court plaintiff's book of account kept in Chinese. *Yick Wo v. Underhill*, (Cayl. App. 1907) 90 Pac. 967.

**5. California Code C. P. § 1884** ("any person a resident of the proper county" may be selected); *People v. Morine*, 138 Cal. 626, 72 Pac. 166 (1903); *People v. Young*, 108 Cal. 8, 41 Pac. 281 (1895); *Schall v. Eisner*, 58 Ga. 190 (1877); *Rev. Stat. (Ind.)* 1897, § 508; *Skaggs v. State*, 108 Ind. 57, 8 N. E. 695 (1886) (the number of interpreters is discretionary with the court); *Com. v. Sanson*, 67 Pa. St.

322 (1871); *Rev. Civ. Stats. (Texas)* 1895, § 7285; *Livar v. State*, 26 Tex. App. 115 (1888).

**6. Schall v. Eisner**, 58 Ga. 190 (1877); *Livar v. State*, 26 Tex. App. 115 (1888). See also, to the same effect, *Nioum v. Com.*, 33 Ky. L. Rep. 62, 108 S. W. 945 (1908). The consent of the opposite party is not necessary. *Mennella v. Metropolitan St. Ry. Co.*, 86 N. Y. Suppl. 930, 43 Misc. 5 (1904).

**7. Kozlowski v. City of Chicago**, 113 Ill. App. 513 (1904). See also *Brozowski v. National Box Co.*, 104 Ill. App. 338 (1902). Refusal to order an interpreter is an exercise of administrative power within this rule. *Kozlowski v. City of Chicago*, 113 Ill. App. 513 (1904). A finding as to the qualifications of an expert and as to the character of the testimony which will satisfy the judge's mind on the point has even been held to be conclusive. *Fennen v. State*, 24 Ohio Cir. Ct. R. 583 (1903).

**1. When the former testimony of a witness who testifies through an interpreter is offered in evidence the original evidence, the absence of which should be accounted for, is that of both witnesses.** Not only therefore should the absence of the first witness be satisfactorily explained by proof of death or unavoidable detention (*Infra*, § 1629), but the interpreter must be called upon to repeat the evidence of

found to be disqualified, in the court's opinion, by reason of relationship to the parties<sup>2</sup> or other bias,<sup>3</sup> the office may be discharged by any competent witness.<sup>4</sup>

*The interpreter must however understand*<sup>5</sup> or have a fair

the absent witness, or he must be shown to be deceased or otherwise unavailable as a witness without fault of the proponent. Failure to do so excludes the evidence. *People v. Sierp*, 116 Cal. 249, 48 Pac. 88 (1897); *People v. Ah Yute*, 56 Cal. 120 (1880); *People v. Lee Fat*, 54 Cal. 527 (1880). But see *People v. John*, 137 Cal. 220, 89 Pac. 1063 (1902); *Scheerer v. Harber*, 36 Ind. 536 (1871); *In re Wiltsey's Will*, (Iowa) 98 N. W. 294 (1904); *State v. Epstein*, (R. I. 1903) 55 Atl. 204; *State v. Terline*, 23 R. I. 530, 51 Atl. 24 (1902). See also 17 L. R. A. 813, note.

2. *State v. Thompson*, 14 Wash. 285, 44 Pac. 553 (1896); *Barber, etc., Co. v. Odasz*, 57 U. S. App. 129, 85 Fed. 754 (1898).

3. *State v. Thompson*, 14 Wash. 285, 44 Pac. 533 (1896).

A witness in the cause is not rendered incompetent by that fact. *People v. Ramirez*, 56 Cal. 533, 38 Am. R. 73 (1880); *Chicago, etc., R. Co. v. Shenk*, 131 Ill. 283, 23 N. E. 436 (1890).

Friendship between the interpreter and a party is not necessarily a disqualification. *State v. Burns*, (Iowa) 78 N. W. 681 (1899); *Swift v. Applebone*, 23 Mich. 252 (1871) (infant's next friend). Where prosecuting witness was deaf and dumb, the court did not abuse its discretion in permitting a professor at a state deaf and dumb institute to act as interpreter on the ground that he was biased in her favor because she had been a pupil at the institute. *State v. Smith*, 203 Mo. 695, 102 S. W. 526 (1907). Though the prosecuting attorney had been interested in the prosecution of defendant for abducting a female, such fact did not render it error for

the court to allow him to act as interpreter for witnesses who spoke in Spanish, there being nothing to indicate a lack of fairness or impartiality on his part. *Tores v. State*, (Tex. Cr. App. 1901) 63 S. W. 880.

4. *Iowa*.—*State v. Burns*, 78 N. W. 681 (1899) (friend).

*South Carolina*.—*State v. Weldon*, 39 S. C. 318, 17 S. E. 688 (1893).

*Texas*.—*Jacobs v. State*, 42 Tex. Cr. 353, 59 S. W. 1111 (1900) (sequestered witness).

*Utah*.—*People v. Thiede*, 11 Utah 241, 39 Pac. 837 (1895) (juror).

*Washington*.—*State v. Thompson*, 14 Wash. 285, 44 Pac. 533 (1896) (witness).

Waiver.—While the determination of the sufficiency of the interpreter's qualifications is a matter of administration, a presiding judge may well assume, where no objection to an interpreter is made, that any claim of his lack of qualification is waived. *Nioum v. Com.*, 33 Ky. L. Rep. 62, 108 S. W. 945 (1908).

5. *Alabama*.—*Central, etc., Ry. Co. v. Joseph*, 125 Ala. 313, 28 So. 35 (1899).

*California*.—*People v. Wong Ah Bang*, 65 Cal. 305 (1884); *People v. Ah Wee*, 48 Cal. 236 (1874); *People v. Gelabert*, 39 Cal. 664 (1870).

*Georgia*.—*Schall v. Eisner*, 58 Ga. 190 (1877).

*Illinois*.—*Chicago, etc., Ry. Co. v. Shenk*, 131 Ill. 283, 23 N. E. 436 (1890).

*New York*.—*People v. Constantino*, 153 N. Y. 24, 47 N. E. 37 (1897).

*South Carolina*.—*Kuhtman v. Brown*, 4 Rich. L. 479 (1851).

*Texas*.—*Kuhlmann v. Thedlinka*, 29 Tex. 392 (1867).

knowledge<sup>6</sup> of both languages as spoken; but it is not necessary that he should be able to read English as written.<sup>7</sup>

§ 353. ([1] *Right to Prove One's Case*; [b] *Means of Communication; Interpreters*); Details of Interpretation.—The interpreter acts under the sanction of an oath properly to perform his duty<sup>1</sup> truly to interpret between the court and jury and the witness.<sup>2</sup> Unless a suitable oath is administered to the interpreter the evidence should be rejected.<sup>3</sup> The probative effect of the evidence as interpreted, involving necessarily an estimate as to the accuracy and general value of the interpretation, is determined by the jury;<sup>4</sup> and a party is accordingly at liberty to impeach the translator's correctness.<sup>5</sup> While the manner of taking evidence through an interpreter is largely a question of administration, it is fairly clear that it is, as a rule, the duty of the interpreter to repeat each statement of the witness<sup>6</sup> and not, except so far as incidental to the work of translation, to undertake

6. *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695 (1886). The witness need not be one exceptionally well skilled to act as an interpreter. *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695 (1886).

7. *Central, etc., Ry. Co. v. Joseph*, 125 Ala. 313, 28 So. 35 (1899).

1. *Skaggs v. State*, 108 Ind. 57, 8 N. E. 695 (1886); *Amory v. Fellowes*, 5 Mass. 219, 225 (1809); *People v. Dowdigan*, 67 Mich. 95 (1887); *R. v. Douglas*, 13 Q. B. 42, 59 (1846). One who while testifying as a witness translates a foreign document need not be sworn as an interpreter. *Kuhlman v. Medlinka*, 29 Tex. 385 (1867).

Translations by a witness of statements made to him in a foreign language, with which he is acquainted, in like manner need be under no oath additional to that ordinarily administered to a witness. *People v. Ah Wee*, 48 Cal. 236 (1874); *Com. v. Kepper*, 114 Mass. 278 (1873).

2. *California*.—*People v. Wong Ah Bang*, 65 Cal. 305, 3 West Coast Rep. 58 (1884); *People v. Ah Yute*, 56 Cal. 119 (1880).

*Georgia*.—*Conner v. State*, 25 Ga. 515, 71 Am. Dec. 184 (1858).

*Massachusetts*.—*Amory v. Fellowes*, 5 Mass. 219, 226 (1809); *Norberg's Case*, 4 Mass. 81 (1808).

*Michigan*.—*People v. Dowdigan*, 67 Mich. 95, 38 N. W. 920 (1887).

*New York*.—*Vandervoort v. Smith*, 2 Caines (N. Y.) 155 (1804).

*South Carolina*.—*State v. Weldon*, 39 S. C. 318, 17 S. E. 688 (1893).

3. *Amory v. Fellowes*, 5 Mass. 219, 225 (1809) (deposition). The interpreter must be sworn for the purposes of the particular trial. It is not sufficient that he should appear to be a public functionary acting under the sanction of his oath of office. *Amory v. Fellowes*, 5 Mass. 219, 226 (1809).

4. *Schnier v. People*, 23 Ill. 17 (1859); *Skaggs v. State*, 108 Ind. 53, 57, 8 N. E. 695 (1886); *U. S. v. Gilbert*, 2 Sumn. (U. S.) 19 (1834).

5. *Schnier v. People*, 23 Ill. 17 (1859); *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695 (1886); *Skaggs v. State*, 108 Ind. 53 (1886); *Ulrich v. People*, 39 Mich. 245 (1878), *United States v. Gibert*, 2 Sumn. (U. S.) 19 (1834).

6. *People v. Wong Ah Bang*, 65 Cal. 305, 3 West Coast Rep. 58 (1884).

to give its effect. He may adopt the suggestions of a third person as to what would be the proper translation of a word or phrase.<sup>7</sup>

**§ 354. ([1] *Right to Prove One's Case*; [b] *Means of Communication; Interpreters*); Foreign.**—Where a witness does not understand or speak<sup>1</sup> English or speaks a language unintelligible to a portion at least of the jury,<sup>2</sup> the court, if satisfied that a *bona fide* forensic necessity exists,<sup>3</sup> will appoint an interpreter,<sup>4</sup> either of his own selection or as recommended by a party, to repeat, in his own language, the oath to the witness as dictated to him by the person administering it.<sup>5</sup> It will then be the duty of the interpreter to translate the evidence whatever may be the manner in which the witness shall give it.<sup>6</sup> Where a document is in a language unknown to the jury a translation in the vernacular may be submitted in connection with it;<sup>7</sup> but it is not apparently necessary that the translation by a witness of statements made to

7. *U. S. v. Gilbert*, 2 Sumn. (U. S.) 19 (1834).

1. "Any language is heard in court where a foreign witness must be used there, and what is the office that the law performs? It requires that means shall be furnished by the actor on the occasion, or in some manner provided, to convert the testimony, clothed and adduced in a foreign tongue, into that which the jury, who are to estimate it comprehend." *Kuhlman v. Brown*, 4 Rich. L. (S. C.) 479, 485 (1851).

2. *Coningmark's Trial*, 9 How. St. Tr. 1, 37 (1682) (witness speaking English and French may translate his own evidence).

3. *Infra*, § 1809.

4. *California*.—*People v. Ah Wee*, 48 Cal. 236 (1874).

*Indiana*.—*Skaggs v. State*, 108 Ind. 53, 8 N. E. 696 (1886).

*Illinois*.—*Chicago, etc., Ry. Co. v. Shenk*, 131 Ill. 283, 23 N. E. 436 (1890).

*Iowa*.—*State v. Severson*, 78 Iowa 653, 43 N. W. 533 (1889).

*Ohio*.—*Haupt v. Haupt*, Wright 156 (1832).

*England*.—*R. v. Burke*, 8 Cox Cr. 44–64 *passim*. (1858).

5. *Norberg's Case*, 4 Mass. 81 (1808).

6. *Com. v. Storti*, 177 Mass. 339, 58 N. E. 1021 (1901) (confession).

How far translated statements in pais when testified to by the interpreter, bind the original declarant is a question in the law of agency. *Com. v. Vose*, 157 Mass. 393, 32 N. E. 385 (1892); *Camberlin v. Palmer Co.*, 10 Allen (Mass.) 539 (1865); *Diener v. Diener*, 5 Misc. 483 (1856); *Fabrigas v. Mostyn*, 20 How. St. Tr. 123 (1773). The conversation, however, may be testified to by any one who heard it, though for part of it he is forced to assume the accuracy of a translation;—that circumstance affecting merely the weight of the evidence. *Com. v. Vose*, 157 Mass. 393 (1892); *Camberlin v. Palmer Co.*, 10 Allen (Mass.) 539 (1865); *Fabrigas v. Mostyn*, 20 How. St. Tr. 123 (1773).

7. *Yick Wo v. Underhill*, (Cal. App. 1907) 90 Pac. 967 (Chinese account).

In taking a deposition an interpreter is not, it would seem, needed where the commissioners understand both languages. *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660, 665, 672 (1871).

him in the foreign tongue should be accompanied by an enumeration of the words which he is translating.<sup>8</sup>

§ 355. ([1] *Right to Prove One's Case*; [b] *Means of Communication; Interpreters*); Deaf Mutes, etc.—The witness may understand English and still be unable, by reason of some organic imperfection, to express himself in words. He may, for example, be a deaf mute; and, as such, confined to the use of signs. The necessity for it being shown, the signs he makes must be translated into language by an interpreter<sup>1</sup> skilled in the code of signs employed by the witness.<sup>2</sup>

§ 356. ([1] *Right to Prove One's Case*; [b] *Means of Communication; Interpreters*); Defective Speech.—Reason makes no distinction nor is any made by the rule between cases of defective speech where the difficulty, while organic, is merely temporary, e. g., where it has been caused by physical violence,<sup>1</sup> and those where the trouble is of a more permanent nature. In either case,

8. *Com. v. Kepper*, 114 Mass. 278 (1873).

1. *Connecticut*.—*State v. De Wolf*, 8 Conn. 93 (1830).

*Illinois*.—*People v. Weston*, 236 Ill. 104, 86 N. E. 188 (1908).

*Indiana*.—*Skaggs v. State*, 108 Ind. 53, 8 N. E. 695 (1886). A second interpreter may be another deaf mute. *Skaggs v. State*, 108 Ind. 57, 8 N. E. 695 (1886).

*Iowa*.—*State v. Burns*, 78 N. W. 681 (1899).

*Massachusetts*.—*Com. v. Hill*, 14 Mass. 207 (1817).

*South Carolina*.—*State v. Weldon*, 39 S. C. 318, 17 S. E. 688 (1893).

*England*.—*Ruston's Case*, 1 Leach, C. C. 408 (1786).

The defendant in a criminal proceeding, being deaf and dumb, may be tried on an indictment read to him by signs through an interpreter. *Com. v. Hill*, 14 Mass. 208 (1817).

On voir dire, to ascertain whether a deaf mute's testimony could be obtained through an interpreter, neither she nor her interpreter need be sworn. *People v. Weston*, 236 Ill. 104, 86 N. E. 188 (1908).

2. *Connecticut*.—*State v. De Wolf*, 8 Conn. 98 (1830).

*Indiana*.—*Snyder v. Nations*, 5 Blackf. 295 (1840).

*Massachusetts*.—*Com. v. Hill*, 14 Mass. 207 (1817).

*Missouri*.—*State v. Howard*, 118 Mo. 127, 144, 24 S. W. 41 (1893).

*New York*.—*Cowley v. People*, 83 N. Y. 464 (1881); *People v. McGee*, 1 Denio 21 (1845).

*England*.—*Morrison v. Lennard*, 3 C. & P. 127 (1827).

Express authority has been conferred by Statute.—*Canada* (Stat. 1893, ch. 31).

Writing by a deaf-mute has been suggested as a preferable substitute for signs. *Morrison v. Leonard*, 3 C. & P. 127 (1827). But the better reasoning seems to be with the cases which deny such a modification of the usual rule. *State v. De Wolf*, 8 Conn. 98 (1830); *State v. Howard*, 118 Mo. 127, 144, 24 S. W. 41 (1893).

1. *Roberson v. State* (Tex. Cr. 1899) 49 S. W. 398.

the court may appoint some suitable person to repeat the evidence of the witness.<sup>2</sup> No special skill is, however, in such cases required on the part of the interpreter. The same rule applies where a witness is of tender years,<sup>3</sup> suffers bashfulness or other bodily infirmity.<sup>4</sup> The evidence of the witness though in the vernacular and fully delivered is not spoken so loudly as to be audible.

**§ 357. ([1] *Right to Prove One's Case*); (c) *Scope of Right*.**

—The scope of a party's case, which is protected by the administrative principle under consideration, is such as will cover the proof of all facts as to which at any stage of the case he has the burden of evidence.<sup>1</sup> In other words, it extends to proof of every fact which he needs or on which he relies to establish his claim or defense. It is the positive, affirmative evidence on which he rests his position; — as distinguished from evidence testing or rebutting the affirmative case against him, the right of introducing which is elsewhere considered.

*Evidence in Chief or in Rebuttal.*—The difference between these two classes of facts, those covered by the scope of the first and those covered by that of the second of the party's legal rights in a judicial trial is obvious. The first set of facts is, as it were, placed originally by the actor in the scale to establish a *prima facie* case<sup>2</sup> or by the non-actor,<sup>3</sup> to make an equilibrium in a civil, or a reasonable doubt in a criminal one, as the case may be, by means of a defense. The second set of facts are those adduced at a later stage of the trial by these respective litigants, in order to maintain their contentions by offsetting any unfavorable inferences arising from facts first introduced by the adversary at the last preceding stage. The actor seeks to keep good the *prima facie* case after the desired balance of the scales to that effect has been disturbed by the non-

2. *Connor v. State*, 25 Ga. 515, 75 Am. Dec. 184 (1858).

3. *Lord Mohun's Trial*, 12 How. St. Tr. 950 (1692).

4. *Connor v. State*, 25 Ga. 515 (1858); *Earl of Wintowns Case*, 15 How. St. Tr. 804, 861 (1716).

1. *Infra*, §§ 967 *et seq.*

"This burden, however, which [in a criminal case] was simply to meet the *prima facie* case of the government,

must not be confounded with the preponderance of evidence, the establishment of which usually rests upon the plaintiff." *United States v. Denver, etc., R. Co.*, 191 U. S. 84, 92, 24 Supp. Ct. 33, 35, 36 (1903).

2. *Infra*, § 992.

3. Actor in this treatise will be used as designating the party having the burden of proof; non-actor, or *reus*, as indicating his opponent.

actor in placing evidence in his own scale, or otherwise taking probative force from the *prima facie* case established by the actor. The non-actor, in turn, endeavors to meet the logical effect of the fresh facts now first adduced by the actor. In connection with the stages of a trial, this division in the scope of a party's case is called the difference between *evidence in chief* and that in *rebuttal*. The original case of either party is covered by his evidence in chief. The evidence which antagonizes that produced by his opponent, is evidence in rebuttal. The right to introduce evidence in chief is the first of the substantive legal rights of a party which it is the administrative duty of the court to protect.<sup>4</sup> The right to test the evidence in chief of the opponent, by cross-examination or otherwise and to rebut the inferences arising from it, has been assigned as the second of such rights.<sup>5</sup> These are logical divisions, the necessity for which is inherent in the nature of things—usual features of any contest decided by the use of reason. It is in no way peculiar to the rules of practice in connection with litigation that each party, in presenting his case, should be entitled to offer evidence in chief and evidence in rebuttal.

**§ 358. ([1] *Right to Prove One's Case; [c] Scope of Right*); Limited to Proof of Res Gestæ.**—The right to insist upon presenting to a tribunal the best evidence within the proponent's power is subject to a procedural qualification of great importance. The right does not apply equally to all branches of a party's case. His claim is confined to proof of the *res gestæ*,<sup>1</sup> or more properly to such facts found inferentially or in specie among the *res gestæ* as are constituent.<sup>2</sup> Where direct proof of the *res gestæ* is unattainable, he may, as of right, establish probative facts,<sup>3</sup> from which, as circumstantial evidence, the exist-

4. *Supra*, §§ 332 *et seq.*

5. *Infra*, §§ 377 *et seq.*

1. *Res gestæ* facts being of all degrees of probative force, the trial judge may decline to receive proof direct or circumstantial, of such of them as are of a secondary grade of relevancy to the disputed proposition and, *a fortiori*, such as are entirely irrelevant. Being a segregated part of the world's happenings, facts of all grades of evidentiary bearing or facts of no bearing whatever, may be

found within its bounds of time, space or causation. These may be dealt with by the court in accordance with their respective grades of probative effect. What the court cannot reasonably or legally do is to decline to permit a party to prove, as best he can, within the lines of reason, the material facts in the *res gestæ*, i. e., those which are constituent of the right or liability involved.

2. *Supra*, § 47.

3. *Supra*, § 51.

ence of the *res gestæ* or constituent facts may be inferred. The necessity in seeking to ascertain truth of relying rather upon judicial administration than upon rules of substantive law or procedure, to which reference is elsewhere made,<sup>4</sup> is strikingly illustrated by the bewildering variety of circumstances under which it is necessary to apply the general principle under consideration.

*The ultimate possible relations* of any fact are infinite in number. For the practical purposes of a trial lines or perhaps more properly, circles of logical relevancy must be drawn upon the proposition in issue as a *quasi* center. The circles are two; and precisely where each circle shall be drawn is necessarily determined by an exercise of administrative power.<sup>5</sup> When these circles are formed, within the first will lie the facts which *must* be considered; within the second are properly placed facts which *may* be investigated. Beyond lie irrelevant facts, which *should not* be investigated. The first circle includes *res gestæ* or constituent facts. The second embraces those which are relevant but not constituent. They are the subsidiary facts, i. e., those which corroborate or impeach the probative tendency of the constituent facts, which assist the reasoning faculty if the constituent facts fail to point to a definite inference or such deliberative facts<sup>6</sup> as tend to determine the probative weight to be accorded to various portions of the evidence.<sup>7</sup> Outside the second circle, are the irrelevant, nonprobative facts. Of the two, the inner circle is at once the more important for the purposes of the case, and the line which defines it by far the more difficult to draw.<sup>8</sup>

4. *Supra*, § 174.

5. As inevitably occurs in attempting to classify things which merge into each other by imperceptible gradations, it is, in many cases, difficult to draw either circle with absolute precision and entire uniformity of action. Even upon substantially similar sets of facts such uniformity cannot reasonably be expected.

6. *Supra*, § 52.

7. Should the party have produced, or be shown to be able to produce, facts, more primary in their nature, the less conclusive facts take their place within the second circle and the party

has no right to insist upon their admission.

8. To draw such a line in any particular instance is therefore a matter of delicacy and difficulty. It is, however, in practice, constantly being done. How wide, in point of time, space, causation or logical sequence shall be this inner circle in any particular case depends on the nature of the right or liability asserted. The *res gestæ* may cover a shorter or a longer time. In one case they may embrace a wide territory; in another, a very limited territorial area constitutes the entire field of investigation.



*The function of administration* in dealing with these circles will be found to vary somewhat, in appearance at least, according to whether (1) this inner circle of facts can be established by direct evidence or whether (2) it is incumbent upon the proponent to seek to reproduce the facts of the inner circle by indirect or circumstantial evidence.

(1) *Where the party has direct evidence* as to the inner circle of facts, within it will lie in specie or inferentially the facts which tend directly to establish the truth or falsity of a proposition in issue. Here enclosed are the constituent facts necessary to establish the right or liability asserted. To proof of constituent facts within this circle, the attribute of right attaches. In other words, it is not discretionary with a judge whether he will or will not permit parties to offer evidence of constituent facts. A litigant has a right to insist upon proving such a fact, and it is the fundamental administrative duty of the court to secure to him the benefit of it.

(2) *Should direct proof* of the *res gestæ* or constituent facts be unavailable — as where a crime has been secretly committed — the facts of the inner circle cannot be in themselves placed before the tribunal. All that a litigant — or in a criminal case, the prosecuting officers — can do is to seek to establish probative facts from which the existence and nature of the *res gestæ* or constituent facts can be inferred. Where this state of affairs is presented, the right to resort to facts within the second circle is conferred by the substantive law and will be protected by the administrative principle now under examination.

*In other words*, the right of a party is to prove the *res gestæ* or constituent facts; by direct proof if and so far as in his power; by probative facts so far as he is forced to resort to these.

*The right to prove the res gestæ* facts does not mean that the litigant is legally at liberty to prove his case as he sees fit, regard-

The efficient cause may be reached immediately in the chain of events or it may require to be traced for some distance along its course. One contention may be supported by a few facts from the existence of which its own correctness necessarily follows by an immediate mental process. Another presents no similar feature; but on the contrary, must be established, if at all, by force of a combination of

many circumstances; — each of but but slight logical cogency, and operating by a series of more or less probable inferences. But in any investigation the *res gestæ* facts are those nearest in time, space, causation or logical sequence to the proposition in issue; and among these *res gestæ* are the constituent facts, out of which, if at all, the right or liability arises.

less of the views of the justice presiding at the trial. All that is to be understood is that the suitor must be afforded a fair opportunity of proving in some way every fact essential to his cause, i. e., every constituent fact.<sup>9</sup> If a party, for example, has produced evidence which, if believed, would establish a particular fact, he cannot insist, as of right, upon producing additional witnesses to the same effect or to present additional facts in support of it. Evidence of this class is cumulative<sup>10</sup> or merely consistent;<sup>11</sup> and, so far as the right to present a case is concerned, within the judge's discretion.

*It will be observed* that while the court thus regards preservation of the fundamental rights of the parties, the first of the objects which it seeks to attain in drawing the first of these circles, its drawing of the second and use of the facts so enclosed is guided by the wider object of reaching substantial justice between the parties and protecting the interests of the community at large, which is the second object which the principles of administration seek to reach.<sup>12</sup>

*The broad extension of meaning* given in America to the term *res gestæ*, to which reference is elsewhere made,<sup>13</sup> may have taken its origin, in part at least, from the assumption that as a party under the present administrative principle has a right to prove the *res gestæ* facts, all the facts which he might prove as of right are facts in the *res gestæ*.

**§ 359. ([1] *Right to Prove One's Case*); (d) *Order of Stages*.**

—The order in which evidence may be introduced is within the administrative power of the presiding judge.<sup>1</sup> His action must be reasonable, in view of all the circumstances of the case, including the existence of any rule of practice on the observance of which the parties may have relied, the reasons upon which such a rule of practice has been founded, the action of other judges on similar states of fact and the like. If the action is reasonable it will be sustained, though each judge of an appellate court would himself have acted otherwise under the same state of facts.

9. *Supra*, § 47.

10. *Infra*, § 1777.

11. *Infra*, § 1752.

12. *Infra*, §§ 463 *et seq.*

13. *Infra*, § 2583.

1. *Atlantic Coast Line R. Co. v.*

*Crosby*, (Fla. 1907) 43 So. 318; *Richbourg v. Rose*, (Fla. 1907) 44 So. 69; *Blickley v. Luce*, 148 Mich. 233, 111 N. W. 752, 14 *Detroit Leg. N.* 121 (1907).

§ 360. ([1] *Right to Prove One's Case*; [d] *Order of Stages*); *Right to Open and Close*.—At each stage of a judicial trial, by a fairly uniform practice, the parties alternate;—the litigant who has the right to open and close preceding at each stage and being immediately followed by his opponent. This continues until neither party has further relevant facts to present for consideration. The allotment of the right to open and close—both at the stage of argument or that of introducing evidence—is purely a matter of practice. But, like other matters of practice, it is properly subject to the administrative power of the court.<sup>1</sup> The exercise of this power will not be disturbed so long as it has been reasonably exercised and until actual prejudice is shown from unreasonable conduct.<sup>2</sup>

*Plaintiff Has Right*.—In certain jurisdictions as, Alabama,<sup>3</sup> California,<sup>4</sup> Maryland,<sup>5</sup> and Massachusetts<sup>6</sup> the rule of practice, except so far as modified by statute, is that the plaintiff invariably opens and closes, regardless of the state of the pleadings.

§ 361. ([1] *Right to Prove One's Case*; [d] *Order of Stages*; *Right to Open and Close*); *Actor Has Right*.—With these infrequent exceptions, however, the rules of practice award the right, from obvious considerations of fairness, to the party having the burden of proof.<sup>1</sup> The burden of establishing the truth of the proposition under investigation being on him, he is in a position to ask that whatever advantage there may be in presenting the case in its first, fresh aspect to the unwearied minds of the tribunal, or of having the last word, involving the opportunity of hearing all his opponent has said, should be granted to him.<sup>2</sup>

1. *Com. v. Culver*, 126 Mass. 464 (1879). In this way alone may novel situations be handled by the judge: e. g., where as is claimed, the closing argument sets up a cause of action not previously discussed. *Schmitt v. Northern Pac. Ry. Co.*, (Wis. 1904) 98 N. W. 202.

2. *Breiner v. Nugent*, (Iowa 1907) 111 N. W. 446.

3. *Chamberlain v. Gaillard*, 26 Ala. 504 (1855).

4. *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342 (1852).

5. *Townsend v. Townsend*, 7 Gill

(Md. 10, 25 (1848). See also *Yingling v. Hesson*, 16 Md. 112, 121 (1860).

6. *Dorr v. Tremont Bank*, 128 Mass. 349 (1880). See also *Bradley v. Clark*, 1 Cush. (Mass.) 293 (1848).

1. *Infra*, §§ 930 *et seq.*

2. *Georgia*.—*Ransone v. Christian*, 56 Ga. 351 (1876).

*Illinois*.—*Semler Milling Co. v. Fyffe*, 127 Ill. App. 514 (1906).

*Indiana*.—*Rahm v. Deig*, 121 Ind. 283, 23 N. E. 141 (1889).

*Iowa*.—*Swafford v. Whipple*, 3 Greene 261, 54 Am. Dec. 498 (1851).

*The right may be waived*, and a waiver of the right to open implies the waiver of the right to close where the other party omits argument.<sup>3</sup> Who is actor is a question which, under the common law system, would be decided upon an inspection of the pleadings.<sup>4</sup>

§ 362. (*[1] Right to Prove One's Case; [d] Order of Stages; Right to Open and Close*); Plaintiff as Actor.—Should the plaintiff have the burden of proof on any issue,<sup>1</sup> in-

*Kansas*.—*Perkins v. Ermel*, 2 Kan. 325 (1864).

*Kentucky*.—*Wright's Adm'r v. Northwestern, etc., Ins. Co.*, 91 Ky. 208, 15 S. W. 242 (1891).

*Maine*.—*Johnson v. Josephs*, 75 Me. 544 (1884).

*Nebraska*.—*Cortelyou v. Hiatt*, 36 Nebr. 584, 54 N. W. 964 (1893). See also *Osborne v. Kline*, 18 Nebr. 344, 25 N. W. 360 (1885); *Boyce v. Lake*, 17 S. C. 481 (1882); *Dille v. Lovell*, 37 Ohio St. 415 (1881); *Lexington, etc., Ins. Co. v. Paver*, 16 Ohio 324, 330 (1847).

**Damages.**—The rule is the same on hearings when the issue of liability is eliminated and all that the plaintiff is required to do is to prove his damages.

*Arkansas*.—*St. Louis, etc., R. Co. v. Taylor*, 20 S. W. 1083 (1893).

*Indiana*.—*Baltimore, etc., R. Co. v. McWhinney*, 36 Ind. 436 (1871).

*Maine*.—*Johnson v. Josephs*, 75 Me. 544 (1884).

*New York*.—*Tallmadge v. Press Pub. Co.*, 14 N. Y. S. 331 (1891).

*Wisconsin*.—*Wausau Boom Co. v. Dunbar*, 75 Wis. 133, 43 N. W. 739 (1889).

*England*.—*Mercer v. Whall*, 5 Ad. & El. (N. S.) 447 (1845).

It is otherwise where the damages are liquidated. *Huntington v. Conkey*, 33 Barb. (N. Y.) 218, 228 (1860). See also *Harvey v. Ellithorpe*, 26 Ill. 418 (1861); *Blackledge v. Pine*, 28 Ind. 466 (1867); *Elwell v. Chamberlin*, 31 N. Y. 611 (1864); *Hudson v. Wetherington*, 79 N. C. 3 (1878).

3. *St. Louis & S. F. R. Co. v. Johnson*, (Kan. 1906) 86 Pac. 156.

4. *Beale-Doyle Dry Goods Co. v. Barton*, 80 Ark. 326, 97 S. W. 58 (1906).

1. *Alabama*.—*Tennessee Coal, etc., Co. v. Hamilton*, 100 Ala. 252, 14 So. 167, 46 Am. St. Rep. 48, 54 (1893).

*Arkansas*.—*Mine La Motte Lead, etc., Co. v. Consolidated, etc., Coal Co.*, 85 Ark. 123, 107 S. W. 174 (1907); *Bertrand v. Taylor*, 32 Ark. 470 (1877).

*California*.—*Watkins v. Glas*, (Cal. App. 1907) 89 Pac. 840; *Mendocino County v. Peters*, (Cal. App. 1905) 82 Pac. 1122.

*Colorado*.—*Macdermid v. Watkins*, (Colo. 1907) 92 Pac. 701; *Mastin v. Bartholomew*, (Colo. 1907) 92 Pac. 682.

*Georgia*.—*Taylor v. Chambers*, 2 Ga. App. 178, 58 S. E. 369 (1907); *Crankshaw v. Schweizer Mfg. Co.*, 1 Ga. App. 362, 58 S. E. 222 (1907); *Boston Mercantile Co. v. Ould-Carter Co.*, 123 Ga. 458, 51 S. E. 466 (1905).

*Indiana*.—*Union Cent. Life Ins. Co. v. Loughmiller*, (Ind. App. 1903) 69 N. E. 264; *Bowen v. Spears*, 20 Ind. 146 (1863). See also *Jackson v. Pittsford*, 8 Blackf. 194 (1846).

*Kentucky*.—*Louisville, H. & St. L. R. Co. v. Milby*, 31 Ky. Law Rep. 1197, 104 S. W. 785 (1907); *Louisville & E. Ry. Co. v. Mann*, 31 Ky. Law Rep. 986, 104 S. W. 362 (1907); *Frankfort & Versailles Traction Co. v. Marshall*, 98 S. W. 1035, 30 Ky. Law Rep. 431 (1907); *Doerhoefer v.*

cluding that of damages,<sup>2</sup> or if, there being several defendants, he is found to have the burden of proof as to any of them,<sup>3</sup> he will be accorded, as a rule, the right to open and close the entire case.<sup>4</sup>

**§ 363. ([1] *Right to Prove One's Case*; [d] *Order of Stages; Right to Open and Close*); Defendant as Actor.**—

A defendant's confession, in order to confer on him the privileges of the actor to open and close must as in other cases,<sup>1</sup> be full and complete as to the existence of sufficient constituent or component facts to constitute a *prima facie* case in the plaintiff. A partial confession is not sufficient.<sup>2</sup> Nor is this right lost because the plaintiff fails to introduce any evidence on his own behalf.<sup>3</sup> At common law, unless defendant by his pleadings admits plaintiff's cause of action and relies on affirmative defenses, he is not entitled to open and reply.<sup>4</sup> Where the defendant is actor, he will receive, as a rule, the right to open and close.<sup>5</sup> Where defendant

Shewmaker, 97 S. W. 7, 29 Ky. Law Rep. 1193 (1906).

*New York*.—Hollander v. Farber, 52 Misc. 507, 102 N. Y. Suppl. 506 (1907); Cilley v. Preferred Acc. Ins. Co., 187 N. Y. 517, 79 N. E. 1102 (1907) [*affirming* 109 N. Y. App. Div. 394, 96 N. Y. Suppl. 282 (1905)]; Cilley v. Preferred Acc. Ins. Co., 96 N. Y. Suppl. 282, 109 App. Div. 394 (1905).

*North Carolina*.—Johnson, etc. v. Maxwell, 87 N. C. 18 (1882).

*Ohio*.—Montgomery v. Swindler, 32 Ohio St. 224, 226, 2 Best Ev. 637, Starkie Ev. 382 (1877).

*Texas*.—Guerquin v. Boone, (Tex. Civ. App. 1903) 77 S. W. 630.

*England*.—Jackson v. Hesketh, 2 Stark. 454 (1819).

2. Geringer v. Novak, 117 Ill. App. 160 (1904).

3. Clodfelter v. Hulett, 92 Ind. 426 (1883). See also Sodousky v. McGee, 4 J. J. Marsh. (Ky.) 267 (1830).

4. A co-defendant who pleads affirmatively has, however, been granted the same right as if he were sole defendant. Sodousky v. McGee, 4 J. J. Marsh. (Ky.) 267 (1830).

1. *Infra*, § 365.

2. Nelson County v. Bardstown &

L. Turnpike Road Co., 100 S. W. 1181, 30 Ky. L. Rep. 1254 (1907); Southern Ry. Co. v. Smith, 102 S. W. 232, 31 Ky. L. Rep. 243 (1907).

3. Dickey v. Smith, 127 Ga. 645, 56 S. E. 756 (1907).

4. Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. C. 342, 55 S. E. 768 (1906).

5. *Arkansas*.—Roberts v. Padgett, 101 S. W. 753 (1907).

*Georgia*.—Atlanta Suburban Land Corp. v. Austin, 122 Ga. 374, 50 S. E. 124 (1905).

*Illinois*.—Gibson v. Reiselt, 123 Ill. App. 52 (1905).

*Iowa*.—Shaffer Bros. v. Warren, (Iowa 1905) 102 N. W. 497.

*Kentucky*.—Rich v. Bailey, 97 S. W. 747, 30 Ky. L. Rep. 155 (1906); Mattingly v. Shortell, 27 Ky. L. Rep. 426, 85 S. W. 215 (1905); Ashland & C. St. Ry. Co. v. Hoffman, 26 Ky. L. Rep. 778, 82 S. W. 566 (1904).

*Missouri*.—Absher v. Franklin, 121 Mo. App. 29, 97 S. W. 1002 (1906).

*New York*.—Cilley v. Preferred Acc. Ins. Co., 187 N. Y. 517, 79 N. E. 1102 (1907) [*affirming* 109 N. Y. App. Div. 394, 96 N. Y. Suppl. 282 (1905)]; Fischer v. Frohne, 51 Misc.

as actor opens the case, and the plaintiff introduces no evidence, the right to close may properly be refused.<sup>6</sup>

**§ 364. ([1] *Right to Prove One's Case*; [d] *Order of Stages; Right to Open and Close*); Code and Common Law Pleading.**—The groping, tentative manner of dealing with matters of this kind which statutory or code substitutes for common law pleading have put in place of the precision of the earlier system<sup>1</sup> is illustrated by the rulings as to the right to open and close. These follow, in reality, the rules of the common law relating to the burden of proof;—into the phraseology of which such rulings can generally be transposed. Under common law pleading, when a defendant, by not denying, admitted all the material allegations of the plaintiff's declaration, the burden of proof was assumed by the defendant.<sup>2</sup> There being, under statutory regulation, no constructive admission by failure to deny, an express admission may be made, in substitution, either in the answer or at the stage of evidence, i. e., at the trial. The rule takes on the following form: The defendant may acquire the right to open and close by admitting all the material<sup>3</sup> allegations of the plaintiff's complaint<sup>4</sup>

(N. Y.) 578, 100 N. Y. Suppl. 1016 (1906).

*South Carolina.*—Early v. Early, 75 S. C. 15, 54 S. E. 827 (1906).

*Texas.*—Berry v. Joiner, (Tex. Civ. App. 1907) 101 S. W. 289; Stone v. Pettus, (Tex. Civ. App. 1907) 103 S. W. 413; Bell v. Fox, (Tex. Civ. App. 1904) 84 S. W. 384.

6. Cable Co. v. Parantha, 118 Ga. 913, 45 S. E. 787 (1903).

1. *Infra*, § 942.

2. *Infra*, § 946.

3. List v. Kortepeter, 26 Ind. 27 (1866); Murray v. New York, etc., Co., 85 N. Y. 236 (1881).

The admission must be sufficiently sweeping to relieve the plaintiff from the necessity of introducing any evidence.

*Georgia.*—Seymour v. Bailey, 76 Ga. 338 (1886).

*Indiana.*—Rahm v. Deig, 121 Ind. 283 (1889).

*Iowa.*—Goodpaster v. Voris, 8 Iowa 334, 74 Am. Dec. 313 (1859).

*Massachusetts.*—Page v. Osgood, 2 Gray (Mass.) 260 (1854).

*South Carolina.*—McConnell v. Kitchens, 20 S. C. 430, 47 Am. Rep. 845 (1883).

*Texas.*—Sanders v. Bridges, 67 Tex. 93 (1886). That is, it must be such as, at common law, would transfer the burden of proof.

4. Fairbanks v. Irwin, 15 Colo. 366 (1890); Jackson v. Delaplaine, 6 Hous. (Del.) 358 (1880); Osgood v. Grosellose, 159 Ill. 511, 42 N. E. 886 (1896). See also:

*Illinois.*—Chicago, etc., R. Co. v. Bryan, 90 Ill. 126 (1878).

*Indiana.*—Lindley v. Sullivan, 133 Ind. 588, 32 N. E. 738 (1892).

*Nebraska.*—Suiter v. Park Natl. Bank, 35 Nebr. 372, 53 N. W. 205 (1892).

*New Hampshire.*—Kendall v. Brownson, 47 N. H. 186 (1866).

*New York.*—Huntington v. Conkey, 33 Barb. 218 (1860). See also Conelyea v. Swift, 103 N. Y. 604 (1886);

and assigning an affirmative defense.<sup>5</sup> Probably the same right accrues to him by making the same admissions at the trial.<sup>6</sup>

Again, the rule of pleading at common law that the plaintiff might in his replication confess and avoid the defendant's affirmative pleading in confession and avoidance<sup>7</sup> and thereby assume, if met by a traverse, the burden of proof, may be paraphrased into a statement that, in order to prevent the defendant from acquiring by his admissions the right to open and close, the plaintiff may in his reply or perhaps by verbal admissions at the trial concede the existence of the affirmative facts relied upon by the defendant in his answer,<sup>8</sup> and so retain the right to open and close.

The distinction between burden of proof and burden of evidence, elsewhere more fully stated,<sup>9</sup> is not preserved with the clearness which would be desirable. The fundamental reason for this is that the plaintiff's pleading states constituent facts<sup>10</sup> rather than component facts<sup>11</sup> or propositions of fact. The confusion due to such failure to bear in mind this distinction, may be illustrated by an instance selected almost at random. Under a certain statute of New Mexico providing that the right to open and close belongs to the party against whom judgment would be rendered if no evidence were introduced, the admission of facts by defendant during the trial does not, it was said, shift the burden of proof.<sup>12</sup> Under a more scientific system of pleading, the an-

*Stronach v. Bledsoe*, 85 N. C. 473 (1881); *Martin v. Suber*, (S. C. 1893) 18 S. E. 125; *Burekhalter v. Coward*, 16 S. C. 435 (1881); *Fuller v. Worth*, 91 Wis. 406, 64 N. W. 995 (1895); *Home Benefit Ass'n v. Sargent*, 142 U. S. 691, 12 Sup. Ct. 332 (1891).

5. An argumentative denial though affirmative in form, is not sufficient. There must be an explicit admission. *Robbins v. Spencer*, 121 Ind. 594, 22 N. E. 660 (1889). See also *Turner v. Cool*, 23 Ind. 56 (1864); *Bradley v. Clark*, 1 Cush. (Mass.) 293 (1848).

6. *Campbell v. Roberts*, 66 Ga. 733 (1881); *City of Aurora v. Cobb*, 21 Ind. 492 (1863). But compare *Wiglesworth v. Atkins*, 5 Cush. (Mass.) 212 (1849); *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367 (1890). See *contra*, *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367 (1890).

7. *Infra*, § 945.

8. *Arkansas*.—*Mann v. Scott*, 32 Ark. 593, 596 (1877).

*Illinois*.—*Edwards v. Hushing*, 31 Ill. App. 223 (1888).

*Iowa*.—*Viele v. Germania Ins. Co.*, 26 Iowa 9, 96 Am. Dec. 83 (1868).

*Mississippi*.—*Thornton v. West Feliciana R. Co.*, 29 Miss. 143 (1855).

*North Carolina*.—*Love v. Dickerson*, 85 N. C. 5 (1881).

*Pennsylvania*.—*Richards v. Nixon*, 20 Pa. St. 19 (1852).

*United States*.—*Hall v. Weare*, 92 U. S. 728, 738 (1875).

9. *Infra*, §§ 930 *et seq.*, 967 *et seq.*

10. *Supra*, § 47.

11. *Supra*, § 45.

12. *Palatine Ins. Co., Limited*, of Manchester, England *v. Santa Fe Mercantile Co.*, (N. Mex. 1905) 82 Pac. 363.

nouncement might well be simplified into a statement of the well established rule that the burden of proof does not shift according to the position of the burden of evidence.<sup>13</sup> In much the same way, a court may hold that the burden of proof is not ascertained until the *evidence* has all been introduced.<sup>14</sup> Such a ruling would be unintelligible except in view of the confusion between burden of proof and burden of evidence. The court is quite consistent in holding that issues on which there is no evidence and issues on which it is uncontradicted are not to be considered in determining who has the burden of proof.<sup>15</sup>

*Certain lingerings of the common law distinctions* between burden of proof and burden of evidence appear occasionally. For example, it has been held that an admission, to confer on a defendant the right to open and close, should appear on his pleadings and not in his evidence.<sup>16</sup>

**§ 365. ([1] *Right to Prove One's Case; [d] Order of Stages; Right to Open and Close; Code and Common Law Pleading*); Admissions Must Cover Prima Facie Case.**—Under such circumstances, the defendant instead of confessing and avoiding, as at common law, the allegations of the declaration is required, in order to become *actor* to admit certain constituent facts. In other words, as is commonly said, to entitle defendant to the right to open and close, he must in his pleadings before plaintiff begins to introduce testimony admit enough to make out a *prima facie* case for the latter.<sup>1</sup> A partial admission, i. e., a concession of the truth of certain constituent facts is not sufficient.<sup>2</sup> Oral admissions by defendant are not operative to entitle him to open and close, but admissions for that purpose must be made in his pleadings.<sup>3</sup> In other words, where defendant desires to admit

13. *Infra*, § 938.

14. *Shaffer v. Des Moines Coal & Hay Co.*, (Iowa 1904) 98 N. W. 111.

15. *Shaffer v. Des Moines Coal & Hay Co.*, (Iowa 1904) 98 N. W. 111.

16. *Du Bignon v. Wright*, 122 Ga. 263, 50 S. E. 65 (1905).

1. *Mitchem v. Allen & Barrow*, 128 Ga. 407, 57 S. E. 721 (1907); *Crankshaw v. Schweizer Mfg. Co.*, 1 Ga. App. 363, 58 S. E. 222 (1907); *E. Van Winkle Gin & Machine Works v. Pittman*, 2 Ga. App. 246, 58 S. E. 379 (1907); *Long & Allstatter Co. v.*

*Barnes*, (Ind. 1904) 69 N. E. 454; *Cilley v. Preferred Acc. Ins. Co.*, 96 N. Y. Suppl. 282, 109 App. Div. 394 (1905).

2. *E. Van Winkle Gin & Machine Works v. Pittman*, 2 Ga. App. 246, 58 S. E. 379 (1907); *Farmer v. Norton*, (Iowa 1905) 105 N. W. 371; *Southern Ry. Co. v. Steele*, 29 Ky. L. Rep. 690, 94 S. W. 653 (1906).

3. *E. Van Winkle Gin & Machine Works v. Pittman*, 2 Ga. App. 246, 58 S. E. 379 (1907).



plaintiff's cause of action and secure the right to open and close by setting up an affirmative defense, he must make his admissions clear and comprehensive, leaving nothing, no matter how inconsequential, to be proved by plaintiff in order to establish a *prima facie* case.<sup>4</sup> For example, where a plaintiff charges gross negligence, a defendant cannot acquire a right to open and close by admitting simple negligence.<sup>5</sup>

**§ 366. ([1] *Right to Prove One's Case*; [d] *Order of Stages*; *Right to Open and Close*); Proceedings in Rem.—**

On proceedings *in rem* he who concedes that his adversary is entitled to succeed unless he can show that he is himself entitled to do so, has the right of an actor. Where, in a claim case, the claimant admits that the plaintiff has a *prima facie* case, he will be deemed to have acquired the right to open and close.<sup>1</sup> On a will contest where the contestant admits the execution of the will he has been said to assume the burden of proof.<sup>2</sup> It is doubtful, however, whether this result is good administration. If it be found that the evidence at the end of the hearing is *in equilibrio* the will should properly fail. The sounder rule, therefore, is to the effect that the executor or other proponent of a will is actor throughout the hearing. Where all claimants stand on equal degrees of remoteness from responsibility for the issue, i. e., where each is simply for himself to the exclusion of all others, the allotment of the order of argument is purely a matter of administration.<sup>3</sup>

**§ 367. ([1] *Right to Prove One's Case*; [d] *Order of Stages*); Variations in Order of Evidence.—**If he think proper, a presiding judge may receive a relevant fact at any time prior to final judgment;<sup>1</sup> — provided that when evidence is offered at a

4. *Cilley v. Preferred Acc. Ins. Co.*, 187 N. Y. 517, 79 N. E. 1102 (1907) [affirming 109 N. Y. App. Div. 394, 96 N. Y. Suppl. 282 (1905)]; *Cilley v. Preferred Acc. Ins. Co.*, 96 N. Y. Suppl. 282, 109 App. Div. 394 (1904).

5. *Southern Ry. Co. in Kentucky v. Steele*, 28 Ky. L. Rep. 764, 90 S. W. 548 (1906).

1. *Turner v. Elliott*, 127 Ga. 338, 56 S. E. 434 (1907).

2. *In re Wharton's Will*, (Iowa 1906) 109 N. W. 492.

3. *Sorensen v. Sorensen*, (Neb. 1904) 98 N. W. 837.

1. *Western Union Tel. Co. v. Bowman*, (Ala. 1904) 37 So. 493; *Van Camp v. City of Keokuk*, (Iowa 1906) 107 N. W. 933; *Pharr v. Shadel*, (La. 1905) 38 So. 914; *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209 (1905). Where evidence is relevant in support of plaintiff's claim, the

stage at which alone it can be effective for the purpose for which it is offered the discretion of the presiding judge does not extend to declining to receive it until a later stage. The rule is not modified by the fact that the evidence is offered on a preliminary inquiry, as with regard to the voluntary nature of a confession.<sup>2</sup> In other words, the order of evidence is a matter of administrative control; it is, as is usually said, "within the court's discretion."<sup>3</sup> So long as the action of the trial court is reasonable, it will stand.<sup>4</sup> A judge may in any case reject tenders of evidence for the non-actor made before the actor has rested his case.<sup>5</sup> For example, a judge is not required, on an objection that a deed is a forgery, to try that issue at that particular stage. He may admit the evidence and hear the other party in his proper order.<sup>6</sup> On the other hand, where a quick settlement may be reached by allowing a party to interpolate a piece of evidence, the

court in its discretion may admit it as direct evidence of the cause of action, or on cross-examination of defendant, or in rebuttal. *Moody v. Peirano*, (Cal. App. 1907) 88 Pac. 380.

2. *Com. v. Culver*, 126 Mass. 464 (1879). It is even more clear that power to control the order of evidence does not authorize the judge to exclude it where material, e. g., when offered in reply to testimony previously received. *Com. v. Culver*, 126 Mass. 464 (1879).

3. *Alabama*.—*Armour Packing Co. of Louisiana v. Vietch-Young Produce Co.*, (Ala. 1903) 39 So. 680.

*Colorado*.—*San Miguel Consol. Gold Min. Co. v. Bonner*, 33 Colo. 207, 79 Pac. 1025 (1905); *Sheridan v. Patterson*, (Colo. 1905) 82 Pac. 539.

*Iowa*.—*Alquist v. Eagle Ironworks*, (Iowa 1904) 101 N. W. 520; *Fitch v. Mason City & C. L. Traction Co.*, (Iowa 1904) 100 N. W. 618.

*Kansas*.—*McBride v. Steinweden*, 72 Kan. 508, 83 Pac. 822 (1906).

*Massachusetts*.—*Burnside v. Town of Everett*, 186 Mass. 4, 71 N. E. 82 (1904).

*Minnesota*.—*Campbell v. Railway Transfer Co.*, 95 Minn. 375, 104 N. W. 547 (1905).

*New Jersey*.—*Foley v. Brunswick Traction Co.*, (Supp. 1903) 55 Atl. 803.

*New York*.—*Johnston v. Mutual Reserve Fund Life Ins. Co.*, 87 N. Y. Suppl. 438, 43 Misc. Rep. 251 (1904).

*Pennsylvania*.—*Baldi v. Metropolitan Life Ins. Co.*, 30 Pa. Super. Ct. 213 (1906); *Duncansville Building & Loan Ass'n v. Ginter*, 24 Pa. Super. Ct. 42 (1903).

*Rhode Island*.—*Spink v. New York, N. H. & H. Ry. Co.*, 26 R. I. 115, 58 Atl. 499 (1904).

*Texas*.—*Dreeben v. First Nat. Bank*, (Tex. Civ. App. 1906) 93 S. W. 510; *Gulf, C. & S. F. Ry. Co. v. Matthews*, (Tex. Civ. App. 1905) 89 S. W. 983.

4. *McBride v. Steinweden*, 72 Kan. 508, 83 Pac. 822 (1906).

5. *Bowen v. White*, 26 R. I. 69, 58 Atl. 252 (1904).

6. *Ming v. Olster*, 195 Mo. 460, 92 S. W. 398 (1906).

There are limits to what may be deemed reasonable. The examination of a witness for the defense before the plaintiff has opened his case should not be allowed except by consent. *Conant v. Jones*, 120 Ga. 568, 48 S. E. 234 (1904).

"short-cut" may reasonably be allowed.<sup>7</sup> The right to prove one's case rather assures a litigant of the benefit of appropriate stages in proof as established by law than guaranties that they shall not be varied against him or shall be modified in his favor.<sup>8</sup> A litigant is entitled to insist upon the right to present his case fully, to test that of his adversary with reasonable completeness, and to put in a reply to all new matter, in rebuttal. These rights are substantial. The court must secure to him due consideration for his contention. His claim must go to the tribunal with proper relative weight as compared to the contention of his adversary. But this right is to the substance rather than to the *form*; the age of formal precision is over.<sup>9</sup> Though the party who presents evidence at an appropriate stage, whether in chief or in rebuttal<sup>10</sup> will, as a rule be heard at that particular stage, in the absence of special considerations, no rule of procedure, other than that requiring the use of reason, fetters the administrative power of the court to order otherwise.

*The litigant is not entitled* to insist that his right to prove his case should be preserved to him at any particular time in any special way;— even though the time which he desires is the regular time, and the way he seeks to have adopted is the one usual in such cases. The observance of the regular practice is not a right of the party. If a reasonably adequate substitute is provided, he has received no prejudice.<sup>11</sup> In some way, at some time during the course of every trial, suitable opportunity for presenting his case must be accorded. Whatever things are reasonably necessary to enable the litigant to prove his case, will, within the confines of the trial, be secured to him. The rules of the contest in which the parties are engaged require that he should have them.

7. *Patton v. Fox*, 179 Mo. 525, 78 S. W. 804 (1904).

8. *Law v. Merrills*, 6 Wend. (N. Y.) 268, 281 (1830); *Alexander v. Byron*, 2 John. Cas. (N. Y.) 318, 319 (1801). *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. (U. S.) 448, 463 (1840).

9. *Goss v. Turner*, 21 Vt. 437, 439 (1849).

10. *California*.—*Wade v. Thayer*, 40 Cal. 578, 584 (1871).

*Iowa*.—*Farmers & M. Bank v. Young*, 36 Iowa 45, 46 (1872).

*Missouri*.—*Glenn v. Stewart*, 167 Mo. 584, 67 S. W. 237 (1902).

*Montana*.—*Anaconda C. M. Co. v. Heinze*, 27 Mont. 161, 69 Pac. 909 (1902).

*England*.—*Briggs v. Ainsworth*, 2 Mo. & Rob. 168 (1838).

The rule applies to deliberate facts. *Ankersmit v. Tuch*, 114 N. Y. 54, 20 N. E. 819 (1889) (contradiction).

11. *Hathaway v. Hemingway*, 20 Conn. 191, 195 (1850).

**§ 368. ([1] *Right to Prove One's Case*; [d] *Order of Stages; Variations in Order of Evidence*); Administrative Considerations.**— In all cases of variation, good reasons must be furnished.<sup>1</sup> No concession will be given to evidence which is immaterial,<sup>2</sup> or simply cumulative.<sup>3</sup> Among administrative reasons is that of expediting trials.<sup>4</sup> In judging of the reasonableness of the action of the trial judge, the existence of certain regular stages approved in practice is a consideration of much importance. Variations require explanation, i. e., the assignment of an administrative reason. On the other hand, the preservation of the established order requires no defense or explanation. No special excuse is required, for example, for declining to allow the nonactor, *reus*, to interpolate his defense in the midst of the actor's original case.<sup>5</sup> However justified, in itself considered, an order varying the order of evidence may be, the judge may decline to concede it, if incidental administrative evils are likely to result. Thus, for example, a party will not be permitted to introduce certain evidence, where the result would be to open up a wide field of inquiry, or go all over old ground,<sup>6</sup> involving a consumption of time without compensating administrative results.

**§ 369. ([1] *Right to Prove One's Case*; [d] *Order of Stages; Variations in Order of Evidence*); Evidence in Chief.**— A party on his original case may introduce evidence appropriate only to rebuttal.<sup>1</sup> On the other hand, the actor may supplement his evidence in chief at that stage,<sup>2</sup> especially where, as in assess-

1. *Cincinnati, N. O. & T. Ry. Co. v. Cox*, (Tenn. 1906) 143 Fed. 110; *Wilkie v. Richmond Traction Co.*, (Va. 1906) 54 S. E. 43.

2. *Potsdam Electric Light & Power Co. v. Village of Potsdam*, 99 N. Y. Suppl. 551, 112 App. Div. 810 (1906); *Gulf, C. & S. F. Ry. Co. v. Matthews*, (Tex. Civ. App. 1905) 89 S. W. 983.

3. *In re Walker's Estate*, (Cal. 1905) 82 Pac. 770.

4. *Miller v. Springfield Wagon Co.*, (Ind. Terr. 1905) 89 S. W. 1011; *Bartlett & Kling v. Illinois Surety Co.*, (Iowa 1909) 119 N. W. 729. See also *Cutter-Tower Co. v. Clements*, 5 Ga. App. 291, 63 S. E. 58 (1908); *Leake v. J. R. King Dry Goods Co.*, 5 Ga. App. 102, 62 S. E.

729 (1908); *Southern Ry. Co. v. Clay*, 130 Ga. 563, 61 S. E. 226 (1908).

5. *Yazoo & M. V. R. Co. v. Grant*, (Miss. 1905) 38 So. 502.

6. *Union Ry. Co. v. Hunton*, 114 Tenn. 609, 88 S. W. 182 (1905).

1. In a personal injury suit, the introduction of evidence in chief to anticipate an affirmative defense that plaintiff is simulating is proper, and, though it may more properly be introduced in rebuttal, the order of proof rests largely within the discretion of the trial court. *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45 (1907). See WITNESSES.

2. *Wolfert v. Hochbaum*, (Ark. 1909) 117 S. W. 525; *Blair v. State*,

ment cases against a municipality,<sup>3</sup> the original case is a broad one, and until the evidence in reply is introduced, it cannot accurately be known what item the respondent intends to attack;<sup>4</sup> or where, as in case of sanity, the burden of evidence in the original case is sustained as to a particular fact by a presumption<sup>5</sup> or assumption<sup>6</sup> of law. Either party may be permitted to do this not only after his case has been stated by him to be closed,<sup>7</sup> and

69 Ark. 558, 64 S. W. 948 (1901); *Hathaway v. Hemingway*, 20 Conn. 191, 195 (1850); *Pease v. Magill*, (N. D. 1908) 115 N. W. 260; *Clinton v. McKenzie*, 5 Strobh. 36, 42 (1850); *Scott v. Swan*, (S. D. 1908) 114 N. W. 1005. See also *Davis v. State*, (Fla. 1902) 32 So. 822; *Miller v. State*, (Tex. Cr. App. 1906) 91 S. W. 582.

**Deliberative facts.**—The court will experience reluctance to open a closed case for the purpose of receiving proof of facts merely deliberative in their nature. For example, reopening for purposes of *impeachment* may reasonably be refused. *Barclay v. Com.*, 25 Ky. Law Rep. 463, 76 S. W. 4 (1903).

3. *Chytraus v. Chicago*, 160 Ill. 18, 43 N. E. 335 (1896). See also *McCullough v. State*, (Miss. 1900) 28 South 946; *Hamilton v. State*, (Tex. Cr. App. 1900) 58 S. W. 93; *Schissler v. State*, (Wis. 1904) 99 N. W. 593; *Alexis v. U. S.*, 129 Fed. 60, 63 C. C. A. 502 (1904).

4. Dispatch of business by the elimination of cumulative evidence would be assisted by an administrative canon permitting the actor to produce merely a *prima facie* case by his evidence in chief reserving the balance for the stage of rebuttal. Such was formerly the practice in Vermont. *Stevens v. Dudley*, 56 Vt. 156, 164 (1883).

5. *Infra*, § 1055.

6. *Infra*, § 1082.

7. *Alabama*.—*Chandler Bros. v. Higgins*, 47 South 284 (1908).

*California*.—*Abbey H. Ass'n v. Willard*, 48 Cal. 614 (1874). See also

*Loewenthal v. Coonan*, 135 Cal. 381, 67 Pac. 324 (1902) [judgment *modified*, 67 Pac. 1033]; *Loewenthal v. Coonan*, (Cal. 1902) 68 Pac. 303; *Douglass v. Willard*, 129 Cal. 38, 61 Pac. 572 (1900).

*Florida*.—*Ferrell v. State*, 34 So. 220 (1903).

*Georgia*.—*Penn v. Georgia*, S. & F. Ry. Co., 129 Ga. 856, 60 S. E. 172 (1908); *Miller v. Springfield Wagon Co.*, (Ind. Terr. 1905) 89 S. W. 1011; *Bartlett & Kling v. Illinois Surety Co.*, (Iowa 1909) 119 N. W. 729. See also *Cutter-Tower Co. v. Clements*, 5 Ga. App. 291, 36 S. E. 58 (1908); *Leake v. J. R. King Dry Goods Co.*, 5 Ga. App. 102, 62 S. E. 729 (1908); *Southern Ry. Co. v. Clay*, 130 Ga. 563, 61 S. E. 226 (1908).

*Illinois*.—*Consolidated Coal Co. v. Jones & Adams Co.*, 120 Ill. App. 139 (1905); *Burgener v. Lippold*, 128 Ill. App. 590 (1906); *Hartrick v. Hawes*, 202 Ill. 334, 67 N. E. 13 (1903) [*affirming* judgment, 103 Ill. App. 433 (1902)]; *Chicago City Ry. Co. v. Carroll*, 102 Ill. App. 202 (1902).

*Indiana*.—*Williams v. Allen*, 40 Ind. 295, 297 (1872).

*Iowa*.—*Cathcart v. Rogers*, 115 Ia. 30, 87 N. W. 738 (1901).

*Kansas*.—*Hill v. Miller*, 50 Kan. 659, 662 (1893). See also *State v. Brechbill*, (Kan. App. 1900) 62 Pac. 251.

*Kentucky*.—*Louisville Ry. Co. v. Williams*, 33 Ky. Law. Rep. 168, 109 S. W. 874 (1908); *Western Union Tel. Co. v. Parsons*, 24 Ky. Law Rep. 2008, 72 S. W. 800 (1903).

*Louisiana*.—*State v. Sims*, 106 La. 453, 31 So. 71 (1901). See also *State v. Robertson*, 111 La. 35, 35 So. 375 (1903).

*Massachusetts*.—*Cushing v. Cushing*, 180 Mass. 150, 61 N. E. 814 (1901).

*Missouri*.—*Mary v. State*, 5 Mo. 71, 80 (1837). See also *Doyle v. St. Louis Transit Co.*, 124 Mo. App. 504, 101 S. W. 598 (1907); *State v. Thornhill*, 177 Mo. 691, 76 S. W. 948 (1903) (clothing).

*Nebraska*.—*Union Pac. R. Co. v. Edmondson*, (Neb. 1906) 110 N. W. 650. See also *Union Pac. R. Co. v. Edmondson*, (Neb. 1906) 110 N. W. 650.

*New Jersey*.—*Vogel v. North Jersey St. Ry. Co.*, (Supp. 1903) 54 Atl. 563.

*Nevada*.—*State v. Murphy*, 9 Nev. 394, 397 (1874).

*New Hampshire*.—*Stone v. Boscawen Mills*, 71 N. H. 288, 52 Atl. 119 (1902).

*New York*.—*Shepard v. Potter*, 4 Hill 202 (1842).

*North Carolina*.—*Olive v. Olive*, 95 N. C. 485, 486 (1886).

*Oregon*.—*State v. Isenhardt*, 32 Or. 569, 52 Pac. 569 (1898).

*Pennsylvania*.—*Com. v. Biddle*, 200 Pa. 640, 50 Atl. 262 (1901). See also *McCoy v. Niblick*, 221 Pa. 123, 70 Atl. 577 (1908).

*Rhode Island*.—*Hopkinton v. Waite*, 6 R. I. 374, 380 (1860).

*South Carolina*.—*Davis v. Collins*, 69 S. C. 460, 48 S. E. 469 (1904); *State v. Derrick*, 44 S. C. 344, 22 S. E. 338 (1895); *Browning v. Huff*, 2 Bail. 174, 179 (1831).

*South Dakota*.—*Citizens' Bank v. Shaw*, 84 N. W. 779 (1900).

*Texas*.—*St. Louis, I. M. & S. Ry. Co. v. Cassidy Southwestern Commission Co.*, (Civ. App. 1908) 107 S. W. 628; *Dodson v. State*, (Tex. Cr. App. 1902) 70 S. W. 969; *Office v. Beneke*, (Tex. Civ. App. 1899) 53 S. W. 98 (deed).

*Vermont*.—*State v. Hopkins*, 56 Vt. 250, 262 (1883).

*Washington*.—*State v. Constantine*, 86 Pac. 384 (1906); *Knapp v. Order of Pendo*, 36 Wash. 601 (1905).

*Wisconsin*.—*Humphrey v. State*, 78 Wis. 570, 572, 74 N. W. 836 (1891). See also *Murphy v. Herold Co.*, 137 Wis. 609, 119 N. W. 294 (1909); *Maywell v. Town of Wellington*, 138 Wis. 607, 120 N. W. 505 (1909).

*United States*.—*Omaha Bridge Cases*, 10 U. S. App. 98, 191, 2 C. C. A. 174, 51 Fed. 309 (1892).

*England*.—*Middleton v. Barned*, 4 Exch. 241, 243 (1849).

A judge sitting without a jury may make the same order. *Burgener v. Lippold*, 128 Ill. App. 590 (1906).

In the interest of justice, the court may reopen the case for further evidence.

*Florida*.—*Anthony v. State*, 32 So. 818 (1902).

*Louisiana*.—*Pharr v. Shadel*, 38 So. 914 (1905); *State v. Boice*, 114 La. 856, 38 So. 584 (1905).

*Nebraska*.—*Blair v. State*, 101 N. W. 17 (1904).

*New Jersey*.—*Foley v. Brunswick Traction Co.*, (Supp. 1903) 55 Atl. 803.

*Texas*.—*Griffey v. State*, (Cr. App. 1900) 56 S. W. 335.

The order being made in the interest of justice may be so moulded by the imposition of terms as to make the aid afforded more sweeping and complete. For example, a party so indulged may be required to produce also other illuminating evidence in his power. *Cole v. Gray*, (Kan. 1905) 79 Pac. 654. Where the evidence has come to the knowledge of the offering party too late to present it at an earlier stage, the practice is to accept the testimony, if it be deemed material. *State v. Dunn*, 179 Mo. 95, 77 S. W. 848 (1903). It is within the discretion of the trial court to reopen a cause after the

after both parties have rested their respective cases,<sup>8</sup> or one party

argument has commenced, and permit the prosecution to introduce additional evidence; and, unless there has been a clear abuse of such discretion to the manifest prejudice of the defendant, the appellate court will not interfere. *Harvey v. Terr.*, (Okl. 1901) 65 Pac. 837.

Justice, on the contrary, may seem to forbid any order for admitting further testimony.

*Florida*.—*Bellamy v. State*, 47 So. 868 (1908).

*Kentucky*.—*Jackson v. Com.*, 23 Ky. L. Rep. 1114, 64 S. W. 729 (1901); *Abbott v. Com.*, 23 Ky. L. Rep. 226, 62 S. W. 7T5 (1901).

*Montana*.—*Schilling v. Curran*, 76 Pac. 998 (1904).

*Ohio*.—*State v. Dugan*, 1 Cleve. L. Rep. 18, 4 Ohio Det. 93 (1878).

*Texas*.—*Greer v. Bringham*, (Civ. App. 1900) 56 S. W. 947.

*Wyoming*.—*Keffer v. State*, 73 Pac. 556 (1903).

8. *Alabama*.—*Southern Ry. Co. v. Wilson*, 138 Ala. 510, 35 So. 561 (1903).

*Colorado*.—*Lord v. Guyot*, 30 Colo. 222, 70 Pac. 683 (1902).

*Florida*.—*Volusia County Bank v. Bigelow*, 33 So. 704 (1903).

*Georgia*.—*Watson v. Barnes*, 125 Ga. 733, 54 S. E. 723 (1906). See also *Bridger v. Exchange Bank*, 126 Ga. 821, 56 S. E. 97 (1906); *Fordham v. State*, 125 Ga. 791, 54 S. E. 694 (1906); *Duggan v. State*, 116 Ga. 846, 43 S. E. 253 (1903).

*Illinois*.—*People v. Cole*, 227 Ill. 59, 81 N. E. 7 (1907); *People v. Wiemers*, 225 Ill. 17, 80 N. E. 45 (1907); *Hock v. Magarstadt*, 124 Ill. App. 140 (1906).

*Indiana*.—*Todd v. Crail*, 77 N. E. 402 (1906). See also *Todd v. Crail*, (Ind. 1906) 77 N. E. 402.

*Iowa*.—*State v. Leonard*, 112 N. W. 784 (1907) (burglar's tools).

*Kansas*.—*State v. Moon*, 80 Pac. 597 (1905).

*Louisiana*.—*State v. Sims*, 106 La. 453, 31 So. 71 (1901).

*Massachusetts*.—*Morena v. Winston*, 80 N. E. 473 (1907).

*Missouri*.—*Doyle v. St. Louis Transit Co.*, 124 Mo. App. 504, 101 S. W. 598 (1907).

*New Jersey*.—*Willett v. Morse*, 60 Atl. 362 (1905); *Foley v. Brunswick Traction Co.*, 55 Atl. 803 (1903).

*New York*.—*Standard Supply & Equipment Co. v. Merritt*, 96 N. Y. Suppl. 181, 48 Misc. 498 (1905); *Jarvis v. New York House Wrecking Co.*, 84 N. Y. Suppl. 191 (1903).

*South Carolina*.—*Davis v. Collins*, 69 S. C. 460, 48 S. E. 469 (1904) (oversight of counsel).

*Texas*.—*St. Louis, etc., Ry. Co. v. Cassidy Southwestern Commission Co.*, (Civ. App. 1908) 107 S. W. 628; *St. Louis Southwestern Ry. Co. of Texas v. Johnson*, (Civ. App. 1906) 94 S. W. 162; *Pittsburg Plate Glass Co. v. Roquemore*, (Civ. App. 1905) 88 S. W. 449. See also *Pool v. State*, (Tex. Cr. App. 1907) 103 S. W. 892; *Jones v. Wright*, (Tex. Civ. App. 1906) 92 S. W. 1010; *Gulf, C. & S. F. Ry. Co. v. Matthews*, (Tex. Civ. App. 1905) 89 S. W. 983; *Ham v. State*, (Tex. Cr. App. 1904) 78 S. W. 929; *Harper v. Marion County*, (Tex. Civ. App. 1903) 77 S. W. 1044.

*Washington*.—*Bergman v. London & L. Fire Ins. Co.*, 34 Wash. 398, 75 Pac. 989 (1904).

*Wisconsin*.—*Howard v. Beldenville Lumber Co.*, 108 N. W. 48 (1906). See also *Winn v. Itzel*, (Wis. 1905) 103 N. W. 220; *Kerslake v. McInnis*, 113 Wis. 659, 89 N. W. 895 (1902).

*United States*.—*Alaska United Gold Min. Co. v. Keating*, 116 Fed. 561 (1902).

Terms may be imposed on the allowance. For example, a party may be required to introduce evidence in addition to what he offers. *Cole v. Gray*, (Kan. 1905) 79 Pac. 654. If the party on whom terms are im-

has rested and the other declined to introduce any evidence.<sup>9</sup> Nor is it even material that a motion for a verdict<sup>10</sup> or nonsuit has been made,<sup>11</sup> or even allowed<sup>12</sup> or refused.<sup>13</sup> Nor have the limits of the judge's power in this respect yet been reached. Although the practice should be discouraged as a rule,<sup>14</sup> additional evidence may, in the interests of justice, be received even after counsel have concluded their arguments,<sup>15</sup> the case been taken under advise-

posed fails to comply with the order, judgment may properly be entered against him. *Cole v. Gray*, (Kan. 1905) 79 Pac. 654. A discharge of the opponents' witnesses will be good ground for refusing to reopen the case. *Bundrick v. State*, 125 Ga. 753, 54 S. E. 683 (1906); *Dunwoody v. State*, 118 Ga. 308, 45 S. E. 412 (1903); *Jackson v. State*, 118 Ga. 780, 45 S. E. 604 (1903). A statute conferring this power is merely directory. *Western Union Tel. Co. v. Roberts*, (Tex. Civ. App. 1903) 78 S. W. 522.

**Equity proceedings.**— The rule is the same in equity causes. *Winn v. Itzel*, (Wis. 1905) 103 N. W. 220.

9. *Pocahontas Collieries Co. v. Williams*, 105 Va. 708, 54 S. E. 868 (1906); *Reiff v. Coulter*, (Wash. 1907) 92 Pac. 436.

A stricter rule in criminal cases has been suggested. *Brown v. Giles*, 1 C. & P. 118 (1823), by Park, J.

10. *Bridger v. Exchange Bank*, 126 Ga. 821, 56 S. E. 97 (1906); *Cathcart v. Rogers*, 115 Iowa 30, 87 N. W. 738 (1901).

11. *Hill v. City of Glenwood*, (Iowa 1904) 100 N. W. 522; *Richardson v. Agnew*, (Wash. 1907) 89 Pac. 404. See also *Stone v. Boscawen Mills*, 71 N. H. 288, 52 Atl. 119 (1902); *Buck v. City of McKeesport*, 223 Pa. 211, 72 Atl. 514 (1909); *Carmack v. Drum*, (Wash. 1902) 67 Pac. 808.

A demurrer to evidence stands in the same position as a motion to direct a verdict. *Hill v. City of Glenwood*, (Iowa 1904) 100 N. W. 522; *Goodrich v. Kansas City, C. & S. Ry.*

*Co.*, 152 Mo. 222, 53 S. W. 917 (1899); *Kane v. Kane*, 35 Wash. 517, 77 Pac. 842 (1904) (divorce proceedings).

12. *Penn v. Georgia, S. & F. Ry. Co.*, 129 Ga. 856, 60 S. E. 172 (1908); *Moore v. Central of Georgia Ry. Co.*, 1 Ga. App. 514, 58 S. E. 63 (1907); *Brooke v. Lowe*, 122 Ga. 358, 50 S. E. 146 (1905); *Pitts v. Florida Cent. & P. R. Co.*, (Ga. 1902) 42 S. E. 383; *Browning v. Huff*, 2 Bail. 174, 179 (1831).

A contrary ruling, refusing to hear further evidence, may with equal propriety be made. *Central Nat. Bank v. National Metropolitan Bank of Washington*, 31 App. D. C. 391 (1908). The judge is amply justified in refusing to reopen the case at this stage. *Currie v. Consolidated Ry. Co.*, 81 Conn. 383, 71 Atl. 356 (1908); *Stewart v. Mundy*, 131 Ga. 586, 62 S. E. 986 (1908).

13. *Dorr Cattle Co. v. Chicago & G. W. Ry. Co.*, (Iowa 1905) 103 N. W. 1003; *Anderton v. Blais*, 28 R. I. 78, 65 Atl. 602 (1906). It has been said that such a motion will be allowed almost as a matter of course. *Rice v. Ware & Harper*, 3 Ga. App. 573, 60 S. E. 301 (1908).

14. *Law v. Merrills*, 6 Wend. (N. Y.) 268, 281 (1830).

15. *Alabama*.— *Dyer v. State*, 88 Ala. 225, 229, 7 So. 267 (1889). See also *Western Union Tel. Co. v. Bowman*, (Ala. 1904) 37 So. 493.

*Georgia*.— *Jackson v. State*, 45 S. E. 604 (1903).

*Florida*.— *Wilson v. Johnson*, 41 So. 395 (1906).



*Hawaii*.—Herblay v. Norris, 8 Haw. 335, 336 (1892).

*Illinois*.—Bolen v. People, 184 Ill. 338, 56 N. E. 408 (1900). See also Robinson v. Kirkwood, 91 Ill. App. 54 (1900).

*Indiana*.—Roush v. Roush, 154 Ind. 562, 55 N. E. 1017 (1900).

*Iowa*.—State v. Wright, 112 Iowa 436, 84 N. W. 541 (1900). See also Dorr Cattle Co. v. Chicago & G. W. Ry. Co., (Iowa 1905) 103 N. W. 1003.

*Kentucky*.—Hendron v. Robinson, 9 B. Monr. 503, 505 (1849).

*Louisiana*.—New Orleans v. Locke, 10 La. Ann. 730 (1855).

*Maine*.—State v. Martin, 89 Me. 117 (1896).

*Missouri*.—Freleigh v. State, 8 Mo. 606, 612 (1844).

*Nebraska*.—Tomer v. Densmore, 8 Neb. 384, 388 (1879).

*North Carolina*.—State v. Rash, 12 Ired. 382, 385 (1851); Parish v. Fite, 2 N. C. Law Repos. 238 (1811).

*Pennsylvania*.—Colclough v. Rhodus, 2 Rich. 76, 78 (1845); Duncan v. McCullough, 4 S. & R. 480, 482 (1818).

*Texas*.—Gulf, C. & S. F. Ry. Co. v. Matthews, (Civ. App. 1905) 89 S. W. 983; Harper v. Marion County, (Civ. App. 1903) 77 S. W. 1044; Cotton v. Jones, 37 Tex. 34 (1872). See also McIntyre v. State, (Tex. Cr. App. 1906) 94 S. W. 1048.

**Spontaneous action of judge.**—It has been said that the trial court has no power to reopen a case *sua sponte* long after its full submission at a previous term. Hagerle v. Beebe, 123 Iowa 620, 99 N. W. 303 (1904).

*Vermont*.—Buchanan v. Cook, 70 Vt. 168, 40 Atl. 102 (1897). See also Howard v. Beldenville Lumber Co., (Wis. 1906) 108 N. W. 48.

*United States*.—Cincinnati, N. O. & T. Ry. Co. v. Cox, 143 Fed. 110 (1906).

*England*.—Walls v. Atcheson, 2 C. & P. 265, 269 (1826).

*Canada*.—Doe v. Connolly, 3 All. 337 (1856).

A refusal to reopen at this stage may be fully justified. Leake v. J. R. King Dry Goods Co., 5 Ga. App. 102, 62 S. E. 729 (1908); Schwitters v. Springer, 236 Ill. 271, 86 N. E. 102 (1908) [judgment *affirmed*, Springer v. Schwitters, 137 Ill. App. 103 (1907)]. This is especially true where there is no evidence that the belated witnesses had been absent or ill, that there was any surprise, accident or mistakes. Wilkie v. Richmond Traction Co., (Va. 1906) 54 S. E. 43. In certain jurisdictions the settled practice seems to be to admit the evidence necessary to avoid a non-suit unless some special reason appears calling for a different course. Thus, the appellate court of Georgia say;—"While a trial judge has some discretion in refusing a request to reopen the case to supply testimony adequate to avoid a nonsuit, yet this discretion should be liberally exercised in behalf of allowing the whole case to be presented. It is the usual course to allow the additional evidence; and, whenever the trial judge refuses to allow it, some good reason should appear for such exercise of his discretion. The trial of a case is not a mere game for testing the skill and vigilance of contesting lawyers, but is an investigation instituted for the purpose of ascertaining the truth." Ellenberg v. Southern Ry. Co., 5 Ga. App. 389, 391, 63 S. E. 240 (1908), per Powell, J. See also Penn v. Georgia, S. & F. Ry. Co., 129 Ga. 856, 60 S. E. 172 (1908); Rice v. Ware & Harper, 3 Ga. App. 573, 60 S. E. 301 (1908); Moore v. Central of Georgia Ry. Co., 1 Ga. App. 514, 58 S. E. 63 (1907); Pittsburg Plate Glass Co. v. Roquemore, (Tex. Civ. App. 1905) 88 S. W. 449. The soundness of this general rule seems unquestionable. Among reasons justifying a refusal to hear additional

ment by the court,<sup>16</sup> or the judge has given his charge to the jury.<sup>17</sup> Nor is even this the extent of administrative power. A party may ask and be permitted to introduce new evidence even after the jury have retired to deliberate as to their verdict;<sup>18</sup> and in fact, it is said, at any time before they are discharged by order of court;<sup>19</sup> — though at law,<sup>20</sup> as distinguished from equity,<sup>21</sup> no

evidence offered to avoid a non-suit is the fact that the other party would be subjected to undue prejudice, or that the plaintiff has given evidence of an intention deliberately to trifle with the court or to delay the progress of the trial. *Ellenberg v. Southern Ry. Co.*, 5 Ga. App. 389, 63 S. E. 240 (1908); *Wood v. Town of Washington*, (Wis. 1908) 115 N. W. 810. Still, it has been ruled that where plaintiff withheld an important witness until the defense closed, and then offered him on the main facts, such action, though very bad practice, and capable of working great injustice, was not, of itself, sufficient to cause reversal. *Southern Ry. Co. v. Hays*, 78 Miss. 319, 28 So. 939 (1900).

16. *Gross v. Watts*, 206 Mo. 373, 104 S. W. 30 (1907). It has been said that the trial court has no power to reopen a case *sua sponte* long after its full submission at a previous term. *Hagerle v. Beebe*, 123 Iowa 620, 99 N. W. 303 (1904). The judge may properly reject evidence then offered as being out of its regular order. *Michner v. Ford*, (Kan. 1908) 98 Pac. 273.

17. *Dyer v. State*, 88 Ala. 225, 229, 7 So. 267 (1889); *Braydon v. Goulman*, 1 T. B. Monr. 115 (1824). See also *Hughes v. State*, 29 Ohio Cir. Ct. R. 237 (1907). A refusal to reopen the case may well be deemed a reasonable exercise of judicial discretion. *Lewis v. Helm*, (Colo. 1907) 90 Pac. 97.

Judge sitting without a jury.—The same rule applies to a final argument before the court where a jury

has been waived. *Lockett v. State*, (Tex. Cr. App. 1900) 55 S. W. 336.

**Waiver.** Declining an offer of time in which to rebut the newly admitted evidence negatives the existence of prejudice from the receipt of the testimony. *Bolen v. People*, 184 Ill. 338, 56 N. E. 408 (1900); *Stewart v. Stewart*, (Ind. App. 1902) 62 N. E. 1023; *Jones v. State*, (Tex. Cr. App. 1906) 95 S. W. 1044.

18. *Arkansas*.—*Bynum v. Brady*, 100 S. W. 66 (1907):

*Iowa*.—*McComb v. Ins. Co.*, 83 Iowa 247, 48 N. W. 1038 (1891).

*North Carolina*.—*Parish v. Fite*, 2 N. C. Law Repos. 238 (1811).

*Tennessee*.—*Van Huss v. Rainbolt*, 2 Coldw. 139, 141 (1865).

*Vermont*.—*Meserve v. Folsom*, 62 Vt. 504, 505, 511, 20 Atl. 926 (1889).

*Virginia*.—*Livingston v. Com.*, 7 Gratt. 658 (1851).

This may be done at the request of the jury. *Trials at Nisi Prius*, 308 (1767); *Hale's Pleas of the Crown*, II, 307. See also *Strickland v. State*, 115 Ga. 222, 41 S. E. 713 (1902).

19. "According to the course of practice and common justice, before them in their several Courts, upon trial by jury, as long as the prisoner is at the bar and the jury not sent away, either side may give their evidence and examine witnesses to discover truth." Answer of judges in *Lord Strafford's Trial*, *Lords' Journals*, April 10, 1642.

20. *Meadows v. Ins. Co.*, 67 Iowa 57, 24 N. W. 951 (1885).

21. *Clavey v. Lord*, 87 Cal. 413, 416, 419, 25 Pac. 493 (1891).

such permission would probably be accorded after the verdict<sup>22</sup> or other final adjudication.<sup>23</sup>

*The principles are the same* whether the evidence offered is by a new witness<sup>24</sup> or by the further examination of one who has already testified.<sup>25</sup>

*Should the court admit the evidence* out of course, the right of the opponent to meet and test it is obvious.<sup>26</sup>

*Opening of Case for Limited Purpose.*—This opening of a case for the purpose of receiving new evidence is not of necessity a general opening of the case for all purposes. Its effect may be limited to furnishing an opportunity for introducing the specific fact alleged.<sup>27</sup>

*Reason Required.*—So long as this administrative power to vary the order of evidence is exercised with reason, its exercise will not be revised.<sup>28</sup>

*The higher interests of the furtherance of justice,*<sup>29</sup> which it is the appropriate function of the court to regard in the discharge of its administrative functions, supervenes as soon as the legal right of the party to a reasonable opportunity to present his case,<sup>30</sup> or test that of his opponent<sup>31</sup> has been met in the course of the

22. See, however, *Bahnsen v. Horwitz*, 90 N. Y. Suppl. 428 (1905).

23. *Commercial Bank v. Brinkerhoff*, (Mo. App. 1905), 85 S. W. 121. Even in criminal cases, the same privilege has been conceded. *Freleigh v. State*, 8 Mo. 606, 612 (1844).

24. *Rucker v. Eddings*, 7 Mo. 115, 118 (1841).

25. *Rucker v. Eddings*, 7 Mo. 115, 118 (1841).

The contrary has been held, to wit, that the evidence of a new witness is more readily received than that of one already examined. "I can readily imagine cases where it would be proper to call a new witness or adduce new testimony, after the cause had been summed up, and yet that it would be very improper to allow a witness to be re-examined for the purpose of re-stating what he had previously said." *Law v. Merrills*, 6 Wend. 268, 281 (1830), per Senator Beardsley.

26. *Hendron v. Robinson*, 9 B. Monr. 503, 505 (1849); *Rucker v. Eddings*, 7 Mo. 115 (1841); *Western Union Tel. Co. v. Roberts*, (Tex. Civ. App. 1903) 78 S. W. 522; *Bergman v. London & L. Fire Ins. Co.*, 34 Wash. 398, 75 Pac. 989 (1904).

27. *Alling v. Weissman*, 77 Conn. 394, 59 Atl. 419 (1904); *Bridger v. Exchange Bank*, 126 Ga. 821, 56 S. E. 97 (1906). The restriction originally imposed by the Court upon the testimony to be admitted may, in the judge's discretion, itself be removed by subsequent order. *Alling v. Weissman*, 77 Conn. 394, 59 Atl. 419 (1904).

28. *Hill v. City of Glenwood*, (Iowa 1904) 100 N. W. 522.

29. *Infra*, § 463.

30. *Supra*, §§ 334 *et seq.*

31. *Supra*, §§ 377 *et seq.*

trial. The order of evidence, in this sense, is within the administrative power of the presiding judge.<sup>32</sup>

**32. Alabama.**—*Drum v. Harrison*, 83 Ala. 384, 386, 3 So. 715 (1887).

**Arkansas.**—*Blair v. State*, 69 Ark. 558, 64 S. W. 948 (1901). See also *Modern Laundry v. Hochbaum*, (Ark. 1909) 117 S. W. 525.

**California.**—*People v. Hill*, 116 Cal. 562, 48 Pac. 711 (1897); *Gordon v. Searing*, 8 Cal. 49 (1857). See also *In re Dolbeer's Estate*, (Cal. 1906) 86 Pac. 695.

**Colorado.**—*DeRemer v. Parker*, 19 Colo. 242, 245, 34 Pac. 980 (1893).

**District of Columbia.**—*Throckmorton v. Holt*, 12 D. C. 552, 582, 584 (1898). See also *Consaul v. Cummings*, 30 App. D. C. 540 (1908); *Barston Stove Co. v. Detroit Stove Works*, 31 App. D. C. 304 (1908).

**Florida.**—*Jacksonville T. & K. W. R. Co. v. Peninsular L. T. & M. Co.*, 27 Fla. 1, 157, 9 So. 661 (1891).

**Georgia.**—*Green v. State*, 45 S. E. 990 (1903); *Eberhart v. State*, 47 Ga. 598, 607 (1873). See also *Hoxie v. State*, 114 Ga. 19, 39 S. E. 944 (1901).

**Hawaii.**—*Mist v. Kawelo*, 13 Haw. 302, 303 (1901).

**Illinois.**—*Hartrich v. Hawes*, 202 Ill. 334, 67 N. E. 13 (1903); *Board v. Harley*, 174 Ill. 412, 51 N. E. 754 (1898). See also *Kingsley v. Kingsley*, 130 Ill. App. 53 (1906); *Hock v. Magerstadt*, 124 Ill. App. 140 (1906); *Mueller v. Rebhan*, 94 Ill. 142, 150 (1879).

**Indiana.**—*Ellison v. Branstrator*, 153 Ind. 146, 54 N. E. 433 (1899); *Throgmorton v. Davis*, 4 Blackf. 174, 175 (1836).

**Iowa.**—*Kassing v. Walter*, 65 N. W. 832 (1896); *Hess v. Wilcox*, 58 Iowa 380, 383, 10 N. W. 847 (1882).

**Kansas.**—*Wilson v. Hays' Ex'r*, 109 Kan. 321, 58 S. W. 773 (1900); *Blake v. Powell*, 26 Kan. 320, 327 (1881).

**Louisiana.**—*Southern R. Co. v. Wil-*

*son*, 138 Ala. 510, 35 So. 561 (1903). See also *Succession of Jones*, 120 La. 986, 45 So. 965 (1908); *Means v. Ross*, 106 La. 175, 30 So. 300 (1901).

**Massachusetts.**—*Lansky v. R. Co.*, 173 Mass. 20, 53 N. E. 128 (1899); *Robinson v. R. Co.*, 7 Gray 92, 96 (1856). See also *Cushing v. Cushing*, 180 Mass. 150, 61 N. E. 814 (1901) (divorce proceedings).

**Michigan.**—*Smith v. Bye*, 116 Mich. 84, 74 N. W. 302 (1898); *Maier v. Benefit Ass'n*, 107 Mich. 687, 65 N. W. 552 (1895).

**Mississippi.**—*King v. State*, 74 Miss. 576, 21 So. 235 (1897).

**Missouri.**—*Beyer v. Hermann*, 173 Mo. 295, 73 S. W. 164 (1903); *State v. Jones*, 64 Mo. 391, 397 (1877).

**Nebraska.**—*Baer v. State*, 59 Neb. 655, 81 N. W. 856 (1900); *Baye v. State*, 45 Neb. 261, 63 N. W. 811 (1895).

**Nevada.**—*Lamance v. Byrnes*, 17 Nev. 197, 202, 30 Pac. 700 (1882).

**New Mexico.**—*People v. Strait*, 154 N. Mex. 165, 47 N. E. 1090 (1897).

**New York.**—*People v. Koerner*, 154 N. Y. 335, 48 N. E. 730 (1897). See also *Potsdam Electric Light & Power Co. v. Village of Potsdam*, 99 N. Y. Supp. 551, 112 App. Div. 810 (1906); *Barson v. Mulligan*, 79 N. Y. Supp. 31, 77 App. Div. 192 (1902); *In re Wormser's Estate*, 64 N. Y. Suppl. 897, 51 App. Div. 441 (1900) [Order modified, *In re Wormser*, (Sur. 1899) 59 N. Y. S. 1088, 28 Misc. Rep. 608] (surrogate).

**North Carolina.**—*State v. King*, 84 N. C. 737, 741 (1881).

**Ohio.**—*Shahan v. Swan*, 48 Ohio 25, 26 N. E. 222 (1891); *Webb v. State*, 29 Ohio St. 351, 356 (1876).

**Oklahoma.**—*Cochran v. U. S.*, 76 Pac. 672 (1904) (for purposes of further cross-examination).

§ 370. ([1] *Right to Prove One's Case; [d] Order of Stages; Variations in Order of Evidence*); Considerations Influencing Judge's Action.—In exercising this discretion various considerations may reasonably affect the court's action. It may fairly be said, on the one hand, that less injustice will, as a rule, be done by admitting evidence than by excluding it. There is an obvious disregard of the duty of the court to expedite causes<sup>1</sup> and to further justice<sup>2</sup> when a party is compelled either to climb once more the long hill of litigation, or else, disheartened, abandon the

*Oregon*.—*State v. Hunsaker*, 16 Or. 497, 499, 19 Pac. 605 (1888).

*Pennsylvania*.—*Acklin v. McCalmont Oil Co.*, 201 Pa. 257, 50 Atl. 955 (1902); *Dosch v. Diem*, 176 Pa. 603, 35 Atl. 207 (1896).

*Rhode Island*.—*State v. Ballou*, 20 R. I. 607, 40 Atl. 861 (1898).

*South Carolina*.—*Ludden & Bates S. M. H. v. Sumter*, 47 S. C. 335, 25 S. E. 150 (1896). See also *Virginia-Carolina Chemical Co. v. Kirven*, 57 S. C. 445, 35 S. E. 745 (1900).

*Tennessee*.—*Jones v. Galbraith*, 59 S. W. 350 (1900).

*Texas*.—*Burt v. State*, 38 Tex. Cr. 397, 420, 40 S. W. 1000, 43 S. W. 344 (1897). See also *Gulf, C. & S. F. Ry. Co. v. Matthews*, (Tex. Civ. App. 1905) 89 S. W. 983.

*Utah*.—*State v. Webb*, 18 Utah 441, 56 Pac. 159 (1899).

*Vermont*.—*State v. Lawrence*, 70 Vt. 524, 41 Atl. 1027 (1898); *Goss v. Turner*, 21 Vt. 437, 439 (1849).

*Virginia*.—*Reed v. Com.*, 98 Va. 817, 36 S. E. 399 (1900). See also *Pocahontas Collieries Co. v. Williams*, 105 Va. 708, 54 S. E. 868 (1906).

*West Virginia*.—*State v. Williams*, 49 W. Va. 220, 38 S. E. 495 (1901).

*Wisconsin*.—*Stanhillber v. Graves*, 97 Wis. 515, 73 N. W. 48 (1897). See also *Lauterbach v. Netzo*, 111 Wis. 322, 87 N. W. 230 (1901).

*United States*.—*Atchison T. & S. F. R. Co. v. Phipps*, 60 C. C. A. 314, 125 Fed. 478 (1903); *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 463 (1840).

*England*.—*R. v. Nicholson*, 2 Lew. Cr. C. 151 (1834). See also *Walls v. Atcheson*, 2 C. & P. 268, 269 (1826).

*Canada*.—*Devlin v. Crocker*, 7 C. Q. B. 398 (1850); *Harvey v. R. Co.*, 3 Man. 266 (1885); *Heavy v. Odell*, 5 All. N. Br. 102 (1863).

It is entirely discretionary with the trial court whether a witness, after the evidence is closed, shall be permitted to again occupy the witness stand. *Roe v. Bank of Versailles*, 167 Mo. 406, 67 S. W. 303 (1902). A considerable delay in making a motion to reopen may fairly be considered by the trial judge in dealing with such an application. *Houston's Adm'r v. Thompson's Adm'r*, 87 Mo. App. 63 (1901) (two months). Unless the discretion has been harshly exercised, an appellate court will not interfere. *Houston's Adm'r v. Thompson's Adm'r*, 87 Mo. App. 63 (1901).

The practice extends also to chancery causes. *Hamersly v. Lambert*, 2 Johns. Ch. 432 (1817).

This inherent power of a court was early held to be possessed by the federal courts of the United States. "We think," says Judge Story, "that the circuit courts possess this discretion in as ample a manner as other judicial tribunals." *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 463 (1840).

1. *Infra*, §§ 544 *et seq.*

2. *Infra*, §§ 463 *et seq.*

prosecution of a just claim when a few minutes' indulgence to human fallibility might end the matter at the time once for all.<sup>3</sup>

*On the other hand*, it may properly be considered that there frequently arises hardship when evidence is offered against a party who has dismissed his witnesses, the appropriate stage for using them having passed. The judge may fairly regard the ulterior effect of a ruling in encouraging laxity of practice and a constant repetition, on the part of the bar, of the same request for indulgence.<sup>4</sup>

*The maximum of concession* will be extended where the evidence which the party asks to supply is of a formal nature,<sup>5</sup> or where it has been assumed that it has been shown, that its existence is not controverted or that, as matter of law, it could not be controverted;<sup>6</sup> or where the evidence offered is already in the case in another form.<sup>7</sup> This may be done up to the time when the jury retire.<sup>8</sup>

*The minimum of administrative indulgence* will be shown where the course of the trial has developed a fatal weakness, unconsidered by the party now offering the evidence, and where the latter<sup>9</sup> or other interested or friendly person is offered as a witness for the purpose of repairing the difficulty.<sup>10</sup> In a lesser degree a party who preferred to allow his adversary to introduce evidence which he might have himself offered at an appropriate stage, will be exposed to the influence of the suggestion

3. "The attainment of speedy justice is one great object of a suit at law; and it would be a bad way of attaining this end to say to a party situated as the plaintiff was in the court below, 'Your case must fail, and you must begin *de novo*, because you did not offer evidence before you closed which you can now obtain in a few moments.'" *Browning v. Huff*, 2 Bail. 174, 179 (1831).

4. *Hathaway v. Hemingway*, 20 Conn. 191, 195 (1850); *Braydon v. Goulman*, 1 T. B. Monr. 115, 118 (1824).

5. *Giles v. Powell*, 2 C. & P. 259, 261 (1826).

6. "If the plaintiff could, without delaying the court or the party, make out a fact on which the proceedings themselves informed the defendant

the plaintiff did rely, and which she had omitted to prove from supposing that in point of law it could not be questioned, surely she ought to have been permitted to do so." *Browning v. Huff*, 2 Bail. 174, 179 (1831).

7. *Kane v. Kane*, 35 Wash. 517, 77 Pac. 842 (1904).

8. "Where mere formal proof has been omitted, courts have allowed witnesses to be called or documents to be produced at any time before the jury retire, in order to supply it." *Rucker v. Eddings*, 7 Mo. 115, 118 (1841).

9. *Lewis v. Helm*, (Colo. 1907) 90 Pac. 97; *Commercial Bank v. Brinkerhoff*, (Mo. App. 1905) 85 S. W. 121.

10. *Law v. Merrills*, 6 Wend. 263, 281 (1830).

that he has intentionally and voluntarily assumed a hazard from the issue of which he expected personal advantage, and cannot fairly complain if the chance goes against him.<sup>11</sup>

*The same feeling will be found* to exist whenever the temptation to fabrication or perjury is fairly obvious.<sup>12</sup>

*Newly Discovered Evidence.*—A judge may very reasonably decline to reopen a case to hear alleged new evidence if he has already substantially considered it.<sup>13</sup>

§ 371. ([1] *Right to Prove One's Case; [d] Order of Stages; Variations in Order of Evidence*); *Practical Administration.*—Between these limits of maximum and minimum indulgence lies a great variety of conditions, which invite the exercise of trained intelligence; and which, except in rare cases, e. g., where reason has not been exercised, surprise has been caused,<sup>1</sup> a party confronted with new evidence after he has discharged his witnesses,<sup>2</sup> or some other injustice has been done,<sup>3</sup>

11. *Schander v. Gray*, (Cal. 1906) 86 Pac. 695.

12. *Parish v. Fite*, 2 N. C. Law Rep. 238 (1811); *Price v. Jenkins*, 1 Nott & McC. 153 (1818); *Duncan v. McCullough*, 4 S. & R. 480, 482 (1818); *Johnson v. Clinton*, A. M. & O. 123 (1841); *Rucker v. Eddings*, 7 Mo. 115, 118 (1841); *Law v. Merrills*, 6 Wend. 268, 281 (1830).

13. *Emerson v. McDonnell*, (Wis. 1906) 107 N. W. 1037.

1. *Mueller v. Rebhan*, 94 Ill. 142, 150 (1879); *Browning v. Huff*, 2 Bail. 174, 179 (1831).

2. *Alexander v. Byron*, 2 Johns. Cas. 318, 319 (1801) *Price v. Jenkins*, 1 Nott & McC. 153 (1818); *Clinton v. McKenzie*, 5 Strobb. 36, 42 (1850).

3. *Alabama.*—*Gayle v. Bishop*, 14 Ala. 552 (1848).

*California.*—*Foote v. Richmond*, 42 Cal. 439, 442 (1871).

*Colorado.*—*Brooke v. People*, 23 Colo. 375, 48 Pac. 502 (1897).

*Florida.*—*Ferrell v. State*, 34 So. 220 (1903).

*Georgia.*—*Ward v. State*, 112 Ga. 75, 37 S. E. 111 (1900); *Eberhart v. State*, 47 Ga. 598, 607 (1873).

*Hawaii.*—*R. v. Helelilili*, 5 Haw. 16, 19 (1883).

*Illinois.*—*Chicago City R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087 (1903).

*Indiana.*—*McNutt v. McNutt*, 116 Ind. 545, 565, 19 N. E. 115 (1888).

*Iowa.*—*Hartley S. Bank v. McCorkell*, 91 Iowa 660, 665, 60 N. W. 197 (1894).

*Kansas.*—*Rheinhardt v. State*, 14 Kan. 318, 323 (1875).

*Kentucky.*—*Froman v. Com.*, 42 S. W. 728 (1897).

*Louisiana.*—*State v. Robertson*, 111 La. 35, 35 So. 375 (1903).

*Missouri.*—*Joplin Waterworks Co. v. Joplin*, 177 Mo. 496, 76 S. W. 960 (1903).

*Nevada.*—*Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1036 (1897).

*New York.*—*Carradine v. Hotchkiss*, 120 N. Y. 608, 613, 24 N. E. 1020 (1890).

*North Carolina.*—*Sutton v. Walters*, 118 N. C. 495, 24 S. E. 357 (1896).

*Pennsylvania.*—*Richardson v. Stewart*, 4 Binn. 198, 200 (1811).

*South Carolina.*—*Clinton v. McKenzie*, 5 Strobb. 36, 42 (1850).

should not be controlled in an appellate court.<sup>4</sup> Honest inadvertence, necessitated, except in cases tried in a leisurely manner between experienced practitioners, by the confusion of the

*Utah*.—*State v. Webb*, 18 Utah 441 (1899).

*Virginia*.—*Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869 (1895).

*West Virginia*.—*Perdue v. C. C. C. Co.*, 40 W. Va. 372, 21 S. E. 870 (1895).

*Wisconsin*.—*Blewett v. Gaynor*, 77 Wis. 378, 393, 46 N. W. 547 (1890).

*United States*.—*Hart v. U. S.*, 23 C. C. A. 612, 84 Fed. 799 (1898).

*England*.—*George v. Radford*, 3 C. & P. 464 (1828).

*Canada*.—*Wilkes v. Heaton*, 17 U. C. Q. B. 95 (1859). See also *Richardson v. Stewart*, 4 Binn. 198, 200 (1811); *Braydon v. Gouldman*, 1 T. B. Monr. 115, 118 (1824).

Unless some injustice or denial of right appear, it is evident that there is no prejudice.—“No good end is to be accomplished by reversing this case and sending it back for a new trial and for the admission of the same evidence at a different stage of the trial.” *Crane v. Ellis*, 31 Iowa 510, 512 (1871). “Even did we interfere, and reverse the judgment for this cause, how would the party complaining be benefited by a new trial? Would not the evidence, of the introduction of which he complains, come out in an unexceptionable manner on another trial?” *Brown v. Burrus*, 8 Mo. 26, 30 (1843).

4. *Iowa*.—*Crane v. Ellis*, 31 Iowa 510, 512 (1871).

*Missouri*.—*Brown v. Burrus*, 8 Mo. 26, 30 (1843); *Rucker v. Eddings*, 7 Mo. 115, 118 (1841).

*New York*.—*Law v. Merrills*, 6 Wend. 268, 281 (1830).

*North Carolina*.—*Williams v. Averitt*, 3 Hawks 308 (1824).

*Vermont*.—*Goss v. Turner*, 21 Vt. 437, 439 (1849).

Plainly unreasonable action will, however, be reversed. Thus, should the entire contention of a party be shut out from the jury by the Court's action, prejudicial error has been committed. *Cathcart v. Rogers*, (Iowa 1901) 87 N. W. 738; *Sun Ins. Office v. Stegar*, (Ky. 1900) 112 S. W. 922; *Moreland v. New Berger Cotton Co.*, (Miss. 1909) 48 So. 187; *Lott v. Payne*, (Miss. 1903) 33 So. 948 (ejectment); *Marx v. Pennsylvania Fire Ins. Co. of Philadelphia*, 66 N. Y. Supp. 481, 32 Misc. Rep. 637 (1900). In like manner where important evidence has, without fault of a party, but just come to his knowledge, the action of a trial judge in refusing to allow him to produce it out of due course may be reversed on appeal. *Etly v. Com.*, (Ky. 1908) 113 S. W. 896; *Glenn v. Stewart*, 167 Mo. 584, 67 S. W. 237 (1902); *Elsworth v. State*, (Tex. Cr. App. 1907) 104 S. W. 903 (ink-spots). So, where the previous course of the trial has been such as to create a strong bias on the part of a witness, it may be unreasonable to receive his evidence at a later stage. *People v. Harper*, (Mich. 1906) 108 N. W. 689, 13 Detroit Leg. N. 440. In general, where an omission appears distinctly to have been the fault of counsel, a trial judge will be loath to preclude testimony upon the point, if a material one. *Lewandowski v. State*, (Tex. Cr. App. 1903) 72 S. W. 594. Where a party has dismissed his witnesses upon the assurance of the opposite party that no further evidence will be offered on a given subject, it may be error to permit such testimony to be offered out of course. *Hendrick v. State*, (Tex. Cr. App. 1904) 83 S. W. 711.



trial,<sup>5</sup> appeals strongly for indulgence in this respect.<sup>6</sup> Surprise at the evidence, produced by the other side, an unexpected position taken or claim advanced by it, will usually, if genuine, be deemed sufficient ground for receiving evidence out of its order. A court may legitimately be guided somewhat by the character of the parties, the reputation, skill and experience of their counsel, as well as by the nature of the claim advanced.<sup>7</sup> If the new evidence, in turn, constitutes a surprise, the possibility that admitting the evidence may result in an adjournment or continuance may reasonably be considered by the court in passing upon the question of its admission.

*Any Reasonable Interpolation Will be Allowed.*—The non-actor (for example) may be permitted to introduce a witness during the actor's evidence in chief.<sup>8</sup>

**§ 372. ([1] *Right to Prove One's Case*; [d] *Order of Stages*); Evidence in Chief; Actor.**—It will be convenient, therefore, to assume as universal that which is so general and say that the party having the burden of proof—the actor, as he may be shortly called—after making such an “opening” as is permitted or deemed advisable, first presents his case to the jury.

5. *Hathaway v. Hemingway*, 20 Conn. 191, 195 (1850); *Clinton v. McKenzie*, 5 Strobb. (S. C.) 36, 42 (1850); *Goss v. Turner*, 21 Vt. 437, 439 (1849).

6. *Dannelly v. Russ*, 54 Fla. 285, 45 So. 496 (1907); *Rucker v. Eddings*, 7 Mo. 115, 118 (1841). The discretion is not an arbitrary one. *Sun Ins. Office v. Stegar*, (Ky. 1908) 112 S. W. 922.

Where the failure to introduce evidence at a proper stage was intentional and intended to gain by trickery an unfair advantage, the evidence will be rejected when offered. *Richardson v. Stewart*, 4 Binn. 198, 200 (1811). Surprise and probable prejudice caused to the other side may be a reasonable ground for declining to open a case. *Atlas Engine Works v. Woolford*, 22 Pa. Super. Ct. 545 (1903). On the other hand, where the evidence offered out of course is only such as the other party might

reasonably have anticipated that he would be called upon to meet, the judge will, as a rule, experience less hesitancy in receiving the belated or omitted testimony. *Chesapeake & O. Ry. Co. v. Dupee's Adm'r*, 23 Ky. L. Rep. 2349, 67 S. W. 15 (1902).

7. *Rucker v. Eddings*, 7 Mo. 115 (1841). “That one shall be held to his announcement is in the main right. But to make such a rule so rigid as to separate it from the other rules as to order, and say that whilst the judge may modify them as justice and the public convenience may require, he must be held to this with an iron grip, seems to us absurd.” *Eberhart v. State*, 47 Ga. 598, 607 (1873).

8. *Huston v. Plato*, 3 Colo. 402, 407 (1877). Upon the close of the actor's opening address, the non-actor may be permitted to offer evidence. *Thomas v. Chicago, M. & St. P. Ry. Co.*, (Iowa 1901) 86 N. W. 259.

He calls and examines his witnesses — the stages of whose examination present a matter for separate consideration<sup>1</sup> — submits his documents, exhibits to the perception of the court, any article, animate or inanimate, which is in any way relevant, and rests his case. This is his evidence in chief. It should contain every fact necessary to the establishment of a *prima facie* case,<sup>2</sup> i. e., as is said elsewhere,<sup>3</sup> it covers the entire *res gestæ* out of which the right or liability claimed or asserted arises.

*Should the actor fail to prove a prima facie case*, the nonactor is under no obligation to introduce any evidence whatever; and his failure to do so will not complete and make a *prima facie* case for the actor.<sup>4</sup> This proposition must, however, be carefully distinguished from the closely related but entirely distinct rule of administration, to the effect that, in considering what shall be deemed a *prima facie* case for the actor, his means of knowledge and access to evidence may properly be considered by the presiding judge.<sup>5</sup> In other words, the court, in ruling as to the existence of a *prima facie* case, i. e., as to when the burden of evidence has shifted, may properly consider that if certain statements or contentions of the actor are not true, the nonactor can and will contradict and disprove them.

**§ 373. ([1] *Right to Prove One's Case; [d] Order of Stages; Evidence in Chief*); Nonactor.**—His adversary — the nonactor, the *reus* — whose only burden in proof in civil cases is the creation of an equilibrium or, in criminal cases, establishing a reasonable doubt,<sup>1</sup> at the close of the actor's evidence in chief, becomes entitled to an opportunity to present his case, by way of defense.<sup>2</sup> Before doing so, a preliminary question should be re-

1. See WITNESSES.

2. *Southern Ry. Co. v. Gullatt*, (Ala. 1907) 43 So. 577; *Mueller v. Rebhan*, 94 Ill. 142, 150 (1879). See also *Hathaway v. Hemingway*, 20 Conn. 191, 195 (1850). "The orderly course of proceeding requires that the party whose business it is to go forward should bring out the strength of his proof in the first instance; but it is competent for the judge, according to the nature of the case, to allow a party who has closed his case to introduce further evidence." *Cushing v. Billings*, 2 Cush. 158, 159 (1848).

3. *Supra*, § 358.

4. *Southern Ry. Co. v. Gullatt*, (Ala. 1907) 43 So. 577. See also *McDuffee's Adm'x v. Boston & M. R. R.*, 81 Vt. 52, 69 Atl. 124 (1908).

5. *Infra*, § 970.

1. *Infra*, § 1174.

2. The rights of co-defendants to be heard with respect to the contentions of each other are considered in *Grundy v. Janesville*, 84 Wis. 574, 54 N. W. 1085 (1893); *R. v. Cooke*, 1 C. & P. 322 (1824).

solved: Has the actor presented to the court a *prima facie* case? In other words, has he produced such evidence in favor of his contention that the jury, or judge, as the case may be, would be justified as reasonable men in acting in accordance with it? This point is raised by a request for a ruling upon the basis that such is not the case. The court may, upon suitable terms, rule as to such a motion. If the result is adverse to the actor, that is the end of the case. Otherwise, i. e., if the point is not raised or not sustained, the nonactor proceeds. He "opens" his case to the jury, calls his witnesses, who are examined at the same successive stages as those of his opponent,<sup>3</sup> produces his documents, offers for inspection such articles as may be deemed relevant; and, in turn rests his case. This is his evidence in chief, his case in reply. The nonactor's evidence in chief should contain proof of all facts necessary to meet the claim of right or liability advanced by the actor.<sup>4</sup>

At this point it is open to the actor to ask for a ruling to the effect that his *original prima facie* case has not been impaired and that, consequently, there is nothing for the jury to try. He may, in other words, ask the court to rule that the jury could not, as reasonable men, find otherwise than in favor of his contention.

This is the extent of the right of the parties to present each his original case — the first of his substantive legal rights which it is the administrative duty of the court to secure to a litigant under the canon A of judicial administration; — so far as relates to (d) the order of stages at which it is to be exercised. It remains to consider this right to prove one's case as related (e) to the order in which the several topics covered by the *res gestæ* or constituent facts of that case may be presented to the court.

**§ 374. ([1] *Right to Prove One's Case*); (e) Order of Topics.** — While it is not disputed that what is preliminary should precede in proof that which is subsequent in point of time,<sup>1</sup> or causation, counsel claim and customarily exercise the right to open their cases to the jury in any order of topics which seems to them effective for their purpose. In connection with the order of topics, an administrative question is presented to the court which, unless it should appear that the issue is likely to be befogged or

3. See WITNESSES.

1. *White v. Wilmington City Ry.*

4. *Hathaway v. Hemingway*, 20 Co., (Del. Super. 1906) 63 Atl. 931. Conn. 191, 195 (1850).

the jury misled, will usually be exercised by leaving the matter to the determination of the parties. This order is not commonly disturbed by the court, where the facts alleged are relevant, unless as adopted it is obviously unfair or prejudicial.<sup>2</sup> Therefore, the order in which counsel may see fit to offer evidence of the respective topics covered by their contentions at any particular stage of the proof, is largely left to the unhampered option of counsel.<sup>3</sup> They have the right to call witnesses at the appropriate stage in proof of relevant topics in any order they may see fit, in the absence of general or special regulation — as that requiring a party who declines to go out with his witnesses to testify before they do.<sup>4</sup> This right connotes liberty of placing the topics in any order which he desires. The reverse is equally true — that the right to vary the order of topics connotes that of calling witnesses in any order which may seem judicious. This is not only in accordance with the reasonable strategy in each case, e. g., as where an effort to inspire courage in a hesitating witness whose evidence is logically preliminary, is made by introducing in anticipation of his testimony, that of some more positive witness, is serviceable where, as frequently happens, practical convenience requires a perversion of the logical order. A witness whose testimony is introductory may not be in attendance. One whose evidence would logically be subsequent may be anxious for release from attendance. Again, it may be extremely convenient to complete the entire examination of a witness at one time though the topics covered by his testimony relate to very different parts of the case.<sup>5</sup> For these, or other reasons, the court, even over objection, may permit a witness called as part of the evidence in chief to be examined as to matters really in rebuttal of facts, proof of which is anticipated at a later stage.<sup>6</sup> On the other hand, the presiding judge, when one of the actor's witnesses has

2. "It is certainly the privilege of a party to present his testimony in the mode his judgment or fancy may dictate; and, if relevant, it cannot be objected to, although it may be of no avail without further proof." *Branch Bank v. Kinsey*, 5 Ala. 9, 12 (1843).

3. *McDanel v. Logi*, 143 Ill. 487, 32 N. E. 423 (1892).

4. *Barkley v. Bradford*, 100 Ky.

304, 38 S. W. 432 (1896); *Clemons v. State*, 92 Tenn. 282, 288, 286, 21 S. W. 525 (1892).

5. The actor may, for example, be permitted to prove facts in rebuttal on cross-examination of one of the nonactor's witnesses. *Ranney v. R. Co.*, 67 Vt. 594, 32 Atl. 810 (1893).

6. *Mayer v. Brensinger*, 180 Ill. 110, 54 N. E. 159 (1899).

failed to arrive on time,<sup>7</sup> or other sufficient cause appears to the judge to exist, may require the nonactor to proceed with his evidence in chief—the actor's unfinished case, in the meantime, standing open. He may immediately read the balance of a document, if fairness requires it, when the actor, in his evidence in chief has placed in evidence the whole and read a part,<sup>8</sup> as he may lawfully do. In other words, while counsel are permitted, in general, to consider the topics within the scope of their appropriate stage, in any order deemed by them advisable, the general administrative power of the court is adequate to prevent this right being made a means of oppressing the opponent or otherwise gaining an unfair advantage. The procedure is extremely flexible, and very properly so.<sup>9</sup> If the discretion is not exercised contrary to reason, the action of the trial judge will not be reversed in an appellate court.<sup>10</sup>

When the admissibility of evidence is dependent upon a preliminary finding of fact by the court, as, for example, whether a bill of exchange were properly stamped,<sup>11</sup> a letter offered in evidence is the original,<sup>12</sup> or is genuine,<sup>13</sup> consideration of this nature will necessarily precede inquiries as to the effect of the evidence; a hearing, complete in itself, is instituted, and the opponent is called upon to present his rebutting evidence, if any, at that time.

**§ 375. ([1] *Right to Prove One's Case*; [e] *Order of Topics*); Conditional Relevancy; Bearing Apparent.**—The right of counsel to present facts in any order of topics is, also subject to the very important qualification that it should affirmatively appear, or be made to appear, that the fact offered in any case is relevant. Where the actual or potential relevancy is obvious, on its face, the party as of right may introduce it;—though it be not, unless supplemented by other evidence sufficient to warrant a finding in his favor.<sup>1</sup> But where the relevancy of the fact offered is

7. *Townsend's Succession*, 40 La. Ann. 66, 73, 3 So. 488 (1888).

8. *Herring v. Skaggs*, 73 Ala. 446, 453 (1882) (deposition).

9. "We take it to be well settled that the order in which witnesses shall be called is a matter of discretion with the court." *Cushing v. Billings*, 2 Cush. 158, 159 (1848).

10. *Cushing v. Billings*, 2 Cush. (Mass.) 158, 159 (1848).

11. *Bartlett v. Smith*, 11 M. & W. 483 (1843).

12. *Boyle v. Wiseman*, 24 L. J. Exch. 284 (1855).

13. *Cooper v. Dawson*, 1 F. & F. 550 (1859).

1. *Alabama*.—*Adams v. Adams*, 29 Ala. 433 (1856).

*North Carolina*.—*Earnhardt v. Clement*, 49 S. E. 49 (1904).

dependent upon proof of other facts, a somewhat different situation is presented, though the logical bearing is obvious.

The court is custodian of the time of the tribunal. In discharge of its administrative function to expedite trials,<sup>2</sup> it is quite justified in insisting that time be not fruitlessly consumed. If evidence is offered which will be of no consequence unless another fact be also shown to have existed, ample warrant is furnished for requiring some satisfactory assurance, before admitting the fact offered, that evidence will at some time be furnished as to the existence of the conditioning fact.<sup>3</sup> For example, it is obviously useless to examine the conduct of one accused of crime unless in some way it shall be made to appear that there is a *corpus delicti* with which to connect him. So, it is useless for the court to listen to proof of the declarations of an alleged agent unless some proof of agency is to be produced during the trial. The court will not wisely receive evidence of the declarations of alleged conspirators unless some *prima facie* proof of a conspiracy is to be, at some time, furnished.<sup>4</sup> In other words, if proof of two facts is essential to the relevancy of either, the court may well insist upon knowing that both are to be shown before he admits proof as to either of them.<sup>5</sup> Still, the party evidently can prove only one of these facts at a time,<sup>6</sup> and cannot reasonably be required to prove all his facts, even those inseparably connected,

*Oregon*.—*Jones v. Peterson*, 44 Or. 161, 74 Pac. 661 (1903).

*Utah*.—*English v. Openshaw*, 78 Pac. 476 (1904).

*Vermont*.—*F. R. Patch Mfg. Co. v. Protection Lodge No. 215, International Ass'n of Machinists*, 60 Atl. 74 (1905).

**Administrative assumptions.**—Evidence which is *prima facie* relevant, though in itself insufficient, may be admitted when offered, since the court is not bound to assume that the party will not, before closing, offer other evidence in connection with it. *Adams v. Adams*, 29 Ala. 433 (1856).

2. *Infra*, § 544.

3. *Bashore v. Mooney*, (Cal. App. 1906) 87 Pac. 553; *Kenniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803 (1903).

"If it would be relevant, when taken in connection with other facts, it ought to be proposed in connection with those facts, and an offer to follow the evidence proposed, with proof of those facts at the proper times. But the court is not bound to spend its time in an inquiry, which from the showing of the party can produce no results." *Weidler v. Farmers' Bank*, 11 S. & R. (Pa.) 134, 140 (1824).

4. *Loder v. Jayne*, (Pa. 1906) 142 Fed. 1010; *Wright v. Stewart*, (Mo. 1904) 130 Fed. 905.

5. *Rogers v. Brent*, 10 Ill. 573, 587 (1849); *Sloan v. Sloan*, (Or. 1904) 78 Pac. 893.

6. *Palmer v. McCafferty*, 15 Cal. 334, 335 (1860); *Rogers v. Brent*, 10 Ill. 573, 587 (1849).

by a single witness.<sup>7</sup> He may, in general, present either fact he chooses first; and, if the fact so selected has an apparently logical bearing upon the truth of some proposition in issue,<sup>8</sup> if connected with it later in an appropriate manner,<sup>9</sup> the evidence is competent;<sup>10</sup>—though standing alone it is irrelevant.

**§ 376. ([1] *Right to Prove One's Case; [e] Order of Topics; Conditional Relevancy*); Bearing not Apparent.**—

Where the actual or potential relevancy of the statement or other fact offered is not apparent, the court may well ask the assurance of counsel as to proof of connecting facts, and, if the information is not satisfactory, may require immediate proof of the connecting facts as a condition for admitting the statement originally offered.<sup>1</sup> Undoubtedly, the judge may rest content with the knowledge which he has that counsel would not trifle with the court's time and so avoid the possible inequity of compelling him to disclose the use which he intends to make of the facts he is proving.<sup>2</sup>

7. *Rogers v. Brent*, 10 Ill. 573, 587 (1849),

8. "It would be no less absurd than inconvenient, when proof is offered in its proper order, of one necessary fact, to require the party to go on and offer to prove at the same time all the other necessary facts to make out the case. Such a practice would embarrass the administration of justice, and prove detrimental to the rights of parties." *Rogers v. Brent*, 10 Ill. 573, 588 (1849).

9. "The proposal of the evidence must contain in itself, by reference to something that has preceded it, or that is to follow, information of the manner in which the evidence is to be legitimately operative." *Weidler v. Farmers' Bank*, 11 S. & R. (Pa.) 134, 140 (1824).

10. *Palmer v. McCafferty*, 15 Cal. 334, 335 (1860); *Rogers v. Brent*, 10 Ill. 573, 587, 588 (1849); *Ming v. Olster*, 195 Mo. 460, 92 S. W. 898 (1906).

1. Where no possible relevancy appears and no connecting evidence is furnished or promised the judge should not admit the evidence over

objection. *Hagan v. McDermott*, (Wis. 1908) 115 N. W. 138.

2. *Rogers v. Brent*, 10 Ill. 573, 588 (1849).

On cross-examination, this, except under unusual circumstances, is the duty of the court. A party is not to be exposed to the hardship of being obliged to disclose the object of his cross-examination or put the witness on his guard by so doing, or appraise his counsel of the plan of attack. The reasons for this practice are thus succinctly stated by the supreme court of Michigan. "On a cross-examination the rule as to relevancy is not so strict; and it would be a very unsafe rule which should allow the court to reject evidence which may in any manner be rendered material, because the party proposing it has not volunteered to precede it with a statement of its precise object, and of the other facts, in connection with which it is to be rendered material. The court may, doubtless, in its discretion, when a question is asked on cross-examination which he thinks cannot be rendered pertinent, require an intimation of its object, and re-

But in an extreme case,<sup>3</sup> or, generally, where the evidence has apparently no possible bearing on the truth of any proposition in issue, the court may well decline to remain quiescent in the face of a threatened waste of time, but may, as has been said, require the assurance of proponent's counsel that he will,<sup>4</sup> or at least reasonably expects to<sup>5</sup> prove the connecting facts at a later stage. With such an assurance the court will, as a rule, rest content,<sup>6</sup>

ject the evidence if not given. But this is a discretion which should be very sparingly exercised, and nothing further than a bare intimation should generally be required. For, in many cases, to state the precise object of a cross-examination would be to defeat it." *Campau v. Dewey*, 9 Mich. 381, 422 (1861). To the same effect, see *Hyland v. Milner*, 99 Ind. 308 (1884); *O'Donnell v. Segar*, 25 Mich. 367, 371 (1872); *Martin v. Elden*, 32 Ohio St. 282, 289 (1877); *Knapp v. Wing*, 72 Vt. 334, 47 Atl. 1075 (1900). "I know of no case where the rule requiring such a disclosure has been applied to a cross-examination. Whether such a case might arise, need not now be decided." *Burt v. State*, 23 Ohio St. 394, 402 (1872).

But this rule is not invariable. As was said by the supreme court of Georgia: "Even when a party is under cross-examination, the court may exercise a sound discretion in requiring counsel to make the relevancy of his questions apparent." *City Bank v. Kent*, 57 Ga. 283, 285, 299 (1876); *Hyland v. Milner*, 99 Ind. 308, 310 (1884). "On the direct examination, it is true, if the relevancy of a proposed inquiry does not appear, the court have a right to call on the counsel to state the proposed testimony, and the manner in which it is to be made relevant." *Campau v. Dewey*, 9 Mich. 381, 422 (1861).

3. *Rogers v. Brent*, 10 Ill. 573, 587 (1849); *Weidler v. Farmers' Bank*, 11 S. & R. (Pa.) 134, 139 (1824).

4. *Mardis v. Shackelford*, 4 Ala.

493, 461 (1842); *O'Brien v. Keefe*, 175 Mass. 274, 56 N. E. 588 (1900); *Campau v. Dewey*, 9 Mich. 381, 422 (1861).

5. "Counsel can only say what they anticipate will be the case; if this is not made evidence, I will strike it out." *Parnell Commission's Proceedings*, 33d day, *Times' Rep.*, pt. 9, p. 104 (1888), per *Hannen, Pres.*

6. *Wilson v. Jernigan*, 57 Fla. 277, 49 So. 44 (1909); *Pittman v. State*, (Fla. 1906) 41 So. 385; *Lanier v. Hebard*, 123 Ga. 626, 51 S. E. 632 (1905); *Ellis v. Thayer*, 183 Mass. 309, 67 N. E. 325 (1903); *Banks v. State*, (Tex. Cr. App. 1908) 108 S. W. 693. "I think I must receive evidence of it, and trust to the statement of the counsel in the cause that by some further evidence it will be shown to be relevant." *Haigh v. Belcher*, 7 C. & P. 389, 390 (1836), per *Coleridge, J.*

**Best evidence.**—The practice under consideration is not so treated as to apply to the administrative principle or canon that primary evidence is required. Thus, for example, parol evidence of the contents of a document will not be received conditionally that it shall be disregarded by the jury if contradicted by the document itself when produced. *North Georgia Milling Co. v. Henderson Elevator Co.*, 130 Ga. 113, 60 S. E. 258 (1908). See, however, *Kehlor v. Wilton*, 99 Ill. App. 228 (1901).

**Deliberative facts** may be admitted *de bene* in the same manner as other



and the evidence is admitted *de bene* — provisionally — to be connected later,<sup>7</sup> by evidence which will render it relevant.<sup>8</sup> If the connection is not made, if the appropriate fact is *not* proved, the remedy is to have the fact already introduced in evidence stricken out,<sup>9</sup> and this has been deemed a sufficient protection to the rights

facts. For example, *contradicting* facts may be received before the testimony so to be controverted has itself been given. *Selensky v. Chicago Great Western Ry. Co.*, (Iowa 1903) 94 N. W. 272.

7. *Alabama*.—*Henry v. Frohlichstein*, (Ala. 1907) 43 So. 126.

*Illinois*.—*City of Chicago v. Saldman*, 129 Ill. App. 282 (1906) [decree *affirmed*, 225 Ill. 625, 80 N. E. 349 (1907)].

*Maryland*.—*Davis v. Calvert*, 5 G. & J. (Md.) 269 (1833).

*Michigan*.—*Hoffman v. Harrington*, 44 Mich. 183, 184, 6 N. W. 225 (1880).

*Montana*.—*Butte Consol. Min. Co. v. Barker*, (Mont. 1907) 89 Pac. 302 [*affirmed* in 90 Pac. 177].

*New Mexico*.—*Richardson v. Pierce*, 93 Pac. 715 (1908).

*Pennsylvania*.—*American Car, etc., Co. v. Alexandria Water Co.*, 218 Pa. 542, 67 Atl. 861 (1907); *Zell v. Com.*, 94 Pa. 258, 274 (1880); *Stewart v. Bank*, 11 S. & R. 267 (1824).

*Texas*.—*Marshall v. State*, 5 Tex. App. 273, 291 (1878).

*Virginia*.—*Southern Ry. Co. v. Stockdon*, 106 Va. 693, 56 S. E. 713 (1907).

8. *Alabama*.—*McCoy v. Watson*, 51 Ala. 466, 467 (1874); *Abney v. Kingland*, 10 Ala. 360 (1846).

*Indiana*.—*Bischof v. Mikels*, 147 Ind. 115, 46 N. E. 348 (1897).

*Iowa*.—*Cramer v. Burlington*, 42 Iowa 315, 319 (1875).

*Maryland*.—*Warner v. Hardy*, 6 Md. 525, 538 (1854).

*Minnesota*.—*Lane v. Agric. Soc.*, 67 Minn. 65, 69 N. W. 463 (1896).

*Missouri*.—*Ober v. Carson*, 62 Mo. 209, 213 (1876).

*New York*.—*Tilton v. Beecher*, N. Y., *Abbott's Rep.* II, 35 (1875).

*North Carolina*.—*State v. Cherry*, 63 N. C. 493, 494 (1869).

*Pennsylvania*.—*Garrigues v. Harris*, 17 Pa. St. 344, 350 (1851).

*Vermont*.—*State v. Hopkins*, 50 Vt. 316, 330 (1877).

*England*.—*Parnell Commission's Proceedings*, 54th day, *Times' Rep.*, pt. 14, p. 149 (1888).

*Canada*.—*Key v. Thomson*, 1 Han. N. Br. 295, 302 (1869).

Subsequent certainty may be given to the description of a deed introduced *de bene* conditioned upon such additional proof of certainty being furnished. *Uvalde County v. Oppenheimer*, (Tex. Civ. App. 1909) 115 S. W. 904.

9. *Alabama*.—*Henry v. Frohlichstein*, 43 So. 126 (1907).

*California*.—*Palmer v. McCafferty*, 15 Cal. 334, 335 (1860).

*Georgia*.—*Hix v. Gulley*, 124 Ga. 547, 52 S. E. 890 (1905); *Lanier v. Hebard*, 123 Ga. 626, 51 S. E. 632 (1905) (treated as of no account).

*Illinois*.—*Rogers v. Brent*, 10 Ill. 573, 587 (1849).

*Iowa*.—*Dorr Cattle Co. v. Chicago & G. W. Ry. Co.*, 103 N. W. 1003 (1905).

*Masachusetts*.—*O'Brien v. Keefe*, 175 Mass. 274, 56 N. E. 589 (1900).

*Michigan*.—*Smith v. Hubbell*, 151 Mich. 59, 114 N. W. 865, 14 *Detroit Leg. N.* 874 (1908).

To refuse such a motion, when made under appropriate circumstances, has been held to be error. *Frorer v. Landon & Mickelberry*, 130 Ill. App. 93 (1906).

of the adverse party,<sup>10</sup> or as a fair risk of litigation.<sup>11</sup> If the motion to strike out is not made, the objection to the admission itself is regarded as waived.<sup>12</sup>

*But it may be doubted* whether this is so. To permit a jury to hear an extremely favorable piece of evidence, which subsequently turns out to have been without foundation in fact, and then, at the end, perhaps, of a long trial, ask them to disregard it, is to require of an untrained tribunal the performance of a task which the highest order of trained intelligence would find extremely difficult, if not impossible of accomplishment — to thrust from the mind, by an act of volition, part of its contents.<sup>13</sup>

*But if the chances* seem to the trial judge to preponderate in favor of subsequent lack of ability to connect up the evidence offered,<sup>14</sup> if the difficulties or inconvenience of producing at once

10. *Palmer v. McCafferty*, 15 Cal. 334, 335 (1860); *Alexander v. Grover*, 190 Mass. 462, 77 N. E. 487 (1906); *Haigh v. Belcher*, 7 C. & P. 389, 390 (1836). "The discernment of the jury must be trusted so far, in case it should turn out to be immaterial." *Haigh v. Belcher*, 7 C. & P. 389, 390 (1836), per Coleridge, J.

11. "If he has suffered an injury, it is one inherent in the trial of causes; and it is well settled, when such evidence is admitted in a jury trial, that the objecting party cannot be heard to complain, if the evidence is ruled out and the jury are instructed to disregard it." *O'Brien v. Keefe*, 175 Mass. 274, 56 N. E. 588 (1900).

It has even been questioned who suffers when this is done. Thus, the supreme judicial court of Massachusetts, speaking by Loring, J., say: "Whether, in such a case, the party who produces the witness whose testimony has been confused, or the party who has undertaken to assert that the witness is not to be believed because he is a criminal, and it turns out that that assertion is unfounded, is the greater sufferer, is open to question." *O'Brien v. Keefe*, 175 Mass. 274, 56 N. E. 588 (1900).

12. *Alexander v. Grover*, 190 Mass.

462, 77 N. E. 487 (1906); *German-American Bank v. Manning*, 133 Mo. App. 294, 113 S. W. 251 (1908) (tax bill); *Galveston, etc., Ry. Co. v. Janert*, (Tex. Civ. App. 1908) 107 S. W. 963. See also *Tijerina v. State*, (Tex. Cr. App. 1903) 74 S. W. 913.

A motion should be made by the party aggrieved. The presiding judge is not to strike out the unconnected evidence required upon his own initiative. *Thomas v. State*, 129 Ga. 419, 59 S. E. 246 (1907); *Hix v. Gulley*, 124 Ga. 547, 52 S. E. 890 (1905); *Stone v. State*, 118 Ga. 705, 45 S. E. 630 (1903). Where the failure to connect is glaring, it is said that the court should strike out, *sua sponte*, the evidence already admitted. *Pittman v. State*, (Fla. 1906) 41 So. 385.

13. *Infra*, § 1957.

14. "The possibility of testimony admitted *de bene* not being subsequently made competent is one of the considerations to be passed upon by the presiding magistrate in determining whether to admit such evidence at the time it is offered or not, and it is necessary, in the conduct of trials, that such discretion should be exercised." *O'Brien v. Keefe*, 175 Mass. 274, 56 N. E. 588 (1900).

the missing link are slight when compared with the loss of time, or the prejudice caused to the opposite party if this is not done; or if the assurance, though offered, is not satisfactory for any reason,<sup>15</sup> or if no assurance is offered,<sup>16</sup> the court is justified in declining to admit the evidence offered until the missing testimony is actually produced. If no relevancy appears in the fact itself,<sup>17</sup> if no sufficient assurance of future evidence is made, or if the offer of subsequent proof is not satisfactory because, assuming the promised facts were introduced, the evidence offered would still be irrelevant, the judge may reject the actual tender.<sup>18</sup>

*The action of the trial court*, with regard to admission of evidence *de bene* will not be reversed in an appellate tribunal, unless the administrative power has been exercised unreasonably.<sup>19</sup> The propriety of the decision will be aided by every intendment or inference in its favor whether the original action were to admit<sup>20</sup> or to exclude<sup>21</sup> the evidence.

**§ 377. (2) Right to Test Adversary's Case.**—The right to test an opponent's case which is conferred on every litigant by substantive law is of an importance to him which makes

15. *Campau v. Dewey*, 9 Mich. 381, 422 (1861).

16. *Pier v. Speer*, (N. J. 1906) 64 Atl. 161; *Lewis, Hubbard & Co. v. Montgomery Supply Co.*, (W. Va. 1906) 52 S. E. 1017.

17. *Weidler v. Farmers' Bank*, 11 S. & R. (Pa.) 134, 139 (1824).

Otherwise, no court could ever reject for irrelevancy for every fact may be connected with an issue by some chain of circumstances, however remote. *Weidler v. Farmers' Bank*, 11 S. & R. (Pa.) 134, 139 (1824). Accordingly, evidence is not admissible because it may become relevant. It must appear potentially relevant or evidence must be in sight or at least promised, making it so. *Weidler v. Farmers' Bank*, 11 S. & R. (Pa.) 134, 139 (1824). "If evidence be irrelevant at the time it is offered, it is not error to reject it because other evidence may afterwards be given in connection with which it would become competent." *Mardis v. Shackelford*, 4 Ala. 493, 501 (1842).

18. The offer may be renewed and the evidence received at a later period when subsequent developments have established the relevancy of the evidence formerly rejected. *Lyford v. Thurston*, 16 N. H. 399, 405 (1844).

19. *Ellis v. Thayer*, 183 Mass. 309, 67 N. E. 325 (1903); *Hoffman v. Harrington*, 44 Mich. 183, 184 (1880); *Bradley v. Dinneen*, 88 Minn. 334, 93 N. W. 116 (1903); *Davidson v. King*, 16 N. Br. 396 (1876).

20. *Reed v. Brashers*, 3 Port. (Ala.) 375 (1836); *Lynch v. Benton*, 3 Rob. (La.) 105 (1842); *State v. McAllister*, 24 Me. 139, 143 (1844).

21. *Innerarity v. Byrne*, 8 Port. (Ala.) 176, 179 (1838); *Cones v. Binford*, 54 Ind. 516, 517 (1876); *Stewart v. Spedden*, 5 Md. 433, 444 (1854). See also *Mardis v. Shackelford*, 4 Ala. 493, 501 (1842); *Reynolds v. Ins. Co.*, 36 Mich. 131, 144 (1877).

its denial or unreasonable curtailment contrary to the principle of judicial administration now under consideration. This right of testing is, in the normal course of judicial proceedings, exercised by the parties at two principal stages, (a) on cross-examination, and (b) on rebuttal.

§ 378. ([2] *Right to Test Adversary's Case*); (a) *Cross-examination*.—Consideration of the rights of the party upon cross-examination may appropriately be postponed until it can be undertaken in connection with the general treatment of that topic. In the exercise of this right, it is the administrative duty of the presiding judge to protect him. Unreasonable failure to do so will cause reversal of the action of the trial court.<sup>1</sup> He may, in general, attack his opponent's affirmative case in one of three ways: (1) He may introduce facts to destroy or minimize the probative effect of the new matter offered by his antagonist; (2) he may deny the existence of these new facts;—in so far as such denial does not amount to a mere reaffirmance of the assertions of his evidence in chief; or, (3) he may attack the credibility of his opponent's witnesses or seek to establish the improbability of their story. It is no objection to such evidence that it might have been adopted by the actor as a substitutionary method of proving his *prima facie* case;<sup>2</sup> nor, as is more fully stated elsewhere,<sup>3</sup> is it objectionable that it is secondary evidence of the same facts which have been proved by primary evidence as part of his original case.

*The right to a reasonable opportunity for cross-examination*, at an appropriate stage, and in relation to matters then open for consideration,<sup>4</sup> in itself considered, i. e., as distinct from questions of the scope of the right in particular cases, is undisputed in any quarter. The supreme court of North Dakota states a familiar and conceded rule of procedure in saying:<sup>5</sup>—"An

1. *Stanley v. Beckham*, 153 Fed. 152, 82 C. C. A. 304 (1907).

2. *Burk v. Pence*, 206 Mo. 315, 104 S. W. 23 (1907).

3. *Infra*, § 476.

4. *City of Chicago v. Marsh*, 238 Ill. 254, 87 N. E. 319 (1909).

Even after a default and a reference for the assessment of damages, the defendant may cross-examine on the issue then open, the amount of

the damages. He can no longer interrogate as to the merits of the action. *First Nat. Bank v. Miller*, 139 Ill. App. 608 (1908) [*judgment affirmed*, 235 Ill. 135, 85 N. E. 312 (1908)].

5. *State v. Foster*, (N. D. 1905) 105 N. W. 938, per Young, J., citing 1 Thomp. on Trials, § 352; 8 Enc. Pl. & Pr. 110; *Hamilton v. Miller*, (Kan. 1891), 26 Pac. 1030; *State v. Brown*,

opportunity to cross-examine is a matter of right, but the latitude and extent of the cross-examination rests largely in the discretion of the presiding judge, and he may place 'a reasonable limit upon the time which shall be allowed for the examination or cross-examination of a witness.'"<sup>6</sup> The limitations upon this

100 Iowa 50, 69 N. W. 277 (1896); *Hamilton v. Hulett*, 51 Minn. 208, 53 N. W. 364 (1894); *Jones v. Stevens*, 36 Neb. 849, 55 N. W. 251 (1893); *Railway Co. v. Bailey*, 43 Ill. App. 293 (1892).

**6. What is reasonable under given circumstances**, unlike the *right* to a reasonable cross-examination, is very largely a matter of administration; or, as is commonly said, of "discretion."

*Alabama*.—*Gregory v. State*, 42 So. 829 (1906); *Hill v. State*, 41 So. 621 (1906); *Smiley v. Hooper*, 41 So. 660 (1906).

*Arkansas*.—*Richardson v. State*, 80 Ark. 201, 96 S. W. 752 (1906); *Corothers v. State*, 88 S. W. 585 (1905).

*Colorado*.—*Van Wyk v. People*, 99 Pac. 1009 (1909).

*Connecticut*.—*Gorman v. Fitts*, 80 Conn. 531, 69 Atl. 357 (1908).

*Georgia*.—*Fouraker v. State*, 4 Ga. App. 692, 62 S. E. 116 (1908).

*Illinois*.—*Shields v. People*, 132 Ill. App. 109 (1907); *Chicago City Ry. Co. v. Creech*, 207 Ill. 400, 69 N. E. 919.

*Indiana*.—*Heath v. Shutz*, 164 Ind. 665, 74 N. E. 505 (1905).

*Indian Territory*.—*Wilson v. U. S.*, 82 S. W. 924 (1904).

*Kansas*.—*State v. Ross*, (Kan. 1908) 94 Pac. 270.

*Massachusetts*.—*Gleason v. Daly*, 80 N. E. 486 (1907); *Barnes v. Squier*, 193 Mass. 21, 78 N. E. 731 (1906); *Taylor v. Schofield*, 191 Mass. 1, 77 N. E. 652 (1906).

*New Jersey*.—*N. Risley & Sons v. Ocean City Dev. Co.*, 69 Atl. 192 (1908).

*North Dakota*.—*Schwoebel v. Fugina*, 104 N. W. 848 (1905).

*Rhode Island*.—*State v. Farr*, 69 Atl. 5 (1908).

*Texas*.—*Taylor v. McFatter*, (Civ. App. 1908) 109 S. W. 395 The privilege of recalling a witness for further cross-examination, is in like manner a question of administration. *McBride v. Sullivan*, (Ala. 1908) 45 So. 902. Great latitude is allowed upon cross-examination, and the course of the examination from the necessity of the case must be directed and controlled in a large measure by the good sense of the presiding judge. *Regester v. Regester*, (Md. 1906) 64 Atl. 286; *Phillips v. Chase*, 201 Mass. 444 (1909). So, by permission of court, a party may cross-examine his own witnesses. *State v. Robinson*, (Iowa 1904) 101 N. W. 634; *State v. Church*, 199 Mo. 605, 98 S. W. 16 (1906). This permission the court may be justified in refusing. *Whistler v. Cowan*, 26 Ohio Cir. Ct. R. 511 (1903) [*affirmed* without opinion 70 Ohio St. 514, 72 N. E. 1167 (1904)]. If so, the cross-examination will not be permitted. *Ryan v. Schutt*, 135 Ill. App. 554 (1907); *Brayman v. Grant*, 114 N. Y. Suppl. 336, 130 App. Div. 272 (1909); *Myatt v. Myatt*, 149 N. C. 137, 62 S. E. 887 (1908). So also of the privilege of calling one's adversary as a witness. *Mutchmor v. McCarty*, 149 Cal. 603, 87 Pac. 85 (1906). The details of a cross-examination of the adverse party may also be made the subject of special administrative orders. *Taylor v. Schofield*, 191 Mass. 1, 77 N. E. 652 (1906).

**Variations in order.**—Sound administration may require that the customary practice prevailing in a particular jurisdiction as to the order in which evidence is received should be varied, under appropriate circum-

exercise of discretionary power are thus stated by the Illinois Court of Appeals:<sup>7</sup>—"This discretion should be exercised for the discovery of truth and in furtherance of justice, and not be so restricted as to defeat these ends." The right to cross-examine is, however, conditioned by the existence of a direct examination. No right exists in the absence of direct examination. A party has no just legal claim to insist upon cross-examining a witness whom his adversary has merely called and sworn.<sup>8</sup> The rule as

stances, by the trial judge. *Supra*, § 367. This may be, and frequently is, due in connection with the cross-examination of witnesses. Thus, in a jurisdiction where cross-examination is normally limited to examination into facts about which a witness has testified on direct examination, a judge may properly permit a counsel to examine a particular witness as to other matters than those covered by direct examination. *State v. High*, 116 La. 79, 40 So. 538 (1906); *Cate v. Fife & Child*, 80 Vt. 404, 68 Atl. 1 (1907).

**Collateral matters.**—*Eastman v. Boston Elevated Ry. Co.*, 200 Mass. 412, 86 N. E. 793 (1909) (too attenuated and remote for consideration). The administrative power of the court to limit the scope of cross-examination is particularly noticeable in connection with proposed inquiries into collateral matters. *Leavitt v. Fibroid Co.*, 196 Mass. 440, 82 N. E. 682 (1907); *Record v. Pennsylvania R. Co.*, (N. J. Suppl. 1907) 67 Atl. 1040. A refusal to allow a purely abstract question on a subject as to which there was already concrete and positive evidence was not an undue restriction of the right of cross-examination. *Hagood v. State*, 5 Ga. App. 80, 62 S. E. 641 (1908). To few ends is this power better exercised than in refusing to compel a witness to answer a humiliating question which does not show any possible bias. *Adkinson v. State*, (Fla. 1904) 37 So. 522. The presiding judge need not wait until objection is made, but may

exclude the irrelevant matter *sua sponte*. *Wells v. Missouri-Edison Electric Co.*, 108 Mo. App. 607, 84 S. W. 204 (1904). In such a connection, the *length*, as well as the *range*, of cross-examination is largely a matter of administration. *St. Louis, etc., Ry. Co. v. Pell*, 89 Ark. 87, 115 S. W. 957 (1908). While a reluctant, evasive, or interested witness may be cross-examined with great liberality in order to elicit the truth, the trial court, in the exercise of sound discretion, may limit such examination when it becomes tedious or apparently frivolous so that time is unnecessarily consumed. *People v. Smith*, (Cal. App. 1908) 98 Pac. 546.

**Action of appellate courts.**—*State v. Phillips*, 105 Minn. 375, 117 N. W. 508 (1908) (length); *Corkran v. Taylor*, (N. J. Sup. 1908) 71 Atl. 124; *Warren v. State*, (Tex. Cr. App. 1908) 114 S. W. 380. The scope of cross-examination being within the administrative power of the trial court, the action taken will not be reversed on appeal unless the discretion has been abused i. e., reason has not been shown. *Sloss-Sheffield Steel & Iron Co. v. House*, (Ala. 1908) 47 So. 572; *Swygart v. Willard*, (Ind. 1906) 76 N. E. 755.

7. *Prussian Nat. Ins. Co. v. Empire Catering Co.*, 113 Ill. App. 67 (1904), per Vickers, J., *citing* *Hanchett v. Kimbark*, 118 Ill. 121 (1886).

8. *Harris v. Quincy, O. & K. C. Ry. Co.*, 115 Mo. App. 527, 91 S. W. 1010 (1906); *Aikin v. Martin*, 11 Paige 499 (1845). See, however, *Jackson v.*

to the right of cross-examination in a criminal<sup>9</sup> case is the same which is applied in a civil<sup>10</sup> one;—although what is reasonable as to scope in any particular instance may be affected by the nature of the proceeding in which the question arises.<sup>11</sup> The right of cross-examination in criminal cases has also been conferred by constitutional provisions.<sup>12</sup>

**§ 379. ([2] *Right to Test Adversary's Case*); (b) *Rebuttal*.**

—A party has a legal right not only to test by cross-examina-

Varick, 7 Cow. 238 (1824) [*affirmed*, Varick v. Jackson, 2 Wend. 166, 19 Am. Dec. 571 (1828)].

9. Howard v. Com., 25 Ky. L. Rep. 2213, 80 S. W. 211 (1904) [rehearing *denied*, 26 Ky. L. Rep. 36, 81 S. W. 704]; People v. Billis, 110 N. Y. Suppl. 387, 58 Misc. Rep. 150 (1908).

**Witnesses already examined.**—The right of a criminal defendant to cross-examine witnesses already examined must be promptly claimed. Otherwise, it will be deemed to have been waived. Eddleman v. Fasig, 128 Ill. App. 120 (1906).

10. *California*.—Graham v. Larimer, 83 Cal. 173, 23 Pac. 286 (1890).

*Illinois*.—Donk Bros. Coal & Coke Co. v. Tetherington, 128 Ill. App. 256 (1906).

*Kansas*.—Nickelson v. Dial, 93 Pac. 606 (1908).

*Massachusetts*.—Sullivan v. Fugazzi, 193 Mass. 518, 79 N. E. 775 (1907).

*New Jersey*.—Newcomb v. Downman, 13 N. J. L. (1 J. S. Green) 135 (1832).

*New York*.—Willis v. Green, 1 Wend. 78 (1828).

*Ohio*.—Minzey v. Marcy Mfg. Co., 25 Ohio Cir. Ct. R. 593 (1903).

*United States*.—Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668 (1904). The rule is the same on any subsidiary motion or proceeding. Bruce v. Barnes, 20 Ala. 219 (1852) (motion to enter satisfaction of a judgment); Thompson v. Haislip, 14 Ark. 220 (1853) (writ of

inquiry of damages); Mask v. State, 32 Miss. 405 (1856) (change of venue). Where intervenors appear, it is the right of both the other parties to examine the intervenor's witnesses, in the absence of obvious community of interest. Succession of Townsend, 40 La. Ann. 66, 3 So. 488 (1888). Should extraordinary examination of a witness be had by the jury after their retirement, the right of cross-examination attaches to the facts so elicited. Thompson v. Poston, 62 Ky. (1 Duv.) 389 (1865).

11. The government cannot defeat the defendant's right of cross-examination by entering a *nolle prosequi* on the count on which the witness whose cross-examination is desired has testified. Com. v. Scott, 121 Mass. 33 (1876).

**Disclosing object of cross-examination.**—The circumstances in a criminal case may be such as to render it unreasonable for the presiding judge to call upon the defendant to disclose the object with which he is seeking to elicit a certain fact upon cross-examination. Brown v. State, (Miss. 1906) 40 So. 737.

**Right of co-defendants.**—In a criminal case, where two co-defendants are being tried together, it has been held bad administration to require that the counsel for only one of the defendants should cross-examine the state witnesses. People v. Billis, 110 N. Y. Suppl. 387, 58 Misc. Rep. 150 (1908).

12. Wray v. State, (Ala. 1908) 45 So. 697.

tion or otherwise,<sup>1</sup> the case made by his opponent, at any stage; it is a further part of the right, at present under consideration, that he should be at liberty to introduce evidence to offset any affirmative matter on which his opponent relies. In other words, each litigant has a right to *rebuttal*.<sup>2</sup> While evidence in chief is, when properly used a single stage, that of rebuttal may have several. The general rule of administration is simple. Whenever a party at a particular stage of rebuttal, original or subsequent, introduces to the attention of the tribunal new matter, it becomes the right of his opponent to introduce evidence to meet it. Should the opponent, at this stage, in turn set up new matter, or a new aspect of old matter, the right to a subsequent stage of rebuttal to meet it enures to the benefit of the original pleader;—and so on, until the supply of relevant facts is exhausted.

*Testing on Rebuttal*.—But the litigant may not only introduce at this stage facts which tend directly to meet and *disprove* those set up by his opponent; he may introduce evidence which *tests*

1. *Supra*, § 378.

2. *Rebuttal defined*.—Rebuttal is a term which, in this connection may properly be used to designate either a class of evidentiary facts or the stage of a trial at which it may be submitted to the tribunal. What properly may be called rebutting evidence or rebuttal seems free from ambiguity. It is, normally, that which meets or offsets new or affirmative matter introduced by the opponent at the next preceding stage of the evidence. "Rebutting evidence," say the Maryland court of appeals, "is that which repels or counteracts the effect of evidence which has preceded it. Evidence which shows that the evidence of the opposite party was not entitled to the force and effect which the law imputes to it *prima facie* must in its strictest sense be rebutting." Davis v. Hamblin, 51 Md. 525, 539 (1879). "Rebuttal evidence is that which is given to explain, repel, counteract, or disprove facts given in evidence by the adverse party. Anything may be given as rebuttal evidence which is a direct reply to that produced by the other side." People v. Page, 1

Idaho 189, 195 (1868). "Rebutting evidence means not merely evidence which contradicts the evidence on the opposite side, but evidence in denial of some affirmative fact which the answering party is endeavoring to prove." State v. Fourchy, 51 La. Ann. 228, 240, 25 So. 109, 114 (1899), quoting Rice, Ev. "Bouvier says that rebutting evidence is that evidence which is given by a party in a case to counteract or disprove facts which have been given in evidence by the other party." Toledo & O. C. Ry. Co. v. Wales, (Ohio 1896) 5 O. C. D. 168, 170.

A *secondary meaning* of rebuttal is that which not only has a tendency to rebut but which succeeds in doing so, i. e. has that effect. "The word 'rebutting'" say the supreme court of Georgia, "has a twofold significance, both in common and legal parlance. It sometimes means contradictory evidence only. At other times conclusive or overcoming testimony. It may be employed as contravening or opposing, as well as overcoming proof. Fain v. Cornett, 25 Ga. 184, 186 (1858).



them and merely minimizes or destroys their probative force. At the stages of rebuttal, the right of a party to offer facts which tend to contradict or impair the probative value of an opponent's case by discrediting, impeaching or otherwise disparaging his witnesses; or by showing the improbability of their story, is customarily exercised.

*The range of deliberative facts*<sup>3</sup> appropriate to the litigant is dependent upon the scope of the evidence at the preceding stage of the adversary's case. This evidence it is designed to test. It, therefore, of necessity follows its scope. The element is lacking in the case presented by the actor's evidence in chief;<sup>4</sup>—there being no previous case to be thus tested.

*Scope of Rebuttal.*—The object of rebutting evidence is to meet, antagonize or confute new facts introduced by the adverse party at the next previous stage,<sup>5</sup> whether given by him-

3. *Supra*, § 52.

4. *Supra*, § 369.

5. *Alabama*.—Stodenmeyer v. Hart, 46 So. 488 (1908); Heninburg v. State, (Ala. 1907) 43 So. 959.

*California*.—People v. Yee Foo, (Cal. App. 1907) 89 Pac. 450 (alibi).

*Colorado*.—Smith v. People, (Colo. 1907) 88 Pac. 1072 (alibi); Perry v. People, (Colo. 1906) 87 Pac. 796.

*Connecticut*.—State v. Sheronk, 78 Conn. 718, 61 Atl. 897 (1905).

*Delaware*.—State v. Jack, 4 Pennewill 470, 58 Atl. 833 (1903).

*Florida*.—Thompson v. State, 41 So. 899 (1906).

*Illinois*.—Pronskévitch v. Chicago & A. Ry. Co., 232 Ill. 136, 83 N. E. 545 (1908).

*Iowa*.—State v. Thomas, (Iowa 1906) 109 N. W. 900.

*Kentucky*.—Mussellam v. Cincinnati, N. O. & T. P. Ry. Co., 31 Ky. L. Rep. 908, 104 S. W. 337 (1907).

*Louisiana*.—Longino v. Shreveport Traction Co., 45 So. 732 (1908).

*Michigan*.—Alpena Tp. v. Mainville, 153 Mich. 732, 117 N. W. 338, 15 Detroit Leg. N. 605 (1908).

*Missouri*.—State v. Dilts, 191 Mo. 665, 90 S. W. 782 (1905).

*North Dakota*.—State v. Werner, (N. D. 1907) 112 N. W. 60.

*Ohio*.—Schmidt v. Turner, 27 Ohio Cir. Ct. R. 327 (1905).

*Oregon*.—Bade v. Hibberd, 93 Pac. 364 (1908).

*Pennsylvania*.—American Car & Foundry Co. v. Alexandria Water Co., 218 Pa. 542, 67 Atl. 861 (1907).

*South Dakota*.—Smith v. Mutual Cash Guaranty Fire Ins. Co., 113 N. W. 94 (1907).

*Texas*.—Hardin v. State, (Cr. App. 1909) 117 S. W. 974; Smith v. State, (Cr. App. 1908) 106 S. W. 1161; Walker v. Erwin, (Tex. Civ. App. 1907) 106 S. W. 164.

*Vermont*.—Willard v. Norcross, 81 Vt. 293, 69 Atl. 942 (1908); Morgan v. Hendricks, 80 Vt. 284, 67 Atl. 702 (1907); State v. Baird, 79 Vt. 257, 65 Atl. 101 (1906).

*Virginia*.—Southern Express Co. v. Jacobs, 63 S. E. 17 (1908).

*Wisconsin*.—Wood v. Town of Washington, 115 N. W. 810 (1908); Bazelon v. Lyon, 128 Wis. 337, 107 N. W. 337 (1906); Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777 (1905). Spoliation of evidence may be shown on rebuttal. Crawford v. U. S., 212

self<sup>6</sup> or by his other witnesses<sup>7</sup> or on cross-examination;<sup>8</sup>—mere reassertion of the propositions advanced on the evidence in chief not being permitted at this stage.<sup>9</sup> While an opportunity for reasonable rebuttal is a matter of substantive right,<sup>10</sup> which it is the

U. S. 183, 29 S. Ct. 260 (1909) [judgment reversed, 30 App. D. C. 1 (1907)]; *Infra*, §§ 1070 *et seq.*

**Explanation** which contravenes and controls the *inference* sought to be drawn from a fact set up by the adverse party is proper rebuttal.

*Alabama*.—*Boyd v. State*, (Ala. 1908) 45 So. 591; *Cooke v. Loper*, (Ala. 1907) 44 So. 78.

*Arkansas*.—*Dow v. State*, 92 S. W. 28 (1906).

*Florida*.—*Clinton v. State*, 47 So. 389 (1908).

*Michigan*.—*McNaughton v. Smith*, (Mich. 1904) 99 N. W. 382, 11 Detroit Leg. N. 51.

*Texas*.—*Meyer Bros. Drug Co. v. Madden, Graham & Co.*, (Tex. Civ. App. 1907) 99 S. W. 723.

*Washington*.—*Rowe v. Whatcom County Ry. & Light Co.*, (Wash. 1906) 87 Pac. 921. The presiding judge may properly exclude explanatory evidence until that which is to be explained has itself been introduced in evidence. *San Miguel Consol. Gold Min. Co. v. Bonner*, 33 Colo. 207, 79 Pac. 1025 (1905).

A psychological fact may be controverted in this way, *Roberts v. Terre Haute Electric Co.*, (Ind. App. 1906) 76 N. E. 895 [denied petition for rehearing 76 N. E. 323 (1905)] (mental condition), e. g., the mental attitude of a prosecuting witness in rape toward the accused. *Brown v. State*, (Tex. Cr. App. 1907) 106 S. W. 368.

The theory upon which the case is being tried may materially affect the right of a party to a particular fact as a part of his rebuttal. If new matter has been introduced by his adversary, even under an erroneous theory of the case, it is, in general, but reasonable that a party

should be allowed to rebut it. *Dunnett & Slack v. Gibson*, (Vt. 1906) 62 Atl. 141.

6. *Wells v. Gallagher*, (Ala. 1905) 39 So. 747; *State v. Beckner*, 194 Mo. 281, 91 S. W. 892 (1906) (self defense).

7. *Cross v. State*, (Ala. 1906) 41 So. 875; *Cutcliff v. Birmingham Ry., Light & Power Co.*, (Ala. 1906) 41 So. 873.

8. *Alabama*.—*Thomas v. State*, (Ala. 1907) 43 So. 371.

*Indiana*.—*Roberts v. Terre Haute Electric Co.*, (Ind. App. 1906) 76 N. E. 895 [denied petition for rehearing, 76 N. E. 323 (1905)].

*Louisiana*.—*State v. Heidelberg*, (La. 1908) 45 So. 256.

*Texas*.—*Newcomb v. State*, (Tex. Cr. App. 1906) 95 S. W. 1048.

*Washington*.—*Port Townsend Southern R. Co. v. Barbare*, (Wash. 1907) 89 Pac. 710.

9. *California*.—*Higgins v. Los Angeles Ry. Co.*, (App. 1907) 91 Pac. 344.

*Connecticut*.—*State v. Kelly*, 77 Conn. 266, 58 Atl. 705 (1904).

*Louisiana*.—*State v. Smith*, 45 So. 415 (1908).

*New Hampshire*.—*Hallwood Cash Register Co. v. Rollins*, 62 Atl. 380 (1905).

*Texas*.—*Wade v. Galveston, H. & S. A. Ry. Co.*, (Civ. App. 1908) 110 S. W. 84.

10. *California*.—*Burrell v. Collins*, 9 Cal. App. 288, 99 Pac. 211 (1908).

*Illinois*.—*Loftus v. Loftus*, 134 Ill. App. 360 (1907).

*Montana*.—*Mahoney v. King*, 76 Pac. 4 (1904).

*New York*.—*Emanuel v. Maryland Casualty Co.*, 94 N. Y. S. 36, 47 Misc. Rep. 378 (1905).

administrative duty of the court to protect, the judge, as a question of administration, determines what range of evidence is reasonable at this stage under the circumstances of the case.<sup>11</sup> It follows from what has been said that, except by leave of court, a party has not the right to introduce as rebuttal facts which properly constitute part of his evidence in chief. The same rule is even more carefully applied in criminal cases.<sup>12</sup> It frequently happens that nice questions of administration may arise where a fact which might have been made part of the evidence in chief is also, in another aspect, competent in rebuttal of some new facts, not strictly in denial, set up by the accused in a criminal case,<sup>13</sup> or the nonactor in a civil one.<sup>14</sup> The right of the presiding judge to receive on rebuttal evidence which should have been offered as part of the evidence in chief, is, as has been seen,<sup>15</sup> undoubted.<sup>16</sup> Where the action is reasonable,<sup>17</sup> or the course of the

*Pennsylvania*.—Bunnell v. Kintner, 27 Pa. Super. Ct. 605 (1905).

*South Carolina*.—Martin v. Western Union Telegraph Co., 81 S. C. 432, 62 S. E. 833 (1908).

*Wisconsin*.—Anderson v. Arpin Hardwood Lumber Co., (Wis. 1907) 110 N. W. 788; Lounsbury v. Davis, 124 Wis. 432, 102 N. W. 941 (1905).

11. Eckhardt v. People, 116 Ill. App. 408 (1904); Hall v. Wagner, 97 N. Y. S. 570, 111 App. Div. 70 (1906). No right exists to insist upon rebutting evidence introduced upon a purely collateral point. Pichon v. Martin, (Ind. App. 1905) 73 N. E. 1009.

12. People v. Schmitz, (Cal. App. 1908) 94 Pac. 407; Flower v. State, (Miss. 1905) 37 So. 814.

13. *California*.—People v. Yee Foo, (Cal. App. 1907) 89 Pac. 450.

*Iowa*.—State v. Nowells, (Iowa 1906) 109 N. W. 1016.

*Kentucky*.—Adams v. Com., 33 Ky. Law Rep. 779, 111 S. W. 348 (1908).

*Nebraska*.—City of McCook v. McAdams, (Neb. 1906) 106 N. W. 988.

*Texas*.—Magill v. State, (Tex. Cr. App. 1907) 103 S. W. 397.

14. St. Louis Southwestern Ry. Co. of Texas v. Garber, (Tex. Civ. App. 1908) 108 S. W. 742; Wilkins v. Brock, 81 Vt. 332, 70 Atl. 572 (1908).

15. *Supra*, § 369.

16. *Alabama*.—Birmingham Ry., Light & Power Co. v. Martin, (Ala. 1906) 42 So. 618 (railroad fires); Cross v. State, (Ala. 1906) 41 So. 875; Terry v. Williams, (Ala. 1906) 41 So. 804.

*Arkansas*.—Kansas City Southern Ry. Co. v. Henrie, 112 S. W. 967 (1908); Butler v. State, (Ark. 1907) 103 S. W. 382.

*California*.—Moody v. Peirano, (Cal. App. 1907) 88 Pac. 380; Patterson v. San Francisco & S. M. Electric Ry. Co., 147 Cal. 178, 81 Pac. 531 (1905).

*District of Columbia*.—Crawford v. U. S., 30 App. D. C. 1 (1907).

*Florida*.—Thomas v. State, 36 So. 161 (1904).

*Georgia*.—Smith v. State, 126 Ga. 803, 55 S. E. 1024 (1906).

*Indiana*.—Tinkle v. Wallace, (Ind. 1906) 79 N. E. 355.

*Kentucky*.—Louisville & N. R. Co.

objecting party has removed any danger of prejudice to him<sup>18</sup>

*v. Board*, 28 Ky. Law Rep. 921, 90 S. W. 944 (1906).

*New Jersey*.—*Minard v. West Jersey & S. Ry. Co.*, (N. J. Supp. 1906) 64 Atl. 1054.

*New York*.—*Jaffe v. Nagel*, 114 N. Y. S. 905 (1909).

*North Dakota*.—*Petersburg School Dist. of Nelson County v. Peterson*, (N. D. 1905) 103 N. W. 756.

*Oregon*.—*Crosby v. Portland Ry. Co.*, 100 Pac. 300 (1909) [rehearing denied, 101 Pac. 204].

*South Carolina*.—*Bolton v. Western Union Telegraph Co.*, 76 S. C. 529, 57 S. E. 543 (1907).

*South Dakota*.—*Kime v. Bank of Edgemont*, 119 N. W. 1003 (1909). It is not reversible error to permit the introduction in rebuttal of evidence that should have been introduced as a part of the testimony in chief, since the order of introducing proof rests largely in the discretion of the trial court and should be so exercised that neither parties will be taken by surprise or deprived of an opportunity without notice to introduce evidence in contradiction. *Floto v. Floto*, 233 Ill. 605, 84 N. E. 712 (1908).

17. *Alabama*.—*Braham v. State*, (Ala. 1905) 38 So. 919.

*Arkansas*.—*Western Union Telegraph Co. v. Hanley*, 85 Ark. 263, 107 S. W. 1168 (1908).

*Colorado*.—*Kingsbury v. People*, 44 Colo. 403, 99 Pac. 61 (1908).

*Colorado*.—*Prudential Ins. Co. v. Hummer*, 84 Pac. 61 (1906).

*Georgia*.—*Green v. State*, 119 Ga. 120, 45 S. E. 990 (1903).

*Iowa*.—*State v. Seligman*, 127 Iowa 415, 103 N. W. 357 (1905).

*Kentucky*.—*Morehead's Trustee v. Anderson*, 30 Ky. Law Rep. 1137, 100 S. W. 340 (1907).

*Missouri*.—*State v. Forsha*, 190 Mo. 296, 88 S. W. 746 (1905).

*New Jersey*.—*State v. Skillman*, (Suppl. 1908) 70 Atl. 83 (not review-

able in the absence of gross abuse); *Crosby v. Wells*, 73 N. J. Law 790, 67 Atl. 295 (1907).

*North Dakota*.—*Pease v. Magill*, 115 N. W. 260 (1908).

*Oregon*.—*Multnomah County v. Willamette Towing Co.*, (Or. 1907) 89 Pac. 389.

*South Carolina*.—*State v. Harmon*, 79 S. C. 80, 60 S. E. 230 (1908).

*South Dakota*.—*Schott v. Swan*, 114 N. W. 1005 (1908).

*Wisconsin*.—*Steward v. State*, 124 Wis. 623, 102 N. W. 1079 (1905).

The rule is the same in case of real evidence;—e. g. a diagram. *Gosdin v. Williams*, (Ala. 1907) 44 So. 611. Where the trial judge has improperly excluded a portion of the actor's evidence in chief, he may reasonably repair the error by permitting him to introduce it on the stage of rebuttal. *Dutton v. Philadelphia, B. & W. R. Co.*, 32 Pa. Super. Ct. 630 (1907); *State v. Thompson*, 68 S. C. 133, 46 S. E. 941 (1904).

Where a fact is material to the issue and the party who naturally would offer it as part of his evidence in chief announces an intention of not proving it, it is reasonable administration to permit the other party to introduce it upon rebuttal. *Brockmiller v. Industrial Works*, 148 Mich. 642, 112 N. W. 688, 14 Detroit Leg N. 336 (1907). The same course may be adopted where the party primarily entitled to introduce certain evidence, rests his evidence in chief without doing so.

**Use of cumulative evidence on rebuttal.**—A party may close his evidence in chief upon the establishment by him of a *prima facie* case. In fact, the court will probably require him to do so. *Muntz v. Cottage Hill Land Co.*, 222 Pa. 621, 72 Atl. 247 (1909). If this be attacked, he may then submit additional proof which might have been used as cumulative at the stage of evidence in chief had the ad-

the result will not be disturbed. The facts offered in rebuttal being in their nature deliberative,<sup>19</sup> strong probative force is not essential to admissibility;<sup>20</sup>—although some evidentiary cogency, actual or potential, must be made to appear.<sup>21</sup> On the other hand, no test of admissibility is furnished by the fact that the rebutting evidence tends to *strengthen* the case made by the evidence in chief in a civil or criminal<sup>22</sup> case. That is, directly or indirectly, the object of any rebuttal.

**§ 380. ([2] *Right to Test Adversary's Case*; [b] *Rebuttal*);**

**Actor.**—If the actor fail at the end of the nonactor's case to move for a verdict in his own favor; or if, when such a motion is made, it has been overruled; the actor has reached the stage of rebuttal. The evidence in chief of the nonactor has, as is characteristic of the general position of one who will succeed if he but offsets the case against him, has consisted largely of what practically amounts to rebuttal in the average instance.<sup>1</sup> But, so far as the actor is concerned, the first opportunity for rebuttal occurs at the close of the nonactor's case. He is not entitled to reiterate his evidence in chief, nor to reaffirm what his antagonist has denied, or to introduce evidence which he should have offered as part of

ministrative principle of expediting trials permitted the use of cumulative proof at that stage. *Burk v. Pence*, 206 Mo. 315, 104 S. W. 23 (1907). It would be manifestly unreasonable to refuse him at the stage of rebuttal an opportunity of doing so. Where it appeared on the examination of a witness in rebuttal that, if the examination were allowed to proceed, the court would again have to go at large into testimony in chief, it was proper to refuse to permit the examination to so proceed. *Union Ry. Co. v. Hunton*, 114 Tenn. 609, 88 S. W. 182 (1905). In a proper case, the presiding judge may properly decline to permit cumulative evidence on rebuttal. *C. Scheerer & Co. v. Deming*, (Cal. 1908) 97 Pac. 155.

18. *Colorado*.—*Jaynes v. People*, 44 Colo. 535, 99 Pac. 325 (1909).

*Illinois*.—*City of Decatur v. Vaughan*, 233 Ill. 50, 84 N. E. 50 (1908).

*Iowa*.—*State v. Rohn*, 119 N. W. 88 (1909) (opportunity to meet).

*Kentucky*.—*Nelson County v. Bardstown & L. Turnpike Road Co.*, 30 Ky. Law Rep. 1254, 100 S. W. 1181 (1907) (introduced evidence at former trial).

*Montana*.—*State v. De Hart*, 38 Mont. 211, 99 Pac. 438 (1909) (opportunity to meet declined).

19. *Supra*, § 52.

20. *State v. Gallagher*, 14 Idaho 656, 94 Pac. 581 (1908).

21. *Wojtylak v. Kansas & T. Coal Co.*, 188 Mo. 260, 87 S. W. 506 (1905); *Hallwood Cash Register Co. v. Rollins*, (N. H. 1905) 62 Atl. 380; *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287 (1906); *Mahoney v. State*, (Tex. Cr. App. 1906) 98 S. W. 854.

22. *State v. Howard*, (La. 1908) 45 So. 260.

1. *Supra*, § 372.

his original case.<sup>2</sup> All this may be done by leave of court;<sup>3</sup> but, in the average instance, to permit it would amount to trying the case over again by the use of cumulative evidence. As to the assertions of his original case, he must, in general, rely upon case formulated by him in his evidence in chief. But should the nonactor in course of his own evidence in chief fail to confine himself to denial of the actor's assertions; should he, on the contrary, go further by asserting the existence of independent facts which tend to impair the effect of the actor's original case, the latter may and, if he can, should meet this new evidence on rebuttal;—even where the defense might have been excluded on

**2. Alabama.**—*Wilkinson v. State*, 44 So. 611 (1907) (diagram); *Cutcliff v. Birmingham Ry. Light & Power Co.*, 41 So. 873 (1906).

**California.**—*Higgins v. Los Angeles Ry. Co.*, 91 Pac. 344 (1907); *Patterson v. San Francisco & S. M. Electric Ry. Co.*, 147 Cal. 178, 81 Pac. 531 (1905).

**Kentucky.**—*Morehead's Trustee v. Anderson*, 100 S. W. 340, 30 Ky. L. Rep. 1137 (1907).

**Montana.**—*Schilling v. Curran*, 76 Pac. 998 (1904).

**Oregon.**—*Multnomah County v. Williamette Towing Co.*, 89 Pac. 389 (1907).

**Evidence offered and rejected as part of the actor's evidence in chief may upon rebuttal be rendered competent and indeed admissible as a matter of right, *ex debito justitiæ*, when the nonactor opens up the subject on his evidence in chief. Thus, where an expert witness called to establish negligence has been improperly rejected, and the defendant has introduced testimony to negative the contention of the plaintiff, the court may permit the plaintiff to call the expert in rebuttal. *Dutton v. Philadelphia, B. & W. R. Co.*, 32 Pa. Super. Ct. 630 (1907).**

**Proper rebuttal does not cease to be competent because it also tends to establish a fact which the actor might have offered as part of his original**

**case. *City of McCook v. McAdams*, (Neb. 1906) 106 N. W. 988.**

**3. Alabama.**—*Birmingham Ry., Light & Power Co. v. Martin*, 42 So. 618 (1906); *Terry v. Williams*, 41 So. 804 (1906); *Birmingham Ry., Light & Power Co. v. Mullen*, 138 Ala. 614, 35 So. 701 (1903).

**California.**—*Moody v. Peirano*, 88 Pac. 380 (1907).

**Colorado.**—*Prudential Ins. Co. v. Hummer*, 84 Pac. 61 (1906).

**North Dakota.**—*Petersburg School Dist. of Nelson County v. Peterson*, 103 N. W. 756 (1905).

**Illinois.**—*Eckhardt v. People*, 116 Ill. App. 408 (1904).

**Indiana.**—*Tinkle v. Wallace*, (Ind. 1906) 79 N. E. 355.

**Kentucky.**—*Louisville & N. R. Co. v. Board*, 28 Ky. L. Rep. 921, 90 S. W. 944 (1906).

**New Jersey.**—*Minard v. West Jersey & S. Ry. Co.*, 64 Atl. 1054 (1906); *Foley v. Brunswick Traction Co.*, 55 Atl. 803 (1903).

**New York.**—*Hall v. Wagner*, 97 N. Y. Suppl. 570, 111 App. Div. 70 (1906).

**Pennsylvania.**—*Wilmoth v. Hamilton*, 127 Fed. 48 (1904).

**South Carolina.**—*Bolton v. Western Union Tel. Co.*, 76 S. C. 529, 57 S. E. 543 (1907).

**Texas.**—*International & G. N. R. Co. v. McVey*, (Civ. App. 1907) 102 S. W. 172.

objection.<sup>4</sup> The normal scope of rebuttal is that it should meet the new matter given in the nonactor's evidence in chief;<sup>5</sup> nor is it material that the nonactor should have interpolated part of his case into the actor's evidence in chief.<sup>6</sup> His rights at this stage are confined to attacking the inferences from this new matter.<sup>7</sup>

*Rebuttal to Matter Elicited on Cross-Examination.*—Where new facts are introduced into evidence upon the cross-examination of the actor's witness, the court may permit the actor to attempt to control the inferences arising from it at the stage of rebuttal.<sup>8</sup> Naturally, this occurs with special frequency in jurisdictions where a party may make out his defense on the cross-examination of his opponent's witnesses.<sup>9</sup> The suggestion has, however, been

*Wisconsin.*—*Ollwell v. Skobis*, 126 Wis. 308, 105 N. W. 777 (1905).

The same difficulty arises when material evidence properly belonging at the stage of evidence in chief is received at the stage of rebuttal. *Alexander v. Byron*, 2 Johns. Cas. 318, 319 (1801).

4. *White v. Western State Bank*, 119 Ill. App. 354 (1905).

5. *Louisiana.*—*Longino v. Shreveport Traction Co.*, 45 So. 732 (1908).

*Nebraska.*—*Campion v. Lattimer*, 97 N. W. 290 (1903); *Crockett v. Miller*, 2 Neb. (Unof.) 292, 96 N. W. 491 (1902).

*Pennsylvania.*—*American Car & Foundry Co. v. Alexandria Water Co.*, 218 Pa. 542, 67 Atl. 861 (1907).

*South Dakota.*—*Smith v. Mutual Cash Guaranty Fire Ins. Co.*, 113 N. W. 94 (1907).

*Vermont.*—*Morgan v. Hendricks*, 80 Vt. 284, 67 Atl. 702 (1907).

Evidence offered by plaintiff in rebuttal which rebuts no evidence offered by defendants is properly excluded. *Saucier v. New Hampshire Spinning Mills*, 72 N. H. 292, 56 Atl. 545 (1903).

6. *Bade v. Hibberd*, (Or. 1908) 93 Pac. 364.

The interpolation itself may not be permitted. *McGregor v. Oregon R. Co.*, (Or. 1908) 93 Pac. 465.

7. *Connecticut.*—*Hoggson & Pettis*

*Mfg. Co. v. Sears*, 77 Conn. 587, 60 Atl. 133 (1905).

*Illinois.*—*Mueller v. Rebhan*, 94 Ill. 142, 150 (1879).

*Nevada.*—*Jos. Schlitz Brewing Co. v. Grimmon*, 81 Pac. 43 (1905).

*Pennsylvania.*—*Bunnell v. Kintner*, 27 Pa. Super. Ct. 605 (1905).

*Texas.*—*Meyer Bros. Drug Co. v. Madden, Graham & Co.*, 99 S. W. 723 (1907).

*Vermont.*—*Green v. Dodge*, 64 Atl. 499 (1906).

*Wisconsin.*—*Anderson v. Arpin Hardwood Lumber Co.*, 110 N. W. 788 (1907); *Bazelon v. Lyon*, 128 Wis. 337, 107 N. W. 337 (1906).

**Rebuttal of incompetent evidence.**—That the new matter introduced by the nonactor might have been excluded on objection is no ground for rejecting the countervailing evidence offered on rebuttal. *Dunnett & Slack v. Gibson*, (Vt. 1906) 62 Atl. 141. But a question of administration is frequently presented. For example, where a party on cross-examination has permitted a purely collateral question to be asked, he cannot, as of right, introduce evidence on the same point in rebuttal. *Pichon v. Martin*, (Ind. App. 1905) 73 N. E. 1009.

8. *Roberts v. Terre Haute Electric Co.*, (Ind. App. 1906) 76 N. E. 895.

9. *Bennett v. Susser*, 191 Mass. 329 77 N. E. 884 (1906).

made that the preferable course would be to ask the witness on redirect examination the requisite questions rather than call him, or other witnesses, in rebuttal.<sup>10</sup>

*The actor's rebuttal may, as of right, discredit the witnesses and attack the claim set up by the nonactor in his evidence in chief.*

*No Defense, No Rebuttal.*—If the nonactor introduces no evidence, there is, as a rule, no rebuttal;—there being nothing to rebut. The court will, however, prevent this rule from being made an instrument of injustice. Where an actor has offered evidence on his examination in chief which the court has declined to receive at that stage because more properly receivable in rebuttal, the actor may tender it when the nonactor rests without introducing evidence.<sup>11</sup>

*Any stage of rebuttal*, however designated, covers, so far as the actor is concerned, only such facts as may tend to offset those adduced against him. He is parrying logical blows directed at his position. He cannot succeed, logically, on the strength of his rebuttal. Its indirect effect, by removing weight from the other side of the scales may well aid him but he will succeed if at all, on the strength of his evidence in chief. The final preponderance of the scale necessary to sustaining the burden of proof<sup>12</sup> cannot well be in his favor unless his evidence in chief is sufficient to create it.<sup>13</sup>

10. *Struth v. Decker*, (Md. 1905) 59 Atl. 727.

11. *Brockmiller v. Industrial Works*, 148 Mich. 642, 112 N. W. 688, 14 Detroit Leg. N. 336 (1907).

12. *Infra*, §§ 930 *et seq.*

13. *Surrebuttal.*—It has seemed convenient, in this connection, to treat the nonactor's evidence in chief as one which set up new matter, i. e., was affirmative from the point of view of logic, evidentially regarded, rather than considered from the view point of pleading. Rebutting testimony is addressed to *evidence* produced by the opposite party, not to his pleading. *Lux v. Haggin*, 69 Cal. 255, 414, 10 Pac. 674, 767 (1886). Under these conditions, the actor's reply necessarily partakes of the nature of a re-

buttal and has been so designated. So far, however, as the nonactor's evidence in chief, i. e., the case in reply, embodies, as it largely does in most cases, the element of rebuttal, the position of the actor in his reply is that of rebutting the nonactor's rebuttal and might properly have been spoken of as surrebuttal, using the term as a general one meaning the stage or process of rebutting a rebuttal. The terms rebuttal and surrebuttal are, moreover, confusing when employed in jurisdictions where the plaintiff invariably goes forward at each stage regardless of the state of the pleadings, i. e., as to whether he is actor or not. *Supra*, § 361. As a matter of fact, the propriety of the terms rebuttal or surrebuttal in



§ 381. ([2] *Right to Test Adversary's Case*; [b] *Rebuttal*); Use of "Experts."—Where a nonactor introduces expert testimony in support of his position, the actor may, as a rule, introduce similar evidence on rebuttal.<sup>1</sup>

§ 382. ([2] *Right to Test Adversary's Case*; [b] *Rebuttal*); *Anticipatory Rebuttal*.—Where the position of the nonactor is known to the actor, a very natural impatience is often shown, especially by inexperienced practitioners, to come at once to the real point upon which the issue will ultimately turn, by means of what may be called an "anticipatory rebuttal."<sup>1</sup> This has the strategic forensic value that it tends to make the nonactor's story a stale one when it reaches the jury. It is, however unfair, and, like most unfair expedients, ultimately unwise, an especial danger being that of suggesting to an ignorant nonactor the true nature of his position. To this form of trying a case the uncertainty of much code pleading gives opportunity. It is, however, clear that a fact is not competent in an actor's evidence in chief merely because it may be received upon rebuttal, when that stage is reached.<sup>2</sup> In general, therefore, such anticipatory rebuttal is excluded;—except by leave of court. Thus, a plaintiff in an action involving negligence cannot, in his original case, attempt the disproof of contributory negligence,<sup>3</sup> or undertake, at that stage, to negative a claim, which he expects will be raised, that the person inflicting the injury was a fellow servant.<sup>4</sup>

Where rebuttal has been anticipated, as on the examination of the actor's witness,<sup>5</sup> the subject may still be resumed, as a matter

their application to any particular stage can seldom be of serious consequence. A rebuttal of rebutting evidence may, however, so far as the term is important, be spoken of as surrebuttal, and the reply to a surrebuttal and an answer to that reply be designated as the stages of re-rebuttal and re-surrebuttal respectively.

1. *Guenther v. Metropolitan R. Co.*, 23 App. D. C. 493 (1904); *William Grace Co. v. Larson*, 227 Ill. 101, 81 N. E. 44 (1907) [*affirming* 129 Ill. App. 290 (1906)]; *St. Louis Southwestern Ry. Co. of Texas v. Smith*, (Tex. Civ. App. 1905) 86 S. W. 943; *Rowe v. Whateom County Ry. & Light Co.*, (Wash. 1906) 87 Pac. 921.

1. *Atlas Lumber & Coal Co. v. Flint*, (S. D. 1905) 104 N. W. 1046.

2. *Maurice v. Hunt*, 80 Ark. 476, 97 S. W. 664 (1906).

3. *Owen v. Portage Telephone Co.*, 126 Wis. 412, 105 N. W. 924 (1905).

4. *Turner v. Southern Pac. Co.*, 142 Cal. 580, 76 Pac. 384 (1904).

5. *Supra*, § 371.

In general, however, it will be required that facts available in rebuttal shall be reserved for that stage. *Turner v. Southern Pac. Co.*, 142 Cal. 580, 76 Pac. 384 (1904) (not fellow servant); *Jos. Schlitz Brewing Co. v. Grimmon*, (Nev. 1905) 81 Pac. 43. A mere incidental reference, in the proper conduct of the actor's case, to

of right, upon rebuttal.<sup>6</sup> In much the same way, where the non-actor fails to put in a material document or other evidence, as was reasonably to have been anticipated, the actor may himself be permitted to put it in evidence on rebuttal.<sup>7</sup>

**§ 383. ([2] *Right to Test Adversary's Case*; [b] *Rebuttal*); Nonactor.**—At the close of the actor's stage of rebuttal, the burden of evidence<sup>1</sup> returns to the nonactor to rebut, as it were, the actor's rebuttal. The opportunity to meet rebuttal is, for purposes of distinction, called the *surrebuttal*. The rights of the nonactor on surrebuttal are analogous to the rights of the actor on rebuttal.<sup>2</sup> He is not at liberty, without leave of court,<sup>3</sup> to reaffirm the allegations of his evidence in chief. The stage for that is past.<sup>4</sup> His rights are entirely in connection with the new matter introduced by the actor on his rebuttal. He may directly deny the existence of those facts or set up other facts inconsistent with their effect, supplementing facts;<sup>5</sup> or he may attempt to discredit this new matter or the witnesses by which it is sought to establish it:

matters pleaded by the nonactor does not prevent the actor offering evidence in rebuttal of the nonactor's evidence in chief in support of his defence. *Rose v. Lewis*, (Ala. 1908) 48 So. 105.

6. *Hamilton v. Smith*, 74 Conn. 374, 50 Atl. 884 (1901); *York v. Pease*, 2 Gray (Mass.) 282 (1854); *Harrison v. Rowan*, 3 Wash. C. C. 582 (1820).

7. *Western Union Telegraph Co. v. Hanley*, 85 Ark. 263, 107 S. W. 1168 (1908).

1. *Infra*, §§ 967 *et seq.*

2. *Alabama*.—*Gosdin v. Williams*, 106 Ala. 23, 17 So. 457 (1894).

*California*.—*First National Bank v. Wolff*, 79 Cal. 69, 73, 21 Pac. 551, 748 (1889).

*Connecticut*.—*Belden v. Allen*, 61 Conn. 173, 23 Atl. 963 (1891).

*Georgia*.—*Walker v. Walker*, 14 Ga. 242, 250 (1853).

*Illinois*.—*Willard v. Pettitt*, 153 Ill. 663, 39 N. E. 991 (1895).

*Iowa*.—*Cannon v. Iowa City*, 34 Iowa 203 (1872).

*Louisiana*.—*State v. Spencer*, 45 La. Ann. 1, 9, 12 So. 135 (1893).

*Michigan*.—*Devonshire v. Peters*, 104 Mich. 501, 63 N. W. 973 (1895).

*Nebraska*.—*Argabright v. State*, 56 Neb. 363, 76 N. W. 876 (1898).

*New York*.—*Stephens v. People*, 19 N. Y. 573 (1859).

*Oregon*.—*State v. Dilley*, 15 Or. 75, 13 Pac. 648 (1887).

*Pennsylvania*.—*Koenig v. Bauer*, 57 Pa. 168, 172 (1868).

*South Carolina*.—*Clinton v. McKenzie*, 5 Strobb. 36, 41 (1850).

*Texas*.—*Bittick v. State*, 40 Tex. 117, 120 (1874).

*Vermont*.—*Pratt v. Rawson*, 40 Vt. 183, 188 (1868).

3. *Crosby v. Wells*, 73 N. J. L. 790, 67 Atl. 295 (1907); *Wysong v. Seaboard Air Line Ry.*, 74 S. C. 1, 54 S. E. 214 (1906).

4. *Baum v. Palmer*, 165 Ind. 513, 76 N. E. 108 (1905).

5. *Cooke v. Loper*, (Ala. 1907) 44 So. 78; *Duckworth v. Duckworth*, (Md. 1903) 56 Atl. 490; *Maloney v. King*, (Mont. 1904) 76 Pac. 4.

*Rights on surrebuttal.*—A nonactor is not entitled on surrebuttal to introduce evidence which he might properly have made part of his evidence in chief,<sup>6</sup> nor does a bare repetition of evidence given in chief constitute surrebuttal.<sup>7</sup> The proper office of a surrebuttal is to antagonize, meet, explain or confute new matter set up by the adverse party at the stage of rebuttal.<sup>8</sup> It can scarcely occur at this stage that the opportunity to introduce evidence is a matter of right. Should it happen that the evidence offered is material and first becomes competent on surrebuttal, it may be error to exclude it at that stage.<sup>9</sup> More often, the question of admissibility is decided as a matter of administration.<sup>10</sup>

§ 384. ([2] *Right to Test Adversary's Case*; [b] *Rebuttal*); *Subsequent Rebuttal.*—The nonactor's deliberative evidence may on surrebuttal discredit the witnesses<sup>1</sup> and attack the fresh facts set up by the actor on rebuttal. The remote benefits which can accrue to the tribunal by a further testing must be, of necessity, largely problematical;—and therefore a matter of administrative discretion. An actor may be permitted<sup>2</sup> to exercise, at the stage of *re-rebuttal*, as regards the witnesses and new facts set up by the nonactor on surrebuttal, the same rights as were exercised by the latter at that stage. If new matter appears in the *re-rebuttal* the nonactor becomes entitled to a *re-surrebuttal*, where the rights are similar to those on surrebuttal, *mutatis mutandis*;—and so on, in alternating stages to which specific names are not, as a practical matter, usually assigned.

§ 385. (3) *Right to the Use of Reason.*—"At the outset, and for centuries after the beginnings of our law as an established

6. *Illinois Steel Co. v. Ferguson*, 229 Ill. App. 396 (1906).

7. *People v. Hutchings*, (Cal. App. 1908) 97 Pac. 325.

8. *Hickey v. State*, (Tex. Civ. App. 1907) 102 S. W. 417.

9. *Anderson v. Anderson*, 136 Wis. 328, 117 N. W. 801 (1908).

10. *Wysong v. Seaboard Air Line Ry.*, 74 S. C. 1, 54 S. E. 214 (1906). See also *Tetterton v. Com.*, 28 Ky. Law Rep. 146, 89 S. W. 8 (1905).

1. *Colorado*.—*Nutter v. O'Donnell*, 6 Colo. 253, 259 (1882).

*Georgia*.—*Thomas v. State*, 27 Ga. 287, 298 (1859).

*South Carolina*.—*State v. Summer*, 55 S. C. 32, 32 S. E. 771 (1899).

*Vermont*.—*Kent v. Lincoln*, 32 Vt. 591, 599 (1860).

*West Virginia*.—*State v. Staley*, 45 W. Va. 792, 32 S. E. 198 (1899). There is authority to the contrary. *Keffer v. State*, (Wyo. 1903) 73 Pac. 556.

2. *State v. Alford*, 31 Conn. 40, 46 (1862).

system, there was no clear conception of Substantive Law as such. The whole legal theory was embodied in forms of remedy. Ceremonies had been embalmed as primary and immutable principles of law. Forms and modes of procedure stood in the place of substantive rights; nor could justice see beyond them or above them.”<sup>1</sup> In the slow evolution of legal institutions of Englishmen the use of reason has succeeded the application of the more formal tests with which our ancestors were familiar. These forms of proof were essentially mechanical and proof, oddly enough as it seems to later generations, was a fixed result of doing certain acts, mental processes being excluded;—in much the same way that a magician might expect to evoke a familiar spirit by the precise repetition of an incantation. “He who would establish his case must maintain it, for example, by success in that judicial battle the issue of which was held to be the judgment of Heaven (*judicium Dei*); or he must go unscathed through the ordeal, and so make manifest his truth or innocence; or he must procure twelve men to swear in set form that they believe his testimony to be true; or it may be sufficient if he himself makes solemn oath that his cause is just. If he succeeds in performing the conditions so laid upon him, he will have judgment; if he fails even in the slightest point he is defeated. His task is to satisfy the requirements of the law, not to convince the court of the truth of his case. What the court thinks of the matter is nothing to the point. The whole procedure seems designed to take away from the tribunals the responsibility of investigating the truth, and to cast this burden upon providence or fate. Only gradually and reluctantly did our law attain to the conclusion that there is no such royal road in the administration of justice, that the heavens are silent, that the battle goes to the strong, that oaths are naught, and that there is no just substitute for the laborious investigation of the truth of things at the mouths of parties and witnesses.”<sup>2</sup>

*A Substantive Right to Reason.*—In an attempt, at the present day, to determine the truth of a proposition of fact by the use of reason, it is one of the inherent fundamental rights of the parties to insist that this test should be reason alone and that the test should be properly applied. The presiding justice should

1. Hepburn, *The Development of Code Pleading*.

2. Salmond, *Jurisp.*, (2d ed.) 451.

For some consideration of forms of trial in England antecedent to the use of reason, see *supra*, §§ 269–271.

so discharge his administrative functions in dealing with the admission of evidence as to preserve this right. He will insist upon the use of correct reasoning by all parts of the tribunal, at each stage of the trial and by all persons who attempt to influence its action. It will be required equally of judge, counsel, witnesses and jurors. Reason constitutes, as it were, the vital atmosphere of a properly administered trial; in this alone the several functions of its various participants can properly be discharged.<sup>3</sup>

*The Legal Test for Conduct.*—It will be observed that in prescribing the procedural rule that in all branches and at all stages of judicial proceedings reason must be employed, the law is by no means segregating legal procedure in court from all other legal and proper conduct. The test which the law applies to conduct as between the different citizens of the state is that it should be *reasonable*. The dispatch of judicial business is governed by the same procedural rule as that prescribed and enjoined in case of all other conduct;—that the act should be that of a reasonable man. In other words, court procedure is merely a part of procedure in general, and, legally, subject to the same standards of required observance.

**§ 386. ([3] *Right to the Use of Reason*); Should Prevent Jury from Being Misled.**—In enforcing the use of reason upon the jury, the court will be vigilant to prevent the use of any evidence or argument which will tend to mislead them; or to replace reason as a guide by any form of emotionalism.<sup>1</sup> Thus where a bitter vindictive assault has been made on one of the parties by a witness<sup>2</sup> or other person in such a way as to present a danger that the jury may be prejudiced or misled, the court will be justified

3. Reason is not an absolute guaranty for the attainment of truth. It is merely the present legally established test for it and the one of highest efficiency which judicial progress has as yet evolved. This efficiency is conditioned not only by the perfection of the instrument but by the extent and accuracy of the data upon which it is to be applied. "Reason," says Jeremy Taylor, "is such a box of quicksilver that it abides nowhere; it dwells in no settled mansion; it

is like a dove's neck, . . . and if we inquire after the law of nature by the rules of our reason, we shall be as uncertain as the discourses of the people or the dreams of disturbed fancies." Ductor Dubitantium, (Works XII, 209, Heber's ed.).

1. *Union Pac. R. Co. v. Field*, (U. S. 1905) 69 C. C. A. 536, 137 Fed. 14.

2. *Hale v. Hale*, 32 Pa. Super. Ct. 37 (1906).

in continuing the case.<sup>3</sup> So where counsel insist upon asking in the presence of the jury a number of irrelevant questions apparently designed to cause the other party to object and thus to present the appearance of seeking to hold back the truth, the judge may compel the offending attorney to dictate his questions to the stenographer out of the jury's hearing.<sup>4</sup>

*Appeals to Sympathy.*—The court well may be cautious in admitting a party to testify in an unusual way calculated to influence the emotion of the jury, as where a plaintiff in a personal injury action asks leave to be brought into court and to testify in a reclining position on a stretcher.<sup>5</sup> Unless it should affirmatively appear that such a course is so necessary that its refusal would be unreasonable, the judge's action will not be reversed.<sup>6</sup> In like manner, though plaintiff in an action to recover for personal injuries may show his wounds to the jury, it may be reversible error to permit a dramatic exhibition in the presence of the jury, a demonstration of the extent of his disability.<sup>7</sup>

*Many of the rules of evidence*, procedural or administrative, e. g., excluding hearsay,<sup>8</sup> rejecting inference—"opinion," as it is called<sup>9</sup>—and the like, have been adopted and are being enforced, with the very object of protecting the jury from being misled. Similarly, where the undisputed circumstances show that the testimony of a witness cannot by any possibility be true, it is the duty of the court to withdraw such testimony from the jury.<sup>10</sup>

**§ 387. ([3] *Right to the Use of Reason*); Guessing not Permitted.**—The jury will not be permitted to guess. Where they cannot reason to a conclusion involving the necessity of judicial action, they must decline to act. It is the administrative duty of the court to enforce this rule. It is, for example, error to submit

3. A caution and implied reprimand by the presiding judge has, however, been spoken of as an improper comment upon the evidence. *Levels v. St. Louis & H. Ry. Co.*, 196 Mo. 606, 94 S. W. 275 (1906). This seems a strange restriction to place upon the executive officer of a court of justice.

4. *Marcum v. Hargis*, 31 Ky. Law Rep. 1117, 104 S. W. 693 (1907).

5. *Blanchard v. Holyoke St. Ry. Co.*, 186 Mass. 582, 72 N. E. 94 (1904).

6. *Blanchard v. Holyoke St. Ry. Co.*, 186 Mass. 582, 72 N. E. 94 (1904).

7. *Felsch v. Babb*, (Neb. 1904) 101 N. W. 1011.

8. *Infra*, § 2700.

9. *Infra*, § 1791.

10. *Wolf v. City Ry. Co.*, (Or. 1907) 91 Pac. 460.

a cause to a jury where the evidence only enables the latter to guess as to which one of several causes produced a certain result.<sup>1</sup>

§ 388. ([3] *Right to the Use of Reason*); **Striking Out Prejudicial Evidence.**—Where inadmissible evidence has been received and is of such a nature as to prejudice the party, the court will, in general, grant a motion to strike it out of the record. Of this nature would be prejudicial hearsay.<sup>1</sup> The same course may properly be followed where the evidence is irrelevant.<sup>2</sup> The fact that the probative force of evidence is seriously impaired by cross-examination<sup>3</sup> or in some other similar way furnishes no ground for striking it out. Nor will this course be adopted merely on the ground that the evidence is *insufficient*.<sup>4</sup>

*Irresponsiveness.*—Where an answer is irresponsible, either party may move to strike it out.<sup>5</sup> But here, as in other cases where objection to the reception of evidence is taken, the objecting party, to secure consideration in an appellate court, will be required to obtain a ruling upon the question by the trial judge. If the ruling is adverse to him, he may then except.<sup>6</sup>

*Objection must have been made* to an obvious incompetent question if the motion to strike out is to be urged as a matter of right.<sup>7</sup> But where the evidence has been admitted without objec-

1. *Fuller v. Ann Arbor R. Co.*, (Mich. 1905) 12 Detroit Leg. N. 348, 104 N. W. 414.

1. *Skinner Mfg. Co. v. Dowville*, 54 Fla. 251, 44 So. 1014 (1907).

2. *Johnston v. Beadle*, (Cal. App. 1907) 91 Pac. 1011.

3. *Platt v. Rowand*, 54 Fla. 237, 45 So. 32 (1907).

4. *Platt v. Rowand*, 54 Fla. 237, 45 So. 32 (1907).

5. *Kramer v. Haeger Storage, etc., Co.*, 108 N. Y. Suppl. 1, 123 App. Div. 316 (1908).

6. *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807 (1907).

"While the testimony as to the Hardwick and Parlin casts was being taken, the defendant's counsel at three different times uttered the word 'exception.' The course taken by counsel called for no ruling by the court, the court made none and the defendant has nothing to complain of. If

counsel really want evidence excluded it must be objected to. Then, if the objection made is overruled, the objecting party may take an exception. In the taking of testimony the occasional ejaculation of the word 'exception' is in the nature of a running and unfavorable comment on the proceedings, and nothing more. It raises no question for the decision of the court and reserves nothing." *Sheldon v. Wright*, 80 Vt. 298, 304 (1907).

7. *Florida.*—*Platt v. Rowand*, 54 Fla. 237, 45 So. 32 (1907).

*Iowa.*—*Aughey v. Windrem*, 114 N. W. 1047 (1908).

*Maryland.*—*Darrin v. Whittingham*, 68 Atl. 269 (1907).

*Texas.*—*Kansas City Consol., etc., Co. v. Taylor*, 107 S. W. 889 (1908).

*Utah.*—*Spiking v. Consolidated Ry. & Power Co.*, 93 Pac. 838 (1908).

tion, the judge is under no obligation to strike out cumulative testimony on the same point.<sup>8</sup> But this proceeds upon the ground of *waiver*, in failing to assert a legal right at the proper time. If nothing in the question appears objectionable, no rights are lost by failing to object to it, if a motion to strike out is promptly made.<sup>9</sup> On a general objection and motion to strike out, if any part of the evidence is competent, the motion will properly be overruled.<sup>10</sup>

**§ 389. ([3] *Right to the Use of Reason*); Withdrawal of Jury.**—Where an argument on any point if conducted in the presence of the jury would tend to mislead them, they may be required to withdraw.<sup>1</sup> The court is to judge, as a question of administration, whether it be preferable, in the interests of justice, to order such a withdrawal and have the same thing gone over by counsel in his argument to the jury; or, on the contrary, to expedite the trial<sup>2</sup> by having the entire matter discussed in their presence in the first instance. Counsel have no right to have the court adopt the latter course.<sup>3</sup>

**§ 390. ([3] *Right to the Use of Reason*); Preventing Irrational Verdicts.**—As is stated more at length elsewhere,<sup>1</sup> the justice presiding at a jury trial may direct a verdict for either party, when a contrary finding could not, as a matter of reason, be sustained by the evidence.<sup>2</sup> The judge, being charged with the duty

8. *Skinner Mfg. Co. v. Dowville*, 54 Fla. 251, 44 So. 1014 (1907).

9. *Johnston v. Beadle*, (Cal. App. 1907) 91 Pac. 1011; *Skinner Mfg. Co. v. Dowville*, 54 Fla. 251, 44 So. 1014 (1907).

10. *Platt v. Rowand*, 54 Fla. 237, 45 So. 32 (1907); *Darrin v. Whittingham*, (Md. 1907) 68 Atl. 269; *Galveston, etc., Ry. Co. v. Janert*, (Tex. Civ. App. 1908) 107 S. W. 963. An objection to certain answers of a witness must be determined without reference to other answers. *Kansas City Consol., etc., Co. v. Taylor*, (Tex. Civ. App. 1908) 107 S. W. 889.

1. *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 71 N. E. 863 (1904).

2. *Infra*, §§ 544 *et seq.*

3. *Rice v. Dewberry*, (Tex. Civ. App. 1906) 93 S. W. 715.

1. *Infra*, §§ 397 *et seq.*

2. *Alabama*.—*Hatch v. Varner*, 43 So. 481 (1907); *McCleskey & Whitman v. Howell Cotton Co.*, 42 So. 67 (1906).

*California*.—*Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, 75 Pac. 787 (1904).

*Colorado*.—*Snyder v. Colorado Springs & C. C. D. Ry. Co.*, 85 Pac. 686 (1906).

*District of Columbia*.—*Dodge v. Rush*, 28 App. Cas. 149 (1906); *Ford v. Ford*, 27 App. Cas. 401 (1906).

*Florida*.—*Mugge v. Jackson*, 43 So. 91 (1907).

*Illinois*.—*Kelly v. Ins. Co.*, 126 Ill. App. 528 (1906); *Chicago & E. J. R. Co. v. Henderson*, 126 Ill. App. 530 (1906); *Smithley v. Snowden*, 120 Ill. App. 86 (1905).



of enforcing upon the jury the use of the reasoning faculty, may also set aside a verdict which is irrational, either as a matter of logical<sup>3</sup> or legal<sup>4</sup> reasoning.

*Actions for a penalty* follow the same rules. In such a case a verdict against the defendant has been ordered.<sup>5</sup>

**§ 391. ( [3] *Right to the Use of Reason* ); Directing Verdicts.**

—But a result which it would be the administrative duty of the court to nullify as irrational and therefore illegal by awarding a new trial,<sup>1</sup> the judge may properly look upon as something which it is his administrative duty to prevent.

*It is not necessary* that he should sit idly by until the end of a protracted trial which so far as the party having the burden of proof is concerned can only result in a verdict which the judge is aware would be set aside as soon and as often as rendered; or, as the phrase is, *toties quoties*. As the law prescribes the use of reason, ruling that a verdict cannot rationally be rendered is, in reality, announcing a rule of law.<sup>2</sup> Such a course would, in fact, be in contravention of the canon of administration requiring the

*Maine*.—*Young v. Chandler*, 102 Me. 251, 66 Atl. 539 (1906).

*Maryland*.—*National Bank of Bristol v. Baltimore & O. R. Co.*, 99 Md. 661, 59 Atl. 134 (1904).

*Michigan*.—*Harrison Granite Co. v. Pennsylvania R. Co.*, 145 Mich. 712, 108 N. W. 1081, 13 Detroit Leg. N. 631 (1906).

*Missouri*.—*Holden v. Missouri R. Co.*, 108 Mo. App. 665, 84 S. W. 133 (1904); *Houts v. St. Louis Transit Co.*, 108 Mo. App. 686, 84 S. W. 161 (1904).

*New Jersey*.—*Vandegrift Const. Co. v. Camden & T. Ry. Co.*, 65 Atl. 986 (1907); *Loper v. Somers*, 71 N. J. L. 657, 61 Atl. 85 (1905).

*Texas*.—*Murphy v. Galveston, H. & N. Ry. Co.*, 96 S. W. 940 (1906); *Maffi v. Stephens*, 93 S. W. 153 (1906); *Lamberida v. Barnum*, 90 S. W. 698 (1905).

*United States*.—*Guild v. Pringle*, 145 Fed. 312 (1906); *Turnbull v. Ross*, 72 C. C. A. 609, 141 Fed. 649 (1905); *Chicago & N. W. Ry. Co. v. De Clow*, 124 Fed. 142 (1903).

**Federal courts.**—In order to justify the direction of a verdict, in an action tried in the federal courts, the undisputed evidence must be so conclusive that all reasonable men, in the exercise of an honest and impartial judgment, can draw but one conclusion therefrom, and that the court, in the exercise of a sound judgment, would be required to set aside a verdict returned in opposition thereto. *Crookston Lumber Co. v. Boutin*, 149 Fed. 680, 79 C. C. A. 368 (1906).

3. *Supra*, § 59.

4. *Supra*, § 61.

5. *Gilbreath v. State*, (Tex. Civ. App. 1904) 82 S. W. 807.

1. *Supra*, § 307.

2. A motion to direct a verdict for the defendant raises only a question of law, namely, whether there is evidence before the jury from which, taken as true, the jury may properly find a verdict for the party. *Smith v. Eitel*, 121 Ill. App. 464 (1905).

presiding judge to expedite trials.<sup>3</sup> He may, therefore, intervene either on motion or *sua sponte*, at an earlier stage by withdrawing the case from the jury and directing a verdict against one of the parties.<sup>4</sup> Thus, where there is an entire failure of proof to sustain a material allegation of a party's petition put in issue by the answer, the action of the trial court in directing a verdict for defendant will be sustained.<sup>5</sup>

**§ 392. ([3] *Right to the Use of Reason; Directing Verdicts*); Relation to Grant of a New Trial.**—As a verdict by a jury may properly be set aside by the presiding judge if reason has not been exercised<sup>1</sup> and as a verdict will be directed where only one conclusion is logically, i. e., legally permissible,<sup>2</sup> it may properly be said, the test being the same, that where the court would be constrained to set aside a verdict for a party complaining, it would be justified in directing a verdict in his favor.<sup>3</sup> It

3. *Infra*, §§ 544 *et seq.*

4. *North Carolina*.—*State v. McBryde*, 97 N. C. 393 (1887).

*Pennsylvania*.—*School Furniture Co. v. Warsaw School Dist.*, 122 Pa. St. 494 (1888).

*South Carolina*.—*Bridger v. Ashville, etc., Ry. Co.*, 25 S. C. 24 (1885).

*United States*.—*Chandler v. Van Roeder*, 24 How. 224 (1860).

*England*.—*Metropolitan Ry. Co. v. Jackson*, L. R. 3 App. Cas. 193 (1877); *Bridges v. North London Ry. Co.*, L. R. 7 H. L. 213, 218 (1874). Where the evidence fails to establish, either directly or by rational deductions, all the facts which go to make up the issue, as where there is a failure of evidence in respect to any material fact involved in the issue, the evidence is not legally sufficient to sustain a finding upon such issue, and it is the duty of the trial judge to instruct the jury accordingly. *Kearns v. Southern Ry. Co.*, 139 N. C. 470, 52 S. E. 131 (1905).

5. *Keckler v. Modern Brotherhood of America*, (Neb. 1906) 109 N. W. 157.

1. *Supra*, § 307.

2. *Infra*, § 61.

3. *Arizona*.—*Ewing v. U. S.* 89 Pac. 593 (1907).

*Arkansas*.—*Western Union Telegraph Co. v. Baker*, 140 Fed. 315 (1905).

*California*.—*Meyer v. Lovdal*, 92 Pac. 322 (1907).

*Colorado*.—*Watson v. Manitou & Pikes Peak Ry. Co.*, 41 Colo. 138, 92 Pac. 17 (1907).

*District of Columbia*.—*Guenther v. Metropolitan R. Co.*, 23 App. Cas. 493 (1904).

*Illinois*.—*Illinois Cent. R. Co. v. Bailey*, 222 Ill. 480, 78 N. E. 833 (1906).

*Indiana*.—*Green v. Macy*, 76 N. E. 264 (1905); *Westfall v. Wait*, 73 N. E. 1089 (1905).

*Mississippi*.—*Wooten v. Mobile & O. R. Co.*, 42 So. 131 (1906).

*Montana*.—*Coulter v. Union Laundry Co.*, 34 Mont. 590, 87 Pac. 973 (1906).

*New Jersey*.—*Maurer v. Gould & Eberhardt*, 59 Atl. 28 (1904).

*New Mexico*.—*Armstrong v. Aragon*, 79 Pac. 291 (1905).

*Oklahoma*.—*Neeley v. Southwestern Cotton Seed Oil Co.*, 75 Pac. 537 (1903).

is stating the same proposition to say that a verdict will be ordered when the evidence at the trial, with all the inferences which the jury could justifiably draw from it, is so insufficient to support a verdict that were it returned it would be set aside.<sup>4</sup>

*In jurisdictions, on the contrary*, where new trials may be granted because the verdict is against the weight or preponderance of the evidence,<sup>5</sup> a jury cannot be ordered to return a verdict where there is enough evidence to warrant them, as a matter of reason, in finding otherwise; although the court fully intends, the weight of the evidence being determined in his mind, that if the jury return any other verdict than the one he is asked to order he will set it aside.<sup>6</sup> This seems contrary to sound judicial administration. That the presiding justice is not himself favorably impressed with the truth of the proposition for which one party or the other is contending should not constitute a factor in determining his course. He should still permit the evidence to go to the jury.<sup>7</sup>

*It is not for a judge* to refuse to submit a case to the jury because he feels that it should not prevail. If a case is pre-

*South Dakota.*—*Greenwald v. Ford*, 109 N. W. 516 (1906).

*West Virginia.*—*Williams v. Belmont Coal & Coke Co.*, 46 S. E. 802 (1904).

*United States.*—*International Text Book Co. v. Heartt*, (N. C. 1905) 136 Fed. 129, 69 C. C. A. 127; *Aetna Indemnity Co. v. Ladd*, (Or. 1905) 68 C. C. A. 274, 135 Fed. 636; *Patillo v. Allen-West Commission Co.*, (Ark. 1904) 131 Fed. 680, 65 C. C. A. 508; *Riley v. Louisville & N. R. Co.*, (Tenn. 1904) 133 Fed. 904; *Gentry v. Singleton*, (Ind. T. 1904) 128 Fed. 679, 63 C. C. A. 231; *Shoup v. Marks*, 128 Fed. 32, 62 C. C. A. 540 (1904).

4. *Chicago Hardware Co. v. Matthews*, 124 Ill. App. 89 (1905); *Anderson v. Cumberland Telephone & Telegraph Co.*, (Miss. 1905) 38 So. 786; *Cobb v. Glenn Boom & Lumber Co.*, (W. Va. 1905) 49 S. E. 1005.

5. *Supra*, § 308.

6. *Georgia.*—*Pendleton Bros. v. Atlantic Lumber Co.*, 3 Ga. App. 714, 60 S. E. 377 (1908).

*Illinois.*—*Cicero & P. St. Ry. Co. v. Hughes*, 125 Ill. App. 186 (1907).

*Mississippi.*—*Fore v. Alabama & V. Ry. Co.*, 39 So. 493 (1905).

*New York.*—*Schmal v. Rothschild*, 96 N. Y. Suppl. 179 (1905); *Lewis v. Erie R. Co.*, 94 N. Y. Suppl. 765, 105 App. Div. 292 (1905); *Wagner v. Einhorn*, 88 N. Y. Suppl. 370 (1904); *McCrystal v. O'Neill*, 86 N. Y. Suppl. 84 (1904); *Marshall v. City of Buffalo*, 176 N. Y. 545, 68 N. E. 1119 (1903).

*North Carolina.*—*Lehew v. Hewitt*, 138 N. C. 6, 50 S. E. 459 (1905).

*Texas.*—*Walker v. Erwin*, 106 S. W. 164 (1907); *Waggoner v. Wyatt*, 94 S. W. 1076 (1906).

*Washington.*—*Weir v. Seattle Electric Co.*, 41 Wash. 657, 84 Pac. 597 (1906).

7. "It is surely possible to admit that reasonable and fair men might come to a conclusion which oneself would not arrive at." *Brett, J.* in *Bridges v. North London Ry. Co.*, L. R. 7 H. L. 218 (1874).

sented from which men may rationally draw different inferences, the court should submit it to the determination of the jury, however strong may be the proofs to the contrary,<sup>8</sup> or however earnestly the judge may feel that the contention ought not to succeed.<sup>9</sup> The difficulty lies in setting aside a rational verdict because the judge does not agree with it. From such a course the judge seems, on principle, to be estopped by his action in submitting the case when requested to withdraw it. Where he allows a case to go to the jury it is because he feels that reason has not absolutely declared against it. If from the evidence adduced the jury might reasonably find in favor of a party's contention, he is entitled to have it submitted for their action.<sup>10</sup>

*The weight* and sufficiency<sup>11</sup> of the evidence should remain entirely within the function of the jury in cases where it is reasonably possible that more than one inference can be drawn from it.<sup>12</sup>

*Sounder Administration.*—Even where new trials may be granted, should the verdict, though rational, be not such as the judge would himself have rendered, a sounder administrative view is to apply the same test to the granting of a motion to direct a verdict.<sup>13</sup> Apparently, if the test is valid in one case, it is

8. *School Furniture Company v. Warsaw School District*, 122 Pa. St. 494 (1888).

9. *Cook v. Union Ry. Co.*, 125 Mass. 57 (1878); *Gaynor v. Old Colony Ry. Co.*, 100 Mass. 208 (1868); *Eilert v. Green Bay, etc., Ry. Co.*, 48 Misc. 606 (1879).

10. *Bridges v. North London Ry. Co.*, L. R. 7 H. L. 218 (1874).

11. *Sufficiency for the jury.*—“Whether there is any evidence is a question for the judge; whether there is sufficient evidence is for the jury.” *Chandler v. Van Roeder*, 24 How. (U. S.) 224 (1860).

12. “The judge has no legal right either directly or indirectly to force upon the jury his view of any fact or inference of fact.” *Bridges v. North London Ry. Co.*, L. R. 7 H. L. 218 (1874).

A more common danger to the rights of the litigant in a jury trial lies in the at times unconscious tendency of

judges to blend their personal preferences into the formation of a general rule on the subject (see *supra* Chap. II), and enforce an individual opinion by excluding evidence in a particular case as part of what the judge deems an objectionable class. “He will do so (enforce his individual view) if he states questions of fact as if they were questions of law.” *Bridges v. North London Ry. Co.*, L. R. 7 H. L. 218 (1874). The formation of a rule of law should be based upon and follow repeated appeals to experience as represented by jury verdicts, rather than used as a means of forestalling such verdicts and transferring the function of the jury in such matters to the rulings of an appellate court.

13. *Livesay v. First Nat. Bank*, (Colo. 1906) 86 Pac. 102; *Bowen v. Chicago & N. W. R. Co.*, 117 Ill. App. 9 (1904).

sound in both. The question which is presented as to submission to a jury is precisely the same which arises when the judge is asked to set aside the verdict as being against the weight of the evidence. In either case it should be: Is the evidence sufficient in point of reason to warrant the verdict?<sup>14</sup> But should the test adopted be whether the judge is satisfied with the finding of the jury, if his dissatisfaction be sufficient warrant for setting aside a verdict, it should, in point of principle, be a satisfactory reason for ordering one to the contrary effect. There is, of course, the motive for allowing the case to proceed in the hope that the jury will find in favor of the view which the judge has taken of the evidence. But the course seems but little characterized by fairness to the parties or good faith to the jury. For a judge who has taken a fixed, permanent view of the evidence to leave a question to the jury secretly purposing, if any verdict than the one he desires is rendered to set it aside, but that if his view is adopted the verdict will stand, suggests juggling rather than justice.<sup>15</sup>

*Federal Courts.*—Under the rule of the Federal courts, a judge should direct a verdict where the evidence produced by the party on whom rests the burden of proof is insufficient to sustain a verdict in his favor.<sup>16</sup>

§ 393. ([3] *Right to the Use of Reason; Directing Verdicts*); *Relation to Motion in Arrest of Judgment.*—Where a defect exists in the declaration or similar pleading which is of such a character as to be ground for a motion in arrest of judgment, it is proper to move to withdraw the case from the jury on the same ground.<sup>1</sup> On such a motion based on a defect in the declaration, matters of evidence and facts proved cannot be considered.<sup>2</sup> The same result may follow where the actor has proved his *prima facie* case and the latter is not such as to warrant, as matter of law, affirmative action by the court in his favor. When issue is

14. *Bridges v. North London Ry. Co.*, L. R. 7 H. L. 218 (1874).

15. It is not the least among administrative objections to the rule refusing to allow a judge to comment to the jury on the evidence that it practically forces a conscientious judge of strong convictions to adopt this course.

16. *National Ass'n of Ry. Postal*

*Clerks v. Scott*, (N. Y. 1907) 155 Fed. 92, 83 C. C. A. 652.

1. *Grace & Hyde Co. v. Sanborn*, 124 Ill. App. 472 (1906) [*affirmed* in 225 Ill. 238, 80 N. E. 88].

2. *American Car & Foundry Co. v. Hill*, 226 Ill. 227, 80 N. E. 784 (1907) [*affirming* 128 Ill. App. 176 (1906)].

joined on an immaterial plea, and its averments are proved, the defendant is entitled to the general charge in his favor.<sup>3</sup> If the defect of a count is one that would be cured by verdict, the jury should not be properly instructed to disregard it; but if each count of a declaration be so faulty that with all the intendments in its favor it cannot, after verdict, support a judgment, there is no reason why the court may not properly instruct the jury to find a verdict for the defendant, notwithstanding the defendant has pleaded to the declaration.<sup>4</sup>

**§ 394. ([3] *Right to the Use of Reason; Directing Verdicts*); A Matter of Law.**—As the duty of the jury is to reason correctly, and as it is the substantive right of the party to insist that this reasoning be exercised,<sup>1</sup> a ruling as to what is or is not rationally possible for the jury to do is, in reality, ruling on a matter of law.<sup>2</sup> In other words, whether there is any evidence

3. *Rasco v. Jefferson*, (Ala. 1905) 38 So. 246.

4. *Owens v. Lehigh Valley Coal Co.*, 115 Ill. App. 142 (1904).

1. *Infra*, §§ 385 *et seq.*

2. *Arkansas*.—*St. Louis, I. M. & S. Ry. Co. v. Neal*, 78 S. W. 220 (1903).

*Illinois*.—*Cleveland, C. C. & St. L. Ry. Co. v. Sparks*, 122 Ill. App. 400 (1905); *Libby, McNeil & Libby v. Banks*, 209 Ill. 109, 70 N. E. 599 (1904) [*affirming* 110 Ill. App. 330 (1903)].

*Indiana*.—*Jennings v. Ingle*, 73 N. E. 945 (1905).

*Maryland*.—*Baltimore & O. R. Co. v. Belinski*, 67 Atl. 249 (1907).

*Nebraska*.—*Baker v. Swift & Co.*, 110 N. W. 654 (1906).

*North Carolina*.—*Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201 (1905).

*Tennessee*.—*Norman v. Southern Ry. Co.*, 104 S. W. 1088 (1907).

*Texas*.—*Lamberida v. Barnum*, 90 S. W. 698 (1905); *Bonn v. Galveston, H. & S. A. Ry. Co.*, 82 S. W. 808 (1901).

*United States*.—*Minnesota & D. Cattle Co. v. Atchison, T. & S. F. Ry. Co.*, 147 Fed. 463, 77 C. C. A. 607

(1906); *Love v. Scatterd*, 146 Fed. 1, 77 C. C. A. 1 (1906); *United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County, Kan.*, (Kan. 1906) 145 Fed. 144; *Northern Pac. Ry. Co. v. Jones*, (Idaho 1906) 144 Fed. 47. No case should be withdrawn from the jury unless the conclusion necessarily follows from the facts as a matter of law that no recovery could be had on any view which could reasonably be drawn from the facts which the evidence tends to establish. *McCabe v. Montana Cent. Ry. Co.*, (Mont. 1904) 76 Pac. 701. Frequently the necessary inference from an undisputed state of facts is so certain that it becomes a question of law. *Sovereign Camp Woodmen of the World v. Hruby*, (Neb. 1903) 96 N. W. 998. Whether from facts in proof a particular inference can be drawn is a question of law. *Seely v. Manhattan Life Ins. Co.*, 73 N. H. 339, 61 A. 585 (1905). A question of law always arises at the close of the evidence in any case in the Federal courts, whether there is any substantial proof warranting a verdict in favor of plaintiff. *Crookston Lumber Co. v. Boutin*, 149 Fed. 680, 79 C. C. A. 368 (1906).

upon which the jury could reasonably determine as to the truth of a matter in issue is a question of law for the court;<sup>3</sup> if there is, it must be left to them.<sup>4</sup> But, in general, a matter about which there is no controversy in the evidence should not be left to the jury.<sup>5</sup> A question of law arises also where the evidence is un-

3. *Universal Metal Co. v. Durham & C. R. Co.*, 145 N. C. 293, 59 S. E. 50 (1907); *Boswell v. First Nat. Bank*, (Wyo. 1907) 92 Pac. 624 [rehearing *denied* 93 Pac. 661].

4. *Alabama*.—*Speakman v. Vest*, 44 So. 1021 (1907).

*Connecticut*.—*Pigeon v. Lane*, 80 Conn. 237, 67 Atl. 886 (1907).

*District of Columbia*.—*Morgan v. Adams*, 29 App. D. C. 198 (1907).

*Georgia*.—*Southern Ry. Co. v. Hardeman*, 130 Ga. 222, 60 S. E. 539 (1908).

*Illinois*.—*Clark v. Chicago R., etc., Ry. Co.*, 231 Ill. 548, 83 N. E. 286 (1907); *Illinois Cent. R. Co. v. Bailey*, 222 Ill. 480, 78 N. E. 833 (1906) [*affirming* judgment, 127 Ill. App. 41 (1906)]; *Schillinger Bros. Co. v. Smith*, 225 Ill. 74, 80 N. E. 65 (1907) [*affirming* judgment, 128 Ill. App. 30 (1906)]; *Eldorado Coal & Coke Co. v. Swan*, 227 Ill. 586, 81 N. E. 691 (1907) [*affirming* judgment, 128 Ill. App. 237 (1906)]; *Swift & Co. v. O'Brien*, 127 Ill. App. 26 (1906); *Packer v. Sheppard*, 127 Ill. App. 26 (1906).

*Iowa*.—*Cahill v. Illinois Cent. R. Co.*, 115 N. W. 216 (1908); *Webster v. Armstrong*, 113 N. W. 549 (1907).

*Kansas*.—*Darling v. Atchison, etc., Ry. Co.*, 76 Kan. 893, 93 Pac. 612 (1907) [rehearing *denied*, 94 Pac. 202 (1908)]; *Missouri, K. & T. R. Co. v. L. A. Watkins Merchandise Co.*, 76 Kan. 813, 92 Pac. 1102 (1907).

*Kentucky*.—*Supreme Lodge K. P. v. Bradley*, 32 Ky. Law Rep. 743, 107 S. W. 209 (1908) [*judgment modified* on rehearing, 109 S. W. 1178]; *Louisville & N. R. Co. v. Brown*, 32 Ky. Law Rep. 1002, 107 S. W. 321 (1908); *Champion Ice Mfg., etc., Co.*

*v. F. Delsignore & Bro.*, 32 Ky. Law Rep. 427, 105 S. W. 1181 (1907); *Switchmen's Union of North America v. Johnson*, 32 Ky. Law Rep. 583, 105 S. W. 1193 (1907); *Owensboro City R. Co. v. Robertson*, 31 Ky. Law Rep. 1047, 104 S. W. 707 (1907).

*Massachusetts*.—*Paine v. Kelley*, 83 N. E. 8 (1907).

*Missouri*.—*Scott Co. Milling Co. v. St. Louis, etc., R. Co.*, 127 Mo. App. 80, 104 S. W. 924 (1907).

*New York*.—*Powers v. Miller*, 107 N. Y. S. 960, 123 App. Div. 396 (1908); *New York Evening Journal Pub. Co. v. William F. Simpson, etc., Agency*, 106 N. Y. S. 858, 56 Misc. Rep. 347 (1907) [*judgment affirmed* 110 N. Y. S. 391 (1908)]; *Hann v. Brettler*, 107 N. Y. S. 78 (1907).

*North Dakota*.—*Higgs v. Minneapolis, St. P. etc., Ry. Co.*, 114 N. W. 722 (1908).

*Oklahoma*.—*Lane v. Choctaw, etc., R. Co.*, 91 Pac. 883 (1907).

*Texas*.—*Gray v. Fussell*, 106 S. W. 454 (1907); *Red River Nat. Bank v. De Berry*, 105 S. W. 998 (1907).

*Washington*.—*Hoffman v. Titlow*, 92 Pac. 888 (1907).

*Wisconsin*.—*Gallaway v. Massee*, 113 N. W. 1098 (1907).

*Wyoming*.—*Boswell v. First Nat. Bank*, 92 Pac. 624 (1907) [rehearing *denied*, 93 Pac. 661].

5. *Alabama*.—*Southern Ry. Co. v. Hardin*, 157 Fed. 645 (1907).

*Georgia*.—*Willingham & Cone v. Huguenin*, 129 Ga. 835, 60 S. E. 186 (1908).

*Kentucky*.—*Central Consumers' Co. v. Booher*, 32 Ky. Law Rep. 794, 107 S. W. 198 (1908); *Hall v. Louisville, etc., Ry. Co.*, 31 Ky. Law Rep. 853, 104 S. W. 275 (1907).

controverted; <sup>6</sup> viz., could the jury rationally find more than one way in view of the evidence? <sup>7</sup> If not, the general administrative rule is to the effect that the judge will direct them to find in the only way in which they can rationally decide. <sup>8</sup> This is in accordance with the general principle elsewhere mentioned, <sup>9</sup> that where the facts are uncontroverted an issue may be dealt with as a question of law. <sup>10</sup> It becomes evident that as the existence and nature of the rule of law is the only doubtful element in reach-

*New York.*—Keene v. Newark Watch Case, etc., Co., 188 N. Y. 598, 81 N. E. 1167 (1907) [affirming judgment, 98 N. Y. S. 68, 112 App. Div. 7 (1906)].

*Texas.*—Southern Pac. Co. v. Godfrey, 107 S. W. 1135 (1908).

*West Virginia.*—Hutchinson v. United States Express Co., 59 S. E. 949 (1907).

**6.** *Colorado.*—Israel v. Day, 41 Colo. 52, 92 Pac. 698 (1907).

*District of Columbia.*—Barstow v. Capital Traction Co., 29 App. D. C. 362 (1907).

*Indiana.*—City of Valparaiso v. Schwerdt, 40 Ind. App. 608, 82 N. E. 923 (1907).

*Missouri.*—Cornovski v. St. Louis Transit Co., 207 Mo. 263, 106 S. W. 51 (1907); Hendley v. Globe Refinery Co., 106 Mo. App. 20, 79 S. W. 1163 (1904).

*Nebraska.*—Schwanenfeldt v. Chicago, etc., Ry. Co., 115 N. W. 285 (1908).

*New York.*—Oppenheimer v. Mit-tenthal, 107 N. Y. S. 48 (1907); Freifeld v. M. Groh's Sons, 116 N. Y. App. Div. 409, 101 N. Y. Suppl. 863 (1906).

*North Carolina.*—Harton v. Forest City Telephone Co., 59 S. E. 1022 (1907).

*South Dakota.*—McComb v. Baskerville, 106 N. W. 300 (1906).

*Tennessee.*—Norman v. Southern Ry. Co., 104 S. W. 1088 (1907).

*Texas.*—Smith v. Humphreyville, 104 S. W. 495 (1907); St. Louis Southwestern Ry. Co. of Texas v. Groves, 97 S. W. 1084 (1906).

*West Virginia.*—Kuykendall v. Fisher, 56 S. E. 48 (1906).

It has, however, been held that where evidence is oral in its nature, though it is impossible to contradict it, the case must go to the jury. Fuller Buggy Co. v. Waldron, 188 N. Y. 630, 81 N. E. 1165 (1907); Wallace v. Pennsylvania Co., 219 Pa. 327, 68 Atl. 952 (1908); Perkiomen R. Co. v. Kremer, 218 Pa. 641, 67 Atl. 913 (1907).

**7.** This is not a matter of administration, except as to time of announcement. Essentially, it is a matter of law. Norman v. Southern Ry. Co., (Tenn. 1907) 104 S. W. 1088.

**8.** Jennings v. Philadelphia, etc., Ry. Co., 29 App. D. C. 219 (1907); City of Chicago v. O'Brien, 128 Ill. 350 (1906); Hollon v. Campton Fuel & Light Co., 32 Ky. Law Rep. 178, 105 S. W. 426 (1907).

**9.** *Supra*, §§ 128 *et seq.*; Williamsport v. Lycoming County, 34 Pa. Sup. Ct. 221 (1907).

**10.** Deschner v. St. Louis & M. R. R. Co., 200 Mo. 310, 98 S. W. 737 (1906); Ryon v. Starr, 214 Pa. 310, 63 Atl. 701 (1906); Smith v. Mutual Cash, etc., Ins. Co., (S. D. 1907) 113 N. W. 94; Peyser v. Western Dry Goods Co., (Wash. 1907) 92 Pac. 886.

**Criminal libel.**—It is on this proposition that the English crown lawyers contended for the right on the part of the judge to say whether, when publication was found by the jury, the same was libelous.



ing a decision, that the court is, in reality, applying it to them, i. e., that the essential question is what is proper legal reasoning. If there be any legal doubt as to the conclusion to be drawn from the whole evidence, the case must be submitted to the jury.<sup>11</sup> Where both parties move for direction of a verdict, it is an affirmation on the part of each that there is no disputed question of fact which could operate to deflect or control the questions of law.<sup>12</sup>

**§ 395. ([3] *Right to the Use of Reason; Directing Verdicts*); General Rules.**—It is not necessary to submit a cause to a jury, unless there is evidence which will warrant a verdict in favor of the party producing it.<sup>1</sup> As a rule, where the evidence on material points is conflicting, a verdict cannot be ordered;<sup>2</sup>

11. *Tyrus v. Kansas City, Ft. S. & M. R. Co.*, 114 Tenn. 579, 86 S. W. 1074 (1905).

12. *West v. Roberts*, (La. 1905) 135 Fed. 350, 68 C. C. A. 58.

1. *Lynch v. Englehardt*, *Winning, Davison Mercantile Co.*, 1 Neb. (Unof.) 528, 96 N. W. 524 (1901).

2. *Alabama*.—*Birmingham Ry., Light & Power Co. v. Martin*, 42 So. 618 (1906); *Sloss-Sheffield Steel & Iron Co. v. Hutchinson*, 40 So. 114 (1906).

*California*.—*Copriviza v. Rilovich*, 87 Pac. 398 (1906).

*Georgia*.—*Wilcox v. Evans & Pennington*, 127 Ga. 580, 56 S. E. 635 (1907); *Shumate v. Ryan*, 127 Ga. 118, 56 S. E. 103 (1906); *McFarland v. Darien & W. R. Co.*, 127 Ga. 97, 56 S. E. 74 (1906).

*Illinois*.—*City of Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079 (1907).

*Iowa*.—*Fleming Bros. v. Linder*, (Iowa 1906) 109 N. W. 771.

*Nebraska*.—*Continental Lumber Co. v. Munshaw & Co.*, 109 N. W. 760 (1906); *Gillis v. Paddock's Estate*, 109 N. W. 734 (1906).

*New Jersey*.—*Hummer v. Lehigh Valley R. Co.*, 65 Atl. 126 (1906).

*New York*.—*Reilly v. Troy Brick Co.*, 184 N. Y. 399, 77 N. E. 385 (1906); *Conte v. City of New York*,

116 N. Y. App. Div. 356, 101 N. Y. Suppl. 491 (1906).

*North Dakota*.—*Zink v. Lahart*, 110 N. W. 931 (1907).

*Pennsylvania*.—*Raymer v. Standard Steel Works*, 216 Pa. St. 101, 64 Atl. 902 (1906).

*Texas*.—*Logan v. Meade*, 98 S. W. 210 (1906).

*Washington*.—*Menasha Wooden Ware Co. v. Nelson*, 88 Pac. 1018 (1907).

*West Virginia*.—*Johnson v. Bank*, 55 S. E. 394 (1906).

*United States*.—*Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 147 Fed. 641, 77 C. C. A. 625 (1906). It is not within the province of the judge, on a motion to withdraw a case from the jury, to weigh the evidence, and ascertain where the preponderance is, but his duty is limited strictly to determining whether there is or is not evidence legally tending to prove the fact affirmed. *Woodman v. Illinois Trust & Savings Bank*, 211 Ill. 578, 71 N. E. 1099 (1904). When the inferences to be drawn from established facts may change with the personality of him who makes them, and when the mind hesitates to affirm just what a reasonable man would likely do under the circumstances, then the ascertainment of the legal duty becomes a mixed

unless, indeed, although there is technically a conflict, the evidence on one side is of so conclusive a character that the court would set aside a verdict rendered in opposition to it.<sup>3</sup> The

question of law and fact, and must be submitted to a jury. *Portland Ice Co. v. Connor*, 32 Pa. Super. Ct. 428 (1907). Where several grounds of negligence are alleged in an action by a passenger for injuries, failure to prove one of them is no ground for direction of verdict for defendant. *Cain v. Atlantic Coast Line R. Co.*, 74 S. C. 89, 54 S. E. 244 (1906).

If there be any count of the declaration on which evidence is offered, a verdict cannot be directed against the plaintiff. *Lewes v. John Crane & Sons*, 78 Vt. 216, 62 A. 60 (1905). In an action at law tried before a jury in a federal court, where an issue of fact is involved the determination of which depends upon the weight, preponderance, and effect of conflicting evidence, such issue must be determined by the jury, and it is error for the court to direct a verdict. *Newburger Cotton Co. v. York Cotton Mills*, 152 Fed. 398, 81 C. C. A. 524 (1907). In passing upon a motion to instruct a verdict it is not the province of the judge to weigh the evidence, but if there is any evidence which, with the inferences that may legitimately be drawn therefrom, would warrant a verdict in favor of the party against whom the motion is made, such motion should be overruled. A mere scintilla of evidence, however, is not enough to prevent the withdrawal of the case from the jury. *Berry v. Chase*, 146 Fed. 625, 77 C. C. A. 161 (1906).

3. *District of Columbia*.—*Green v. Stewart*, 23 App. Cas. 570 (1904).

*Georgia*.—*Harriss v. Howard*, 126 Ga. 325, 55 S. E. 59 (1906); *Skinner v. Braswell*, 126 Ga. 761, 55 S. E. 914 (1906).

*Illinois*.—*Nicholls v. Colwell*, 113 Ill. App. 219 (1904).

*Missouri*.—*Hendley v. Globe Refin-*

*ery Co.*, 106 Mo. App. 20, 79 S. W. 1163 (1904).

*Nebraska*.—*Husenetter v. Little*, 110 N. W. 541 (1907); *Allen v. American Beet Sugar Co.*, 106 N. W. 469 (1906).

*New Jersey*.—*Dederick v. Central R. Co.*, 65 Atl. 833 (1907).

*Pennsylvania*.—*Barley v. Beegle*, 29 Pa. Super. Ct. 635 (1905).

*South Dakota*.—*Edwards v. Chicago, M. & St. P. Ry. Co.*, 110 N. W. 832 (1907).

*Vermont*.—*Bass v. Rublee*, 57 Atl. 965 (1904).

*Wisconsin*.—*Clark v. Slaughter*, 129 Wis. 642, 109 N. W. 556 (1906).

*United States*.—*St. Louis & S. F. R. Co. v. Dewees*, 153 Fed. 56, 82 C. C. A. 190 (1907); *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 146 Fed. 641, 77 C. C. A. 625 (1906); *Woodward v. Chicago, M. & St. P. Ry. Co.*, (Minn. 1906) 145 Fed. 577; *Turnbull v. Ross*, 72 C. C. A. 609, 141 Fed. 649 (1905); *Chambers v. Van Elderen*, (Ark. 1905) 137 Fed. 557; *Chicago Great Western Ry. Co. v. Roddy*, (Minn. 1904) 131 Fed. 712, 65 C. C. A. 470; *Riley v. Louisville & N. R. Co.*, (Tenn. 1904) 133 Fed. 904. It is not within the province of the judge, on a motion to withdraw from the jury, to weigh the evidence and ascertain where the preponderance is. *Bunnell v. Rosenberg*, 126 Ill. App. 196 (1906). Where the evidence was sufficient to create more than a surmise or suspicion of plaintiff's right to recover, it was proper to submit the issue to the jury. *Clark v. Wilson*, (Tex. Civ. App. 1906) 91 S. W. 627. Though there be slight testimony, yet, if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the facts sought to be established, the court should instruct a verdict.

trial judge is not authorized to weigh conflicting testimony in deciding a motion to direct a verdict.<sup>4</sup> The same rule is applied where the evidence, although not in strictness conflicting, is so ambiguous or uncertain as to make it probable that reasonable men might disagree as to the conclusion to be drawn from it.<sup>5</sup> In such a posture of affairs it is the duty of the jury to decide. It is, moreover, for the jury to judge when doubtful or equivocal language has been employed and in what sense it has been used.<sup>6</sup> Where, therefore, at the conclusion of the evidence, both parties move for a directed verdict, each thereby asserts that there is no disputed question of fact that can control or affect the conclusion of law that on all the evidence he is entitled to prevail.<sup>7</sup> On the contrary, should there be no dispute as to the evidence, it is not error to direct a verdict.<sup>8</sup> It should not, however, be directed un-

*Wills v. Central Ice & Cold Storage Co.*, (Tex. Civ. App. 1905) 88 S. W. 265.

4. *Bowen v. Chicago & N. W. R. Co.*, 117 Ill. App. 9 (1904). Authority may be conferred by statute. *Lightcap v. Nicola*, 34 Pa. Super. Ct. 189 (1907).

5. *Williams v. Sleepy Hollow Min. Co.*, (Colo. 1906) 86 Pac. 337; *Roedler v. Chicago, M. & St. P. Ry. Co.*, 129 Wis. 270, 109 N. W. 88 (1906).

6. *Missouri, K. & T. Ry. Co. v. Anderson*, (Tex. Civ. App. 1904) 81 S. W. 781. It is for the jury to determine what a witness means when he uses language warranting distinct and opposite inferences. They must determine his meaning, not only from his words, but from his manner and all the surrounding circumstances, and find whether he was careful or careless. *Smith v. Jackson Tp.*, 26 Pa. Super. Ct. 234 (1904). A verdict cannot be directed unless the testimony is undisputed, and, to constitute such dispute as to preclude such direction, it is not necessary that the testimony in favor of the party asking for the verdict be directly denied, but it is sufficient if it is disputed by indication, or is subject to doubt in view of the cross-examination of his witnesses. *Wilson v. Royal Neighbors of*

*America*, (Mich. 1905) 11 Detroit Leg. N. 867, 102 N. W. 957.

7. *Minnesota & D. Cattle Co. v. Atchison, T. & S. F. Ry. Co.*, 147 Fed. 463, 77 C. C. A. 607 (1906); *Love v. Scatterd*, 146 Fed. 1, 77 C. C. A. 1 (1906).

The right to a jury trial, being a constitutional one, is not to be denied, except in a clear case. When the facts are such that two fair-minded men may draw different inferences from them, and such different inferences lead to different verdicts, then the jury, and not the court, is the tribunal to decide which inference shall be drawn. *Cascade Foundry Co. v. L. J. Mueller Furnace Co.*, (Pa. 1905) 140 Fed. 791 [judgment reversed, 145 Fed. 596 (1906)].

8. *Georgia*.—*Brockhan v. Hersch*, 128 Ga. 819, 58 S. E. 468 (1907); *Reynolds v. Nevin*, 1 Ga. App. 269, 57 S. E. 918 (1907); *Home Ins. Co. of New York v. Chattahoochee Lumber Co.*, 126 Ga. 334, 55 S. E. 11 (1906); *Kern v. Kansas City Southern Ry. Co.*, 125 Ga. 496, 54 S. E. 355 (1906).

*Iowa*.—*Cragun Bros. v. Todd & Kraft*, 108 N. W. 450 (1906).

*Maryland*.—*Ziehn v. United Electric Light & Power Co. of Baltimore*, 64 Atl. 61 (1906).

*New Jersey*.—*Ryle v. Manchester*

less there is no issue of fact, or unless the proved facts, examined from every legal point of view, can sustain no other finding than that directed.<sup>9</sup> It states the same rule in another form to say that the judge has no legal right to withdraw a case from the jury against a party who has produced evidence upon which the jury might reasonably find in his favor<sup>10</sup> and that where there is no evidence in favor of a contention the judge is not justified in leaving it to the jury.<sup>11</sup> So where, of several issues, evidence is produced in favor of but certain of them, these only should be sub-

Building & Loan Ass'n, 67 Atl. 87 (1907).

*New York.*—*Cravath v. Baylis*, 99 N. Y. Supp. 973, 113 App. Div. 666 (1906); *Keene v. Newark Watch Case Material Co.*, 98 N. Y. Supp. 68, 112 App. Div. 7 (1906); *Standard Supply & Equipment Co. v. Merritt*, 96 N. Y. Suppl. 181, 48 Misc. Rep. 498 (1905).

*North Carolina.*—*Walker v. Carolina Cent. R. Co.*, 135 N. C. 738, 47 S. E. 675 (1904).

*Oklahoma.*—*Sovereign Camp Woodmen of the World v. Welch*, 33 Pac. 547 (1905); *Neely v. Southwestern Cotton Seed Oil Co.*, (Okla. 1903) 75 Pac. 537.

*Pennsylvania.*—*Bube v. Weatherly Borough*, 25 Pa. Super. Ct. 88 (1904); *Gudfelder v. Pittsburg, C. C. & St. L. Ry. Co.*, 207 Pa. 629, 57 Atl. 70 (1904).

*United States.*—*International Text-Book Co. v. Heartt*, (N. C. 1905) 136 Fed. 129, 69 C. C. A. 127.

9. *Colorado.*—*Mageon v. Alkire*, 92 Pac. 720 (1907).

*District of Columbia.*—*Riddle v. Gibson*, 29 App. D. C. 237 (1907).

*Georgia.*—*Pendleton Bros. v. Atlantic Lumber Co.*, 3 Ga. App. 714, 60 S. E. 377 (1908); *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209 (1907).

*Illinois.*—*Gathman v. City of Chicago*, 127 Ill. App. 150 (1906); *Linderman Box & Veneer Co. v. Thompson*, 127 Ill. App. 134 (1906).

*Iowa.*—*Rothrock v. City of Cedar Rapids*, 103 N. W. 475 (1905).

*Kentucky.*—*Schonbachler's Adm'r*

*Mischell*, 89 Ky. L. Rep. 460, 89 W. 525 (1905).

*Maryland.*—*Acker, Merrill & Condit Co. v. McGaw*, 106 Md. 536, 68 Atl. 17 (1907).

*Massachusetts.*—*Le Baron v. Old Colony St. Ry. Co.*, 83 N. E. 674 (1908.)

*New Jersey.*—*Daggett v. North Jersey St. Ry. Co.*, 68 Atl. 179 (1907).

*New York.*—*Lekas v. Schwartz*, 107 N. Y. S. 145, 56 Misc. Rep. 594 (1907).

*Oklahoma.*—*Guss v. Federal Trust Co.*, 91 Pac. 1045, (1907).

*South Carolina.*—*Rice v. Bamberg*, 68 S. C. 184, 46 S. E. 1009 (1904).

*South Dakota.*—*Roberts v. Ruh*, 114 N. W. 1097 (1908).

*Texas.*—*Walker v. Erwin*, 106 S. W. 164 (1907).

*Wisconsin.*—*Kersten v. Weichman*, 114 N. W. 499 (1908).

10. *Missouri Real Estate Syndicate v. Sims*, 121 Mo. App. 156, 98 S. W. 783 (1906); *Provident, etc., Soc. v. Hadley*, 102 Fed. 856, 861, 8 Sup. Ct. 1142 (1900); *Starr v. U. S.*, 153 U. S. 614 (1893); *Lovejoy v. U. S.*, 128 U. S. 171, 173, 9 Sup. Ct. 57 (1888); *Rucker v. Wheeler*, 127 U. S. 85, 93 (1887).

11. *Gambill v. Fuqua*, (Ala. 1906) 42 So. 735; *Gillespie v. Ashford*, 125 Iowa 729, 101 N. W. 649 (1904); *Kampmann v. McCormick*, (Tex. Civ. App. 1907) 99 S. W. 1147; *Chicago, R. I. & M. Ry. Co. v. Harton*, (Tex. Civ. App. 1904) 81 S. W. 1236.

mitted.<sup>12</sup> The trial court in directing a verdict is not required to specify its reasons for the order.<sup>13</sup>

§ 396. ([3] *Right to the Use of Reason; Directing Verdicts*); *Scintilla of Evidence Not Sufficient*.—It is not at the present day sufficient to prevent ordering a verdict that the party against whom the ruling is asked may have been able to furnish some little evidence in support of his contention.<sup>1</sup> Before the firm establishment in the modern law of evidence of the requirement that all branches of the judicial tribunal should act in obedience to the rules of reason, *any* evidence offered by a party must be submitted to the jury, whether the judge could or could not see any rational purpose for which they might use it. The earlier law allowed the jury to act if a *scintilla*<sup>2</sup> of proof were furnished; and the same proposition is still occasionally announced.<sup>3</sup> In general, however, it is well settled that a *scintilla* is no longer sufficient;<sup>4</sup> as very fully appears in the statement of

12. Missouri Real Estate Syndicate v. Sims, 121 Mo. App. 156, 98 S. W. 783 (1906).

13. Owens v. San Pedro, L. A. & S. L. R. Co., (Utah 1907) 89 Pac. 825.

1. Offutt v. Columbian Exposition, 175 Ill. 472, 51 N. E. 651 (1898); Simmons v. Chicago & Tomah Railroad Co., 110 Ill. 340 (1884).

2. A spark; a remaining particle; the least particle. The doctrine that where there is *any* evidence, however slight, *tending* to support a material issue, the case must go to the jury, since they are the exclusive judges of the weight of the evidence. Black., Law Dict.

3. Louisville, H. & St. L. Ry. Co. v. Hall, 29 Ky. Law Rep. 584, 94 S. W. 26 (1906); McFarland's Adm'r v. Harbison & Walker Co., 82 S. W. 430, 26 Ky. L. Rep. 746 (1904).

4. Georgia.—Carter v. Central of Georgia Ry. Co., 3 Ga. App. 222, 59 S. E. 603 (1907).

Illinois.—Nolan v. Morris, 108 Ill. App. 261 (1903).

Indiana.—Gipe v. Pittsburgh, etc., Ry. Co., 82 N. E. 471 (1907).

Maryland.—Vogeler v. Devries, 56 Atl. 782 (1904).

Nebraska.—Weed v. Chicago, St.

P., M. & O. Ry. Co., 99 N. W. 827 (1904).

North Carolina.—Butts v. Atlantic & N. C. R. Co., 45 S. E. 472 (1903).

Pennsylvania.—Cromley v. Pennsylvania R. Co., 211 Pa. 429, 60 Atl. 1007 (1905).

Texas.—Harpold v. Moss, 106 S. W. 1131 (1908) [judgment reversed (Suppl.) 109 S. W. 928].

West Virginia.—Dye v. Corbin, 53 S. E. 147 (1906).

United States.—New York Cent. & H. R. R. Co. v. Difendaffer, (Ill. 1903) 125 Fed. 893. While in a civil case, where plaintiff is supported solely by circumstantial evidence, the sufficiency thereof is for the jury; yet before there is any evidence for the jury's consideration, the circumstances must in some appreciable degree tend to establish the conclusion claimed. Georgia Ry. & Electric Co. v. Harris, 1 Ga. App. 714, 57 S. E. 1076 (1907). It is not, however, error to submit a question of fact to the jury under proper instructions, where there is evidence, however slight, reasonably tending to support the proposition. Snyder v. Stribling, 18 Okla. 168, 89 Pac. 222 (1907).

the modern rule which is now to be considered. The question under the present development of the law is correctly stated by Meade, J.:<sup>5</sup> "Applying the maxim *de minimis non curat lex*, when we say that there is no evidence to go to the jury we do not mean that there is literally none, but that there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established."<sup>6</sup> It is, indeed, quite frequently said that a verdict cannot be ordered if there is *any* evidence.<sup>7</sup> But this is not the real meaning of those who announce the rule. It should be completed by adding to the words "any evidence" the phrase "from which the jury might *reasonably* find in its favor."<sup>8</sup>

**§ 397. ([3] *Right to the Use of Reason; Directing Verdicts*); Motion Equivalent to a Demurrer to Evidence.—**

A motion to direct a verdict is in effect a demurrer to the evidence of the opposing party; and in passing on the same the court should consider as established all the facts proved and all inferences which can be logically and reasonably drawn from the evidence submitted by the party against whom the order is asked.<sup>1</sup>

5. *Jewell v. Parr*, 13 C. B. 909, 916 (1853).

6. *Wheelton v. Hardisty*, 8 E. & B. 232, 262 (1857). "It is not enough to say that there was some evidence. . . . A scintilla of evidence . . . clearly would not justify the judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude" that the necessary fact was established. *Toomey v. London, etc., Ry. Co.*, 3 C. B. (N. S.) 146, 150, per Williams, J. (1857).

7. *Florida*.—*Jacksonville Electric Co. v. Sloan*, 42 So. 516 (1906).

*Georgia*.—*Davis v. Albritton*, 127 Ga. 517, 56 S. E. 514 (1906).

*Idaho*.—*Idaho Comstock Min. & Mill Co. v. Lundstrum*, 74 Pac. 975 (1903).

*Illinois*.—*Frank Parmelee Co. v. Wheelock*, 224 Ill. 194, 79 N. E. 652 (1906); *Chicago & J. E. Ry. Co. v. Muff*, 122 Ill. App. 183 (1906); *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N. E. 375 (1905); *Chicago City Ry. Co. v. McCaughna*, 216 Ill.

202, 74 N. E. 819 (1905) [*affirming judgment* 117 Ill. App. 538].

*Indiana*.—*Indianapolis Traction & Terminal Co. v. Romans*, 79 N. E. 1068 (1907).

*Kentucky*.—*Provident Sav. Life Assur. Soc. v. Johnson*, 99 S. W. 1159, 30 Ky. L. Rep. 1031 (1907); *Smith v. Park's Adm'r*, 80 S. W. 1167, 27 Ky. L. Rep. 351 (1905).

*Nebraska*.—*Continental Lumber Co. v. Ed. Munshaw & Co.*, 109 N. W. 760 (1906).

*South Carolina*.—*Koon v. Southern Ry.*, 69 S. C. 101, 48 S. E. 86 (1904).

*Vermont*.—*Scofield's Adm'r v. Metropolitan L. Ins. Co.*, 79 Vt. 161, 64 Atl. 1107 (1906).

8. *Hillsborough Grocery Co. v. Le-man*, (Fla. 1906) 40 So. 680.

1. *District of Columbia*.—*Ubhoff v. Brandenburg*, 26 App. Cas. 3 (1905).

*Illinois*.—*Gibson v. Fidelity & Casualty Co.*, 232 Ill. 49, 83 N. E. 539 (1908); *McKenzie Furnace Co. v. Mallers*, 231 Ill. 561, 83 N. E. 451 (1908); *Village of Montgomery*

A motion that a case be withdrawn from the jury admits the truth of all evidence introduced in the opponent's behalf and all the inferences which may be properly drawn therefrom.<sup>2</sup> The court, therefore, will take that view of the evidence most favorable to the party against whom the instruction is asked.<sup>3</sup> It follows that

*v. Robertson*, 229 Ill. 466, 82 N. E. 396 (1907); *Illinois Cent. R. Co. v. McCollum*, 122 Ill. App. 531 (1905); *B. Shoninger Co. v. Mann*, 219 Ill. 242, 76 N. E. 354 (1905); *Birch v. Charleston Light, Heat & Power Co.*, 113 Ill. App. 229 (1903).

*Indiana*.—*Hall v. Terre Haute Electric Co.*, 76 N. E. 334 (1905).

*Iowa*.—*Hansen v. Kline*, 113 N. W. 504 (1907); *Hartman v. Chicago G. W. Ry. Co.*, 110 N. W. 10 (1906); *Meadows v. Ins. Co.*, 67 Iowa 57, 24 N. W. 591 (1885).

*Kansas*.—*Avery v. Union Pac. R. Co.*, 85 Pac. 600 (1906).

*Kentucky*.—*Hobbs v. Ray*, 96 S. W. 589, 29 Ky. L. Rep. 999 (1906); *Southern Ry. Co. in Kentucky v. Goddard*, 28 Ky. L. Rep. 523, 89 S. W. 675 (1905).

*Maryland*.—*Acker, Merrall & Condit Co. v. McGaw*, 106 Md. 536, 68 Atl. 17 (1907); *United Rys. & Electric Co. of Baltimore v. Weir*, 62 Atl. 588 (1905).

*Mississippi*.—*Alexander v. Zeigler*, 36 So. 536 (1904).

*Nebraska*.—*Harris v. Lincoln Traction Co.*, 111 N. W. 580 (1907); *McLean v. Omaha & C. B. Ry. & Bridge Co.*, 103 N. W. 285 (1905).

*New Jersey*.—*Underfeed Stoker Co. v. Hudson County Consumers' Brewing Co.*, 58 Atl. 296 (1904).

*New York*.—*Hirsch v. American Dist. Tel. Co.*, 90 N. Y. Suppl. 464 (1904).

*North Carolina*.—*Harton v. Forest City Telephone Co.*, 59 S. E. 1022 (1907).

*North Dakota*.—*Nystrom v. Lee*, 114 N. W. 478 (1907).

*Wisconsin*.—*McCune v. Badger*, 105 N. W. 667 (1905). The court

is bound to accept as true all the facts which the evidence tends to prove, and to draw against the party requesting such instruction all inferences which the jury might reasonably draw, and in case of a conflict in the evidence consider only that evidence available to the party against whom the instruction is asked. *Roberts v. Terre Haute Electric Co.*, (Ind. App. 1906) 76 N. E. 895. The true question is, is there any evidence in the case which, if true, with all the inferences and intendments reasonably to be drawn from it, would have tended to support a verdict for the plaintiff? This question is to be considered, leaving entirely out of view the effect of all modifying or countervailing evidence. *Ware v. Illinois Cent. R. Co.*, 119 Ill. App. 456 (1905). On a motion for a peremptory instruction for defendant, the case must be considered solely on plaintiff's evidence. *J. I. Case Threshing Mach. Co. v. Sanford*, 97 S. W. 805, 30 Ky. L. Rep. 188 (1906).

2. *Lane v. Yoemen of America*, 125 Ill. App. 406 (1905).

3. *Birmingham Rolling Mill Co. v. Rockhold*, 143 Ala. 115, 42 So. 96 (1904); *Schillinger Bros. Co. v. Smith*, 225 Ill. 74, 80 N. E. 65 (1907); *Hanley v. West Virginia Cent. & P. Ry. Co.*, (W. Va. 1906) 53 S. E. 625; *Detroit Southern R. Co. v. Lambert*, 150 Fed. 555, 80 C. C. A. 357 (1907); *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 147 Fed. 641, 77 C. C. A. 625 (1906); *Williams v. Choctaw, O. & G. R. Co.*, (Tenn.) 149 Fed. 104, 79 C. C. A. 146 (1906); *McGuire v. Blount*, 199 U. S. 142, Adv. S. U. S.

where each party requests a direction of a verdict in his favor, the court must exercise the functions of a jury in determining questions of fact and in drawing inferences warranted by the evidence.<sup>4</sup> In so doing, the judge may adopt as true the statement of any witness or set of witnesses.<sup>5</sup> A motion by each party that a verdict be directed in his favor is not a waiver, if the motions are disallowed, of the right to have the facts passed upon by the jury, and to submit them to a judge.<sup>6</sup>

**§ 398. ([3] *Right to the Use of Reason; Directing Verdicts*); Direction Against the Actor.**—Frequently this power of the court is employed against the party having the burden of proof on the issue, the actor. As was said in *Ryder v. Wombwell*, and cited with approval in later cases,<sup>2</sup> “There is, in every case . . . a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the question

1, 26 S. Ct. 1, 50 L. ed. 142 (1905). Only evidence tending to prove the opponent's case is considered; and it matters not from which party to the cause the evidence comes. Nothing in rebuttal of opponent's case is to be considered. There is to be no weighing of proof on the respective sides. *Chicago, P. & St. L. Ry. Co. v. Condon*, 121 Ill. App. 440 (1905).

4. *Dilcher v. Nellany*, 52 Misc. (N. Y.) 364, 102 N. Y. Suppl. 264 (1907); *Reed v. Spear*, 94 N. Y. Suppl. 1007, 107 App. Div. 144 (1905); *Baker v. D. Appleton & Co.*, 95 N. Y. Suppl. 125, 107 App. Div. 358 (1905); *Cullinan v. Stein*, 177 N. Y. 574, 69 N. E. 1122 (1904); *Leggat v. Leggat*, 176 N. Y. 590, 68 N. E. 1119 (1903); *Bank of Park River v. Town of Norton*, (N. D. 1903) 97 N. W. 860; *Richter v. Phoenix Building & Loan Co.*, 27 Ohio Cir. Ct. R. 793 (1905); *Gilligan v. Supreme Council of Royal Arcanum*, 26 Ohio Cir. Ct. R. 42 (1904); *Sundling v. Willey*, (S. D. 1905) 103 N. W. 38. A verdict so directed is in effect, that of the jury. *Kennedy v. City of New York*, 99 N. Y. App.

Div. 588, 91 N. Y. Suppl. 588 (1904). It is an election that the trial judge decide any questions of fact in the case. *Rosenstein v. Vogemann*, 102 N. Y. App. Div. 39, 92 N. Y. Suppl. 86 (1905). A motion by both parties for the direction of a verdict is not a waiver of a decision by the jury on questions of fact, requiring the court to decide the facts. *National Cash Register Co. v. Bonneville*, 119 Wis. 222, 96 N. W. 558 (1903).

5. *Zeller v. Leiter*, 99 N. Y. Suppl. 624, 114 App. Div. 148 (1906).

6. *Stauff v. Bingenheimer*, (Minn. 1905) 102 N. W. 694. To the contrary effect, see *Larsen v. Calder*, (N. D. 1907) 113 N. W. 103. See also *German Sav. Bank v. Improvement Co.*, 111 Iowa 432, 82 N. W. 1005 (1900); *Thompson v. Brennan*, 104 Wis. 564, 80 N. W. 947 (1899); *German-American Bank v. Cunningham*, 97 N. Y. App. Div. 244, 89 N. Y. Suppl. 836 (1904).

1. L. R. 4 Ex. 32 (necessaries for an infant) (1868).

2. *Bridges v. North London Ry. Co.*, L. R. 7 H. L. 218 (1874).



for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw from the jury and direct a nonsuit<sup>3</sup> or verdict for the defendant, if the onus is on the plaintiff,<sup>4</sup> or on the contrary direct a verdict for the plaintiff if the onus is on the defendant."<sup>5</sup> The simplest situation which can be presented is where the actor produces no evidence in support of his contention<sup>6</sup> or of a material portion of it,<sup>7</sup> evidence so slight that no

3. See also *Brooker v. Scott*, 11 M. & W. 67 (1843) (necessaries for an infant).

4. *Illinois*.—*Lasher v. Colton*, 126 Ill. App. 119 (1906) [*affirmed* in 80 N. E. 122 (1907)]; *Bartlett v. Wabash R. Co.*, 220 Ill. 163, 77 N. E. 96 (1906); *Baltimore & O. S. W. R. Co. v. H. Friend*, 119 Ill. App. 306 (1905).

*Kentucky*.—*Leamon's Adm'r v. Louisville, H. & St. L. Ry. Co.*, 98 S. W. 1016, 30 Ky. L. Rep. 443 (1907).

*Maine*.—*Young v. Chandler*, 102 Me. 251, 66 Atl. 539 (1906).

*Missouri*.—*Matousek v. Bohemian Roman Catholic First Cent. Union*, U. S. A., 192 Mo. 588, 91 S. W. 538 (1905).

*Nebraska*.—*Kielbeck v. Chicago, B. & Q. R. Co.*, 97 N. W. 750 (1903).

*New York*.—*Romaine v. New York, N. H. & H. R. Co.*, 86 N. Y. Suppl. 248, 91 App. Div. 1 (1904).

*South Carolina*.—*Norris v. Clinkscapes*, 47 S. C. 488, 25 S. E. 797 (1896).

*West Virginia*.—*Hi Williamson & Co. v. Nigh*, 53 S. E. 124 (1906); *Ketterman v. Ry. Co.*, 48 W. Va. 606, 37 S. E. 683 (1900).

*United States*.—*Comm'rs of Marion Co. v. Clark*, 94 U. S. 278, 284 (1876).

Certain States forbid the court to exercise this function. The ruling is based upon a misconception of the province of the jury. *Dalton v. Poplar Bluff*, 173 Mo. 39, 72 S. W. 1068 (1902); *Gannon v. Gaslight Co.*, 145

Mo. 502, 46 S. W. 268 (1898); *Littlejohn v. Fowler*, 5 Cold. (Tenn.) 284, 288 (1868). As the greater includes the less, where the actor does not make out a *prima facie* case, it is error to direct a verdict in his favor. *Moultrie Lumber Co. v. Driver Lumber Co.*, (Ga. 1905) 49 S. E. 729.

5. *Baxley Tie Co. v. Simpson & Harper*, 1 Ga. App. 670, 57 S. E. 1090 (1907); *McCall v. Herring*, 118 Ga. 522, 45 S. E. 442 (1903); *Crosby v. Wells*, 73 N. J. L. 790, 67 Atl. 295 (1907).

6. *Illinois*.—*Pennsylvania Co. v. Canadian Pac. Ry. Co.*, 107 Ill. App. 386 (1903).

*Indiana*.—*Jennings v. Ingle*, 73 N. E. 945 (1905).

*Mississippi*.—*Town of Flora v. American Express Co.*, 45 So. 149 (1908).

*Pennsylvania*.—*Warmcastle v. Castner*, 34 Pa. Super. Ct. 464 (1907).

*West Virginia*.—*La Rue v. Lee*, 60 S. E. 388 (1908).

The court is only authorized to direct a verdict for defendant when there is no evidence to support some material part of the plaintiff's cause of action. *Dill v. Marmon*, (Ind. App. 1904) 71 N. E. 669.

Where one of several counts of a declaration is unsustained by the evidence, the jury may be instructed to disregard that count. *Portsmouth St. R. Co. v. Peed's Adm'r*, 102 Va. 662, 47 S. E. 850 (1904).

7. *Agnew v. Montgomery*, (Neb. 1904) 99 N. W. 820.

reasonable man could act in accordance with it;<sup>8</sup> or it appears without contradiction that a conclusive defense to it exists.<sup>9</sup>

*The principle is the same* as that which permits the judge to apply the rule of law to the constituent facts when nothing remains to be done, as to ascertaining what the latter are.<sup>10</sup> Where the evidence is undisputed or the facts clearly established beyond all reasonable doubt, the constituent facts are, in reality, found; all that remains for a verdict or judgment is to apply the rule of law. Doing this in itself considered and apart from the allotment of function between judge and jury is a matter of law. It amounts to construing the law by the facts, construing the law in terms of fact; it is, therefore, a question of law.

*The propriety of a ruling* withdrawing a case from the jury must be decided upon the evidence, by whomever introduced, as it stood at the time when the ruling was made. The facts themselves may have been introduced by either party. Thus an affirmative case, in itself insufficient, may be saved from withdrawal from the jury by evidence produced by the other side.<sup>11</sup> Or, on the contrary, the affirmative case, apparently adequate may be shown by the undisputed evidence of the adversary to be, in reality, such that a jury could not reasonably find in its favor.<sup>12</sup> It has been held that a verdict will not be ordered where the evidence is oral.<sup>13</sup>

*The lack of rational probative quality* in a party's case may demonstrate its existence on any given set of facts in one of two ways: (1) The evidence as presented, in itself considered, may be too slight in probative value to warrant affirmative action by the court, i. e., it fails to so clearly establish a *prima facie* case that no reasonable person could fail to perceive it. (2) The evidence, while sufficient in itself to establish a *prima facie* case,

8. *Illinois*.—Continental Nat. Bank v. Metropolitan Nat. Bank, 107 Ill. App. 455 (1903).

*Indian Territory*.—Edwards v. Brongaugh, 76 S. W. 294 (1903).

*Nebraska*.—Sattler v. Chicago, R. I. & P. Ry. Co., 98 N. W. 663 (1904).

*Oklahoma*.—Kentucky Refining Co. v. Purcell Cotton Seed Oil Mills, 13 Okl. 220, 73 Pac. 945 (1903).

*Texas*.—W. T. Rickards & Co. v. J. H. Bemis & Co., 78 S. W. 239 (1903).

9. *Peckinpaugh v. Lamb*, (Kan. 1905) 79 Pac. 673 (modification).

10. *Supra*, §§ 128 *et seq.*

11. *Gagnon v. Dana*, 69 N. H. 264, 89 Atl. 982 (1897).

12. *Lonzer v. R. Co.*, 196 Pa. St. 610, 46 Atl. 937 (1900).

13. *Cleveland, C., C. & St. L. Ry. Co. v. Henry*, (Ind. App. 1907) 80 N. E. 636.

were certain parts of the evidence omitted, yet shows also the existence of a legally or logically insuperable obstacle in the way of the actor's recovery. In other words, should a party fail to establish a *prima facie* case, or if his evidence shall disclose facts which destroy any right of recovery, the judge should direct a verdict for the opposing side.<sup>14</sup>

**§ 399. ([3] *Right to the Use of Reason; Directing Verdicts*); Direction in Favor of Actor.**—By a parity of reasoning, where the party having the burden of proof produces to the tribunal a case so completely proved, established by such credible witnesses, and beyond the range of controversy to such an extent<sup>1</sup> that the only rational course for the jury to pursue would be to render a verdict in favor of it, or where the actor proves a *prima facie* case and the nonactor introduces no evidence whatever<sup>2</sup> the court may direct the jury to find in accordance with the evidence submitted to them.<sup>3</sup> The same result follows where the actor,

**14.** *Begenish v. Gates*, 2 Alaska 511 (1905).

**1.** *McKnight v. Parsons*, (Iowa 1907) 113 N. W. 858.

Evidence which a party cannot dispute because it is supplied by his own witnesses has for many purposes, the same effect as evidence which cannot be disputed because it is true. *American, etc., Bank v. New York, etc., Co.*, 148 N. Y. 698, 43 N. E. 168 (1896).

If a reasonable conflict of testimony is presented, the ruling should be refused. *Haven v. Missouri Ry. Co.*, 155 Mo. 216, 55 S. W. 1035 (1899) (on cross-examination).

**2.** *Georgia*.—*Murphy v. Davis*, 122 Ga. 306, 50 S. E. 99 (1905); *Whitley v. Clegg*, 120 Ga. 1038, 48 S. E. 406 (1904).

*Illinois*.—*Village of Franklin Park v. Franklin*, 231 Ill. 380, 83 N. E. 214 (1907).

*Missouri*.—*Badger Lumber Co. v. Muehlebach*, 109 Mo. App. 646, 83 S. W. 546 (1904).

*New Jersey*.—*United States Fidelity & Guaranty Co. v. Donnelly*, 61 Atl. 445 (1905).

*New York*.—*Harding v. Roman Catholic Church of St. Peter*, 188 N. Y. 631, 81 N. E. 1165 (1907) [judgment affirmed, 99 N. Y. Suppl. 945, 113 App. Div. 685 (1906)].

*South Carolina*.—*Uzzell v. Horn*, 71 S. C. 426, 51 S. E. 253 (1905).

**3.** *Georgia*.—*Williams Mfg. Co. v. Warner Sugar Refining Co.*, 125 Ga. 408, 54 S. E. 95 (1906); *McCullough v. Pritchett*, 120 Ga. 585, 48 S. E. 148 (1904); *Brown v. Drake*, 109 Ga. 179, 34 S. E. 309 (1899).

*Illinois*.—*Marshall v. Gross, etc., Co.*, 184 Ill. 421, 56 N. E. 807 (1900).

*Missouri*.—*Stone v. Grand Lodge A. O. U. W. of Missouri*, 117 Mo. App. 295, 92 S. W. 1143 (1906).

*New York*.—*Harding v. Roman Catholic Church of St. Peter*, 99 N. Y. Suppl. 945, 113 App. Div. 685 (1906); *People v. Cook*, 8 N. Y. 67, 74 (1853).

*United States*.—*Leach v. Burr*, 188 U. S. 510, 23 Sup. 393 (1902); *Union Pacific Ry. Co. v. McDonald*, 152 U. S. 262, 284, 14 Sup. 619 (1893); *Delaware, etc., Ry. Co. v. Converse*, 139 U. S. 469, 472, 11 Sup. 569 (1890).

having established a *prima facie* case, the nonactor introduces no evidence,<sup>4</sup> or such evidence as is produced is of such slight logical bearing as to show no tendency to offset the case made out by the actor,<sup>5</sup> or is inadmissible under the rules of evidence.<sup>6</sup> Where the nonactor admits the actor's claim<sup>7</sup> or relies on a defense bad in law, the same order should be made. In reality, however, the rules directing verdicts against the party having the affirmative of the issue or in his favor are merely aspects of the same function of the court to enforce the rules of reason.

*The contrary view* has been strongly maintained in North Carolina.<sup>8</sup>

*Actor May Be Either Plaintiff or Defendant.*—The order directing a verdict may be in favor of either plaintiff or defendant. Indeed, whether the ruling in certain cases of verdicts ordered for defendants, as, for example, those involving contributory negligence,<sup>9</sup> takes this form, or that of nonsuiting the plaintiff on account of the strength of the defendant's case, depends on whether the particular defense is in that jurisdiction regarded as affirmative or negative. The evidence, by reason of which the ruling was made, may be introduced by the party against whom the judge is ruling, either as his own evidence in chief, or it may, on the contrary, have been elicited against him on a cross-examination, conducted by his adversary.<sup>10</sup>

4. *De Witt County v. Spaulding*, 111 Ill. App. 364 (1903); *Polhemus v. Prudential Realty Corp.*, (N. J. 1907) 67 Atl. 303.

5. *Nebraska*.—*Henry v. Dussell*, 99 N. W. 484 (1904).

*New Hampshire*.—*Boston & M. R. R. v. Sargent*, 72 N. H. 455, 57 Atl. 688 (1904).

*Missouri*.—*Poindexter v. McDowell*, 110 Mo. App. 233, 84 S. W. 1133 (1905).

*New York*.—*Mitterwallner v. Supreme Lodge of Knights & Ladies of Golden Star*, 90 N. Y. Suppl. 1076 (1904).

*West Virginia*.—*Kuykendall v. Fisher*, 56 S. E. 48 (1906).

Conversely, moving for verdict, in a certain sum, for the actor is an admission of liability and an abandon-

ment of an attempted defense. *Danziger v. Pittsfield Shoe Co.*, 107 Ill. App. 47 (1903).

6. *National City Bank of New York v. Pacific Co.*, 117 N. Y. App. Div. 12, 101 N. Y. Suppl. 1098 (1907) (opinion).

7. *Tilley v. Cox*, 119 Ga. 867, 47 S. E. 219 (1904); *McCormick v. Gubner*, 90 N. Y. Suppl. 1073 (1904).

8. *Anniston, etc., Bank v. Committee*, 121 N. C. 106, 109, 28 S. E. 134 (1897); *Eller v. Church*, 121 N. C. 269, 28 S. E. 364 (1897). But see *Neal v. Ry. Co.*, 126 N. C. 634, 36 S. E. 117 (1900).

9. *Neal v. Ry. Co.*, 126 N. C. 634, 36 S. E. 117 (1900).

10. *American Exchange Bank v. New York, etc., Co.*, 148 N. Y. 698, 43 N. E. 168 (1896).

*In a criminal case* the court is not at liberty to order a verdict for the prosecution.<sup>11</sup>

**§ 400. ([3] *Right to the Use of Reason; Directing Verdicts*); Time for Making Motion.**—When the original case of the actor is closed, the nonactor may test its sufficiency by a request to direct a verdict in his own favor.<sup>1</sup> On the other hand, the court may postpone the decision of the motion until all the evidence is introduced by both sides.<sup>2</sup> The matter is one of administration;<sup>3</sup>—largely concerned at all times, with the expediting of trials.<sup>4</sup> It is too late to move for a verdict after the stage of argument and among the requests for rulings and instructions by the court to the jury.<sup>5</sup> On the other hand, the judge may perceive that, assuming everything the party asking relief alleges in his pleadings to be true, there is no aspect of the matter in which he is entitled to recover. If so, the court may suggest the difficulty, *sua sponte* and entertain a motion to direct a verdict.<sup>6</sup> When such a motion is made, the party will be regarded as entitled to have every allegation of fact taken most strongly in his favor and to the benefit of every fair presumption which may be implied therefrom.<sup>7</sup>

**§ 401. ([3] *Right to the Use of Reason; Directing Verdicts*; Time for Making Motion); Direction on Opening.**—An administrative device of occasional value in expediting causes is for the presiding judge to rule, *sua sponte*, or on request, at the close of the opening to the jury made by the actor's counsel, that the jury could not, on these facts, find in his favor. Great care must, however, be exercised by the court in seeing that the course does not foreclose the party from the use of any probative

11. *People v. Warren*, 122 Mich. 541, 81 N. W. 360 (and cases cited) (1899); *Sparf v. U. S.*, 156 U. S. 51, 177, 15 Sup. 273 (1894). But see *contra*, *Com. v. Magee*, 12 Cox Cr. 549 (1873).

1. *Grooms v. Neff Harness Co.*, (Ark. 1906) 96 S. W. 135. See also *Crean v. McMahon*, 106 Md. 507, 68 Atl. 265 (1907).

2. *White v. Wilmington City Ry. Co.*, (Del. Super. 1906) 63 Atl. 931.

3. *Oates v. Union R. Co.*, 27 R. I. 499, 63 Atl. 675 (1906).

4. *Infra*, §§ 544 *et seq.*

5. *Ewen v. Wilbor*, 208 Ill. 492, 70 N. E. 575 (1904) [*affirming* 99 Ill. App. 132 (1901)]; *Foy v. City of Winston*, 135 N. C. 439, 47 S. E. 466 (1904).

6. *Robinson Humphrey Co. v. Wilcox County*, 129 Ga. 104, 58 S. E. 644 (1907).

7. *Locker v. American Tobacco Co.*, 106 N. Y. Suppl. 115, 121 App. Div. 443 (1907).

fact or argument. The actor must be given an opportunity for deliberation, for reviewing and reinforcing his statement. Every legitimate inference which can rationally be drawn in his favor should be placed on his side of the scales. If, after all suitable administrative precautions against injustice have been taken, the court still feels that the jury could not rationally find in favor of the actor's contention, the judge may properly order a verdict against the actor on his own statement of it. But it must affirmatively be made plain that the actor has no case.<sup>1</sup> The power of the court has even been denied;—it having been held that in a case not founded on a corrupt cause of action, the trial judge has no power, after issue joined, to direct a verdict solely on the insufficiency of the opening statement of the attorney for the plaintiff.<sup>2</sup>

**§ 402. ([3] *Right to the Use of Reason; Directing Verdicts*); Party Moving May Be Required to Rest.**—By analogy to the rule employed by the court in dealing with demurrers to evidence,<sup>1</sup> a party moving that the action be withdrawn from the jury should rest his case, introducing no evidence. It was early contended that by introducing evidence on his own behalf a party waived the right to make a motion to withdraw.<sup>2</sup> While this has not prevailed generally,<sup>3</sup> time of passing upon a motion to withdraw from the jury is clearly a question of administration, and the presiding judge may decline to act on such a motion until after the entire evidence has been introduced,<sup>4</sup> unless the party moving

1. *Brown v. District of Columbia*, 29 App. D. C. 273 (1907). Where in an action for wrongful death, the opening statement of plaintiff's case by her counsel was defective only in that it fell short of stating facts sufficient to warrant plaintiff's recovery, but no fact indicating a complete defense, or showing affirmatively that there was no cause of action, was stated, it was error to direct a final judgment on the merits for defendant on such statement. *Redding v. Puget Sound Iron & Steel Works*, 36 Wash. 642, 79 Pac. 308 (1905).

2. *Martin Emerich Outfitting Co. v. Siegel, Cooper & Co.*, 108 Ill. App. 364 (1903).

1. *Supra*, §§ 139 *et seq.*

2. *Barabasz v. Kabat*, 91 Md. 53,

46 Atl. 337 (1900); *State v. Groves*, 119 N. C. 822, 824, 25 S. E. 819 (1896); *Purnell v. Ry. Co.*, 122 N. C. 832, 835, 29 S. E. 953 (1898). But see *North Carolina Stat.* 1899, c. 131.

3. *Stephen v. Scott*, 43 Kan. 285 (1890); *Weber v. Kansas City, etc., Co.*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587 (1889). "The defendant, by putting in its evidence took the chance of aiding the plaintiff's case; but it is not thereby deprived of the right to ask the court to direct a verdict on all of the evidence." *Weber v. Kansas City, etc., Co.*, 100 Mo. 194 (1889).

4. *Kaley v. Van Ostrand*, (Wis. 1908) 114 N. W. 817; *Robertson v. Perkins*, 129 U. S. 233 (1888); *North Pacific Ry. Co. v. Mares*, 123 U. S.

shall be willing to rest his case, foregoing the privilege of introducing evidence on his own behalf.<sup>5</sup>

*It follows* that a party may not only, as of right, i. e., with the privilege of having the ruling reviewed in an appellate tribunal, should he rest, move to withdraw the issue at the close of his adversary's evidence,<sup>6</sup> he may, when such a motion, made at the close of his opponent's case, has been denied, or when he has neglected to make it at that time,<sup>7</sup> still offer or renew the early motion to withdraw at the close of all the evidence.<sup>8</sup> In this event, he is neither entitled to assign the previous denial as error,<sup>9</sup> nor complain that the evidence introduced subsequent to the original making of the motion has so altered the complexion of the case that the order which should properly have been granted at the earlier stage is correctly refused at the later.<sup>10</sup>

*An administrative advantage* to the cause of justice results from suspending a ruling until the close of the entire evidence.

710 (1887); *Accident Ins. Co. v. Crandal*, 120 U. S. 527 (1886). "The question of the sufficiency of the evidence for the plaintiff to support his action cannot be considered by this court. It has repeatedly been decided that a request for a ruling that upon the evidence introduced the plaintiff is not entitled to recover cannot be made by the defendant, as a matter of right, unless at the close of the whole evidence; and that if the defendant, at the close of the plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error." *Columbia, etc., Ry. Co. v. Hawthorne*, 144 U. S. 202 (1891).

5. *Columbia, etc., Ry. Co. v. Hawthorne*, 144 U. S. 202 (1891); *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700 (1882).

6. *Nashville Ry. & Light Co. v. Henderson*, (Tenn. 1907) 99 S. W. 700.

7. *Gardner v. Porter*, (Wash. 1906) 88 Pac. 121.

8. *Frye & Bruhn v. Phillips*, (Wash. 1908) 93 Pac. 668 [judgment modified on rehearing 89 Pac. 559 (1907)]; *First Nat. Gold Min. Co. of New York*

& *Colorado v. Altwater*, 149 Fed. 393, 79 C. C. A. 213 (1906).

9. *Columbia Ry. Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. 591 (1891).

10. *Illinois*.—*Ames, etc., Co. v. Strachurski*, 145 Ill. 192, 195, 34 N. E. 48 (1893); *Joliet, etc., Ry. Co. v. Velie*, 140 Ill. 59, 26 N. E. 1086 (1892).

*Maryland*.—*New York, etc., Ry. Co. v. Jones*, 94 Md. 24, 59 Atl. 422 (1901); *Barabasz v. Kabot*, 91 Md. 53, 46 Atl. 337 (1900).

*Missouri*.—*Klockenbrink v. Ry. Co.*, 172 Mo. 678, 72 S. W. 900 (1902); *Weber v. Kansas City Co.*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587 (1889).

*New York*.—*Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194 (1902).

*United States*.—*Columbia, etc., Ry. Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. 591 (1891); *Walton v. Wild Goose, etc., Co.*, 123 Fed. 209, 60 C. C. A. 155 (1903); *McCrea v. Parsons*, 112 Fed. 917, 50 C. C. A. 612 (1902).

In *North Carolina* the original error may be reviewed. *Purnell v. Ry. Co.*, 122 N. C. 832, 29 S. E. 953 (1898).

It is always possible that an original case, imperfectly and unskilfully presented on the evidence in chief, may be strengthened by accessions of fact or argument from the evidence designed to complete its overthrow,<sup>11</sup> or on the stage of rebuttal. In judging at the end of all the evidence, facts and arguments may well be considered as they bear on the case of the party against whom the ruling is asked, though furnished by his opponent—the moving party.<sup>12</sup> If the subsequent evidence has added nothing to the strength of the original case, and it would not have been proper to have directed a verdict at the close of the original case, it would not be right to make such an order at the close of all the evidence. On the contrary, if it would have been proper to have so instructed at the close of the original case, a second motion for such an order, made at the close of all the evidence, should be allowed.<sup>13</sup>

**§ 403. ([3] *Right to the Use of Reason; Directing Verdicts*); Nominal or Actual Verdicts.**—If the reason for directing a verdict against the actor be the weakness of his case, the proper verdict is one of nonsuit<sup>1</sup> or default; especially where the non-actor produces no sufficient evidence in support of his own contention.<sup>2</sup> On the other hand, should the result be due to the affirmative strength of the nonactor's case, he is entitled to a verdict in his own favor. Thus, where at the close of the evidence the court reached a conclusion favorable to defendant, who moved for dismissal, a verdict for defendant should have been directed, and a direction to return a "verdict of nonsuit" was

11. *Fields v. Missouri Pac. Ry. Co.*, (Mo. App. 1905) 88 S. W. 134. Plaintiff's failure to make out a *prima facie* case does not preclude him from going to the jury, where defendant offers evidence which, taken in connection with plaintiff's evidence, may reasonably satisfy the jury of plaintiff's right to recover. *Southern Ry. Co. v. Hill*, (Ala. 1905) 39 So. 987.

12. *Chicago, P. St. L. Ry. Co. v. Condon*, 121 Ill. App. 440 (1905); *Dow v. Kansas City Southern Ry. Co.*, 116 Mo. App. 555, 92 S. W. 744 (1906).

13. *Bunnell v. Rosenberg*, 126 Ill.

App. 196 (1906); *Dow v. Kansas City Southern Ry. Co.*, 116 Mo. App. 555, 92 S. W. 744 (1906).

1. *Caudell v. Southern Ry. Co.*, 2 Ga. App. 479, 58 S. E. 689 (1907). If, on the conclusion of plaintiff's evidence, no *prima facie* case for recovery has been made, it is error to direct a verdict for defendant over plaintiff's objections, but a nonsuit should be awarded that plaintiff may renew his action. *Equitable Mfg. Co. v. J. B. Davis Co.*, 130 Ga. 67, 60 S. E. 262 (1908).

2. *Rothenberg v. Rosenberg*, 108 N. Y. Suppl. 678, 57 Misc. 653 (1908).



erroneous in form.<sup>3</sup> On the other hand, it has been held that where the actor has failed to prove his case as laid and the evidence, with all the inferences reasonably drawn therefrom is insufficient to warrant a verdict in his favor, the judge should order a verdict for the nonactor.<sup>4</sup> These divergent rulings may be reconciled, as a matter of administration, by the consideration that where the actor might, upon a new trial, reasonably hope to produce a stronger case, a nominal verdict may well be ordered; otherwise, a final verdict against him may properly be directed.<sup>5</sup> For a like reason a verdict should not be ordered against the actor because of defects in his pleadings which may be cured by amendment.<sup>6</sup>

**§ 404. ([3] *Right to the Use of Reason; Directing Verdicts*); Effect of Waiver.**— Failure to raise a question as to the sufficiency of the evidence to warrant a verdict for a particular party before the evidence is closed amounts to a waiver of the objection.<sup>1</sup> A previous request to direct a verdict does not preclude a party from requesting to have the case submitted to the jury;<sup>2</sup> but such a course may constitute a waiver of the motion to withdraw.<sup>3</sup> A motion to direct a verdict in favor of the moving party may, until acted upon, be itself withdrawn.<sup>4</sup> Where the judge has acted on the motion, it is then too late to withdraw it and ask for a jury trial.<sup>5</sup> An objection to a motion to direct a

3. *Stumpf v. Hallahan*, 185 N. Y. 550, 77 N. E. 1196 (1906); *Stumpf v. Hallahan*, 101 N. Y. App. Div. 383, 91 N. Y. Suppl. 1062 (1905).

4. *Riley v. American Steel & Wire Co.*, 129 Ill. App. 123 (1906); *Smith v. Chicago Junction Ry. Co.*, 127 Ill. App. 89 (1906); *Wamsley v. Cleveland, C., etc., Ry. Co.*, (Ind. App. 1907) 82 N. E. 490 [rehearing *denied*, 83 N. E. 640 (1908)]; *Brunson v. Southwestern Development Co.*, (Ind. Ter. 1907) 104 S. W. 593.

5. *Alex v. Matzke*, 151 Mich. 36, 115 N. W. 251, 14 Detroit Leg. N. 955 (1908).

6. *Cahill v. Illinois Cent. R. Co.*, (Iowa 1908) 115 N. W. 216.

1. *Elwell v. Roper*, 72 N. H. 585, 58 Atl. 507 (1904); *Jordan v. City of Philadelphia*, (Pa. 1903) 125 Fed.

825. This has been put into the somewhat misleading form of saying that a failure to move to dismiss the complaint at the close of plaintiff's case, or of the whole case, is an admission that there is a question of fact. *Rapp v. Hutchinson Stair Elevator Co.*, 87 N. Y. Suppl. 459 (1904).

2. *Seddon v. Tagliabue*, 98 N. Y. Suppl. 236, 50 Misc. 156 (1906).

3. *Chicago Union Traction Co. v. O'Donnell*, 113 Ill. App. 259 (1904) [affirmed in 211 Ill. 349, 71 N. E. 1015]; *Chicago City Ry. Co. v. Fetzer*, 113 Ill. App. 280 (1904).

4. *Cravath v. Baylis*, 99 N. Y. Suppl. 973, 113 App. Div. 666 (1906).

5. *Solomon v. Levine*, 54 Misc. (N. Y.) 270, 104 N. Y. Suppl. 443 (1907); *Simpson v. Hefter*, 43 Misc. (N. Y.) 608, 88 N. Y. Suppl. 232 (1904). The

verdict prevents a waiver of the right to go to the jury.<sup>6</sup> But, on the other hand, when the excepting party states to the court, in such a case, that there is only one question on which he desires to go to the jury, there is a waiver of the right to have any other question presented.<sup>7</sup> Error in denying a motion to direct a verdict is waived, unless the motion is renewed after the taking of evidence is closed.<sup>8</sup>

*Counterclaim.*—Where defendant pleaded a counterclaim, and on the conclusion of plaintiff's evidence procured an order directing a verdict for defendant on plaintiff's cause of action, he is not entitled thereafter to introduce evidence of his counterclaim, as the order concluded the trial, and defendant by moving for a directed verdict waived a hearing on his counterclaim.<sup>9</sup>

**§ 405. ([3] *Right to the Use of Reason; Directing Verdicts*); Action of Appellate Courts.**—The order directing a verdict being a ruling on matter of law<sup>1</sup> the appellate court may pass upon it as upon other questions of a legal nature.<sup>2</sup> Where it has been ruled by the trial court that there is no sufficient evidence to support a verdict for the actor and the appellate court differs in opinion, error may be declared. In the same way, if the trial court has ordered a verdict for the actor and the appellate court is of opinion, as matter of law, that the conclusion is not a rational one, it is also not a legal one, and will be deemed erroneous.<sup>3</sup> Where a trial court in directing a verdict assumes or decides a material fact on which a different conclusion might legitimately be reached on the testimony, the resulting judgment will be set

withdrawal is not too late if made after the judge says what verdict he will order but before the verdict has been returned by the jury or recorded. *Brown v. Joy S. S. Co.*, 55 Misc. (N. Y.) 201, 105 N. Y. Suppl. 81 (1907). After both parties have moved for a directed verdict, and the court has announced its decision, a party cannot demand the submission of the case to the jury, and assign error upon the court's refusal. *Insurance Co. of North America v. Wisconsin Cent. Ry. Co.*, (Wis. 1905) 134 Fed. 794, 67 C. C. A. 300.

6. *Wood v. Rairden*, 97 N. Y. Suppl. 735, 111 App. Div. 303 (1906).

7. *Wood v. Rairden*, 97 N. Y. Suppl. 735, 111 App. Div. 303 (1906).

8. *Bernheimer Bros. v. Becker*, 102 Md. 250, 62 Atl. 526 (1905); *Garland v. Keeler*, (N. D. 1906) 108 N. W. 484.

9. *Miller v. McGannon*, (Neb. 1907) 113 N. W. 170.

1. *Supra*, §§ 394.

2. *Sunderland v. Cowan*, (Md. 1907) 67 Atl. 141.

3. *Montelius v. Montelius*, 209 Pa. St. 541, 58 Atl. 910 (1904); *McComb v. Baskerville*, (S. D. 1906) 106 N. W. 300.

aside.<sup>4</sup> An arbitrary judgment of dismissal rendered before trial of the issue presented, will be reversed on appeal.<sup>5</sup> Where, however, action in favor of the claim would be unreasonable, as where gross laches has intervened,<sup>6</sup> the judge may be justified in adopting the course, as the only available one.

**§ 406. ([3] *Right to the Use of Reason; Directing Verdicts; Action of Appellate Courts*); Effect of Rulings on Evidence.**—The irrationality of finding in favor of a given contention may have been caused by the fact that the presiding judge has made rulings which have had the effect of excluding important portions of the party's proof. This circumstance is immaterial so far as the trial court is concerned, in passing on the motion to withdraw. For the purposes of a motion to direct a verdict, rulings had in connection with the introduction of evidence must be regarded as the law of the case.<sup>1</sup> But in an appellate court these rulings on the admissibility of evidence are themselves open, in most cases, to review. An order, holding erroneous a rejection of important evidence, may involve in it the ruling of the trial court directing a verdict against a contention which was rendered irrational, i. e., illegal of adoption, as the basis of the court's action by reason of the rejection. The trial judge may anticipate the action of the appellate court by refusing to consider in ordering a verdict any evidence already improperly admitted.<sup>2</sup>

**§ 407. ([3] *Right to the Use of Reason*); Judge Sitting as a Jury.**—Where a judge sits as a jury for the determination of issues of fact, a party is as clearly entitled to the use by him of the reasoning faculty as he would be entitled to insist upon its exercise by a jury. It is not, for example, reasonable that a judge so sitting should reject evidence upon a material issue on the ground that it is cumulative,<sup>1</sup> and then deciding that issue in favor of the other side. Where but one rational conclusion can be drawn from the evidence a party may properly move that a verdict be directed by the judge in favor of that result, as he

4. *Rand v. Armm*, (N. J. 1907) 67 Atl. 71.

5. *Teitelbaum v. Scheinert*, 99 N. Y. Suppl. 813 (1906).

6. *Kavanaugh v. Flavin*, 35 Mont. 133, 88 Pac. 764 (1907).

1. *Hamilton v. Jos. Schlitz Brewing Co.*, (Iowa 1905) 105 N. W. 438.

2. *Townsend v. Greenwich Ins. Co.*, 178 N. Y. 634, 71 N. E. 1140 (1904) [*affirming* 86 N. Y. App. Div. 323, 83 N. Y. Suppl. 909 (1903)].

1. *Brown v. Cohen*, 96 N. Y. Suppl. 116 (1905).

might do in a jury case.<sup>2</sup> If there be such evidence that a finding of fact might rationally have been made in either way, it is error to dismiss, summarily, the action.<sup>3</sup> Where there is a conflict in the testimony, the court must judge, of necessity, as to the credibility of the witnesses.<sup>4</sup>

**§ 408. (4) Right to Judgment of Court or Jury.**—A party has a right under the substantive law to insist not only that each branch of the mixed tribunal of judge and jury shall exercise correct reasoning in connection with his case—that all their acts shall be reasonable or reasoned acts;<sup>1</sup> his right extends to a demand that the reasoning faculty shall be applied to any particular portion of his case by that part of the tribunal to which the law has assigned its consideration. In the enjoyment and exercise of this right it is the administrative duty of the presiding judge to protect the litigant.

*In other words*, the judge will require that the jury exercise logical reasoning upon finding the constituent facts in a litigant's case and apply legal reasoning to these constituent facts in all cases where the law requires them to do so. He will refrain, so far as not required by other administrative principles to do otherwise, from intruding on this field of the jury.<sup>2</sup>

**§ 409. ([4] Right to Judgment of Court or Jury); Performance of Functions by Judge.**—A party is entitled to insist upon a discharge by the presiding justice of his customary judicial functions. It is the litigant's right to ask that the court pass upon the competency of evidence.<sup>1</sup> The judge, therefore, will exercise his duty of making preliminary findings of fact; he will not dele-

2. *Foskett, etc., Co. v. Swayne*, 70 Conn. 74, 38 Atl. 893 (1897); *Lee v. Callahan*, 84 N. Y. Suppl. 167 (1903).

3. *Ness v. March*, (Minn. 1905) 104 N. W. 242; *Vincent v. Means*, (Mo. 1904) 82 S. W. 96; *Weisberger v. Martin*, 86 N. Y. Suppl. 115 (1904). Such a ruling does not amount to a withdrawal by the judge from himself as a jury of any portion of the evidence in the case. *Kansas City ex rel. Neill v. Askew*, 105 Mo. App. 84, 79 S. W. 483 (1904). In an action tried to the court, it has no right to dis-

miss the same without findings on the ground that plaintiff has failed to establish a cause of action, except where the evidence for plaintiff would not have justified findings in his favor. *Ness v. March*, (Minn. 1905) 104 N. W. 242.

4. *Miller v. Piatt*, 33 Pa. Super. Ct. 547 (1907).

1. *Supra*, §§ 385 *et seq.*

2. *Supra*, §§ 306 *et seq.*, 311 *et seq.*

1. *Com. v. Culver*, 126 Mass. 464, 466 (1879); *Bartlett v. Smith*, 11 M. & W., 483 (1843).

gate this power to the jury. Nor will he, in general, so discharge his administrative duties as to leave questions of law to them.<sup>2</sup> So the construction of a written contract cannot properly be left to the jury.<sup>3</sup> Still, where no difference of opinion can well arise as to the meaning of the rule of law, no serious administrative error has been committed where the jury are referred to the law rather than directed as to it. It is not error, therefore, where an ordinance has been duly proved, and its terms are plain, for the court to charge the jury that they are to determine what the ordinance is, and whether it has been violated.<sup>4</sup>

On the contrary, the judge must, when requested, rule upon propositions of law submitted to him for the purpose;<sup>5</sup> nor does a considerable delay of a party in doing so conclude his only legal right in this respect.<sup>6</sup>

**§ 410. ([4] *Right to Judgment of Court or Jury*); Waiver.—**

The right of insistence upon discharge of functions by the appropriate branch of the tribunal may be waived, either expressly, or by conduct. Thus, for example, the right to treat the question of contributory negligence as one of law is waived where the defendant has caused such question to be submitted to the jury as one of fact.<sup>1</sup>

**§ 411. ([4] *Right to Judgment of Court or Jury*); General Right to Jury Trial; Witnesses not Permitted to Reason.—**It is an essential part of this right to insist upon performance of judicial

2. *Alabama*.—*Birmingham Ry., La. & Power Co. v. Hayes*, 44 So. 1032 (1907).

*Illinois*.—*Chicago, etc., Ry. Co. v. Walker*, 127 Ill. App. 212 (1906); *Turner v. Owen*, 122 Ill. App. 501 (1905) (contract); *Ware v. Souders*, 120 Ill. App. 209 (1905).

*Missouri*.—*Carpenter v. Chicago & A. Ry. Co.*, 119 Mo. App. 204, 95 S. W. 985 (1906).

*Montana*.—*Gallick v. Bordeaux*, 78 Pac. 583 (1904).

*New York*.—*Outhouse v. Baird*, 106 N. Y. S. 246, 121 App. Div. 556 (1907).

*Texas*.—*Ben C. Jones & Co. v. Gam-mel-States-Man Pub. Co.*, 94 S. W. 191 (1906).

*West Virginia*.—*Tracewell v. Wood*, County Court, 52 S. E. 185 (1905). An instruction which permits the jury to determine what are the material averments of the declaration, is erroneous as leaving to them the determination of legal questions. *Peoria & P. Terminal Ry. v. Hoerr*, 120 Ill. App. 65 (1905).

3. *Standard Mfg. Co. v. Slaughter*, 122 Ill. App. 479 (1905).

4. *Thomasson v. Southern Ry.*, 72 S. C. 1, 51 S. E. 443 (1905).

5. *Western Valve Co. v. Wells*, 127 Ill. App. 655 (1906).

6. *Western Valve Co. v. Wells*, 127 Ill. App. 655 (1906) (six months).

1. *Chicago City Ry. Co. v. Nelson*, 116 Ill. App. 609 (1904).

function by the appropriate branch of the mixed tribunal that the judge should not only protect his own province of judging from invasion by the jury and himself refrain from interfering, by an extension of his own province, from invading the field of the jury's judicial action; he is also required to protect his own reasoning function and that of the jury from invasion by the exercise on the part of witnesses of their reasoning faculties — their "opinions," so-called. Judges, jurors, counsel, reason, should reason, *must* reason, correctly, for attaining sound judicial results. Normally, witnesses do not *reason*; they are required not to do so. Their province is to use the perceptive faculties — their sense organs, and report the phenomena observed by them to the judge and jury who, in accordance with their respective functions, will reason with regard to such original sense impressions. An ideal jury trial would exclude the use of inference by the observers who testify. Any evidence which tends to supplant the reasoning faculty of the jury is equally incompetent with that which operates to confuse or mislead them. It is, therefore, within the scope of the present principle of administration that, except in case of reasonable necessity, the province of the jury in drawing the final inferences of fact should not be invaded by the inference, conclusions or judgment of witnesses.<sup>1</sup> "Whether accepted in terms or not, this view largely governs the administration of the rule" excluding opinion evidence.<sup>2</sup>

**§ 412. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); A Strongly Entrenched Right.**— Entirely apart from this principle of administration, which forbids witnesses to reason, except so far as is necessary, and, in a sense, behind and above it, stands the substantive right of a litigant to a trial by jury. Within its appropriate scope, few of the rights of a litigant are so strongly entrenched in the substantive law. The original conception of the right to a trial by jury is of ancient date and a matter of gradual evolution, in which no distinct steps are traceable.<sup>1</sup> The right was claimed and conceded prior to

1. *Infra*, §§ 1791 *et seq.*

2. Thayer, Prelim. Treat., 525.

1. *Colorado*.— *Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403 (1900).

*Michigan*.— *McRae v. Grand Rapids, etc.*, R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750 (1892).

*Montana*.— *Kleinschmidt v. Dunphy*, 1 Mont. 118 (1869).

*New Jersey*.— *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811 (1899).

*Ohio*.— *Work v. State*, 2 Ohio St. 296, 69 Am. Dec. 671 (1853).

The development of the institution

Magna Charta,<sup>2</sup> and it was confirmed, as is commonly supposed, by that famous historical document.<sup>3</sup> The American colonists took it from England as the palladium of the liberties of Englishmen.<sup>4</sup> No procedural right is conferred by the substantive law upon a litigant with a positiveness, with an unequivocal fullness equal to that which characterizes the vindication of trial by jury in civil<sup>5</sup> and, to a still greater extent, in criminal<sup>6</sup> cases. Especially noticeable is this feature of the written constitutions, state<sup>7</sup> and national,<sup>8</sup> and statutory legislation of the states of the American Union. It would almost seem that a sacred and solemn efficacy, some sure guaranty of automatic and self-created justice, was anticipated from the use of the time-honored formulary—"the right to trial by jury shall never be questioned."

§ 413. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Federal Constitution.—The provisions of the Constitution of the United States relating to the right to trial by jury, extend only to common law actions in the federal courts.<sup>1</sup> The constitutional guaranty does not apply to causes in

of trial by jury and the nature of certain earlier forms of proof-making are briefly considered, *supra*, §§ 269–271.

2. *People v. Harding*, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95 (1884).

3. *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811 (1899); *Proffatt Jury Tr.* § 24; 4 Blackstone Comm. 349.

4. *Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403 (1900); *McRae v. Grand Rapids, etc.*, R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750 (1892); *State v. Holt*, 90 N. C. 749, 47 Am. Rep. 544 (1884); *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671 (1853).

5. *Sharp v. New York*, 18 How. Pr. 213 (1859); *State v. Holt*, 90 N. C. 749, 47 Am. Rep. 544 (1884); *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671 (1853).

6. 4 Blackstone Comm. 349. See also *Flint River, etc., Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248 (1848).

7. *Infra*, § 419.

8. *Infra*, § 413.

1. The courts of the United States include, however, as the term is used in this connection, those of the District of Columbia. *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873 (1898); *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. ed. 223 (1888). Compare *Matter of Fry* (D. C.) 3 Mackey 135 (1884). Within the phrase are also included appropriate courts established by authority of Congress in the territories of the United States, (*People v. Havird*, 2 Idaho 531, 25 Pac. 294 (1889); *Bradford v. Territory*, 1 Okla. 366 34 Pac. 66 (1893); *Carlson v. Sullivan*, 146 Fed. 476, 77 C. C. A. 32 (1906); *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. ed. 1061 (1898); *Webster v. Reid*, 11 How. 437, 13 L. ed. 761. Compare *Walker v. New Mexico, etc.*, R. Co., 7 N. M. 282, 34 Pac. 43 (1893)), and in her colonial possessions, such as the island of Porto Rico. *Ex p. Ortiz*, 100 Fed. 955 (1900). The Federal Constitution does not guaranty to citizens the right to a jury trial, ex-

equity or admiralty;<sup>2</sup> or affect proceedings in the state courts.<sup>3</sup> The interpretation limiting the right so guaranteed as confined to cases where a jury might have been claimed at common law, has been adopted in the federal as well as in the state courts. Such provisions do not, in the least, abridge the right of the states to deal with the question of trial by jury as they may see fit.<sup>4</sup> Right to such a trial in a state court is not a "privilege and immunity" of a citizen of the United States,<sup>5</sup> nor necessary to "due process of law."<sup>6</sup> It is sufficient in such cases if the person claiming to

cept in the courts of the United States. *Ex parte Brown*, (N. C. 1905) 140 Fed. 461.

2. *Home Ins. Co. v. Virginia-Carolina, etc., Co.*, 109 Fed. 681 (1901); *Motte v. Bennett*, 17 Fed. Cas. No. 9,884, 2 Fish. Pat. Cas. 642 (1849).

3. *Alabama*.—*Boring v. Williams*, 17 Ala. 510 (1850).

*Colorado*.—*Huston v. Wadsworth*, 5 Colo. 213 (1880).

*Connecticut*.—*Colt v. Eves*, 12 Conn. 243 (1837).

*Georgia*.—*Foster v. Jackson*, 57 Ga. 206 (1876).

*Indiana*.—*Baker v. Gorden*, 23 Ind. 204 (1864).

*Louisiana*.—*Joseph v. Bidwell*, 28 La. Ann. 382, 76 Am. Rep. 102 (1876); *State v. Carro*, 26 La. Ann. 377 (1874).

*New Mexico*.—*Walker v. New Mexico, etc., R. Co.*, 7 N. M. 282, 34 Pac. 43 (1893).

*New York*.—*In re Newcomb*, 18 N. Y. Suppl. 16 (1891); *Livingston v. New York*, 8 Wend. 85, 22 Am. Dec. 622 (1831).

*Rhode Island*.—*In re New State House*, 19 R. I. 326, 33 Atl. 443 (1895).

*Utah*.—*In re Maxwell*, 19 Utah 495, 57 Pac. 412 (1899).

*Vermont*.—*Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366 (1893).

*United States*.—*Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436 (1877); *Walker v. Sauvinet*, 92 U. S. 90; 23 L. ed. 678 (1875); *Ed-*

*wards v. Elliott*, 21 Wall. 532, 22 L. ed. 487 (1874).

4. *Alabama*.—*Boring v. Williams*, 17 Ala. 510 (1850).

*Connecticut*.—*Colt v. Eves*, 12 Conn. 243 (1837).

*Illinois*.—*Keith v. Henkleman*, 173 Ill. 137, 50 N. E. 692 (1898).

*Louisiana*.—*State v. Kennard*, 25 La. Ann. 238 (1873).

*New York*.—*In re Newcomb*, 18 N. Y. Suppl. 16 (1891).

*Rhode Island*.—*Shaw v. Silverstein*, 21 R. I. 500, 44 Atl. 931 (1899).

*Utah*.—*In re McKee*, 19 Utah 231, 57 Pac. 23 (1897).

*Vermont*.—*Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366 (1893).

*West Virginia*.—*Ex p. McNeeley*, 36 W. Va. 84, 14 S. E. 436, 32 Am. St. Rep. 631, 15 L. R. A. 226 (1892).

*United States*.—*Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436 (1877); *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678 (1875); *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487 (1874); *Williams v. Hert*, 110 Fed. 166 (1901).

5. *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366 (1893); *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678 (1875).

6. *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366 (1893); *Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436 (1877); *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678 (1875).



have been aggrieved has received the benefit of such a trial as is provided by the law of the state forum.<sup>7</sup>

§ 414. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Federal Constitution*); Consular Courts.—Consular courts, established under the treaties and laws of the United States for the trial of American citizens in foreign countries, are not required to provide a trial by jury.<sup>1</sup>

§ 415. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Federal Constitution*); Criminal Cases.—The Federal Constitution guarantees the same right to one accused of crime, under the laws of the United States.<sup>1</sup> But it has no effect to prevent a state from abolishing trial by a common-law jury.<sup>2</sup> It extends in application to the territories of the United States.<sup>3</sup>

§ 416. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Federal Constitution*); “Jury Defined.”—The term “jury,” as used in the Federal Constitution, is the common law petit jury of twelve. Providing a jury of a smaller number, e. g., six,<sup>1</sup> is not a compliance with this provision.

§ 417. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Federal Constitution*); Removed Causes.—To a case removed from a state to a federal court attach all the rights to trial by jury conferred by the Constitution of the United States.<sup>1</sup>

§ 418. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Federal Constitution*); Special Proceedings.—In special proceedings which did not exist at common law, as the exportation of a Chinese person,<sup>1</sup> where no provision

7. *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366 (1893); *Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436 (1877); *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678 (1875).

1. *In re Ross*, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. ed. 581 [*affirming* 44 Fed. 185 (1890) (1891)].

1. *Bettge v. Terr.*, 17 Okl. 85, 87 Pac. 897 (1906).

2. *Darden v. State*, 80 Ark. 295, 97 S. W. 449 (1906).

3. *Bettge v. Terr.*, 17 Okl. 85, 87 Pac. 897 (1906).

1. *Gius v. United States*, (Alaska 1905) 141 Fed. 956, 73 C. C. A. 272.

1. *Phillips v. Moore*, 100 U. S. 208, 25 L. ed. 603 (1879).

1. *U. S. v. Ngum Lun May*, 153 Fed. 209 (1907); *Toy Tong v. U. S.*, 146 338 (1906).

for a jury trial has been made by Congress, none can be claimed under the constitution.

**§ 419. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); State Constitutions.**—In all state constitutions the right to a trial by jury is regarded as existing and the constitution purports only to forbid making change. “Inviolable” is the favorite word to describe the condition as to the right of trial by jury which the organic law decrees shall continue to exist. The right is to be “inviolable;”<sup>1</sup> or the decree is that it shall remain so.<sup>2</sup> While the particular constitutional provision, like most similar enactments, as the right of confrontation,<sup>3</sup> privilege against self-incrimination,<sup>4</sup> and so on, is conferred in the broadest and most unconditioned terms; still, an important qualification, in point of fact, exists. The right in America is coextensive with the claim which the seventeenth century Englishman made for it. The right, as conferred by the American statutes and constitutions, is the ratification of an existing condition. The circumstances under which a jury was commonly employed at common law are those under which it may be claimed by virtue of the constitutional enactment. Wherever, according to the course of

1. *Kimball v. Conner*, 3 Kan. 414 (1866); *Salt Creek Valley, etc., Co. v. Parks*, 50 Ohio St. 568, 35 N. E. 304, 28 L. R. A. 769 (1893); *Ammon v. Johnson*, 3 Ohio Cir. Ct. 263, 2 Ohio Cir. Dec. 149 (1888).

2. *Alabama*.—*Collins v. State*, 88 Ala. 212, 7 So. 260 (1889); *Tims v. State*, 26 Ala. 165 (1855).

*California*.—*Koppikus v. State Capitol Com'rs*, 16 Cal. 248 (1860).

*Connecticut*.—*Meridan Sav. Bank v. McCormack*, 79 Conn. 260, 64 Atl. 358 (1906).

*Florida*.—*Blanchard v. Raines*, 20 Fla. 467 (1884); *Flint River, etc., Co. v. Roberts*, 2 Fla. 102, 48 Am. Dec. 178 (1848).

*Indiana*.—*Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 613 (1883); *Reynolds v. State*, 61 Ind. 392 (1878); *Allen v. Anderson*, 57 Ind. 388 (1877).

*Iowa*.—*In re Bresee*, 82 Iowa 573, 48 N. W. 991 (1891).

*Minnesota*.—*Whallon v. Bancroft*, 4 Minn. 109 (1860).

*Mississippi*.—*Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300 (1858).

*Nevada*.—*State v. McClear*, 11 Nev. 39 (1876).

*New Jersey*.—*Raphael v. Lane*, 56 N. J. L. 108, 28 Atl. 421 (1893); *State v. Doty*, 32 N. J. L. 403, 90 Am. Dec. 671 (1868).

*Oregon*.—*Raymond v. Flavel*, 27 Oreg. 219, 40 Pac. 158 (1895).

*Rhode Island*.—*Crandall v. James*, 6 R. I. 144 (1859).

*South Dakota*.—*Belatti v. Pierce*, 8 S. D. 456, 66 N. W. 1088 (1896).

*Tennessee*.—*Triggally v. Memphis*, 6 Coldw. 382 (1869).

*Texas*.—*Cockrill v. Cox*, 65 Tex. 669 (1886).

*Wisconsin*.—*Norval v. Rice*, 2 Wis. 22 (1853).

3. *Infra*, §§ 458 *et seq.*

4. *See WITNESSES.*

the common law, a jury could not be claimed, a jury cannot be insisted upon by virtue of later general legislation, statutory or constitutional.<sup>5</sup>

§ 420. (*[4] Right to Judgment of Court or Jury; General Right to a Jury Trial; State Constitutions*); "Hitherto Used and Enjoyed."—In certain states it is provided that the right, *as hitherto used and enjoyed*,<sup>1</sup> shall remain inviolate. The additional words seem to add nothing.<sup>2</sup>

But whether the phrase "as heretofore used or enjoyed," or their equivalents, are added or not, the constitution guarantees only the observance of such a right as existed at the time when the constitution was adopted.<sup>3</sup> The fundamental rule is that where

5. *Florida*.—Camp Phosphate Co. v. Anderson, 37 So. 722 (1904).

*Georgia*.—Flint River, etc., Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248 (1848).

*Illinois*.—Seavey v. Seavey, 30 Ill. App. 625 (1889).

*Kansas*.—Kimball v. Conner, 3 Kan. 414 (1866).

*New Jersey*.—Wood v. Tallman, 1 N. J. L. 153 (1793).

*South Carolina*.—New Town Cut v. Scabrook, 2 Strobb. 560 (1846); Marler v. Wear, (Tenn. 1906) 96 S. W. 447.

1. *Delaware*.—Bailey v. Philadelphia, etc., R. Co., 4 Harr. 389, 44 Am. Dec. 593 (1846).

*Georgia*.—Flint River, etc., Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248 (1848); Rouse v. State, 4 Ga. 136 (1848).

*Illinois*.—Gage v. Ewing, 107 Ill. 11 (1883); Seavey v. Seavey, 30 Ill. App. 625 (1889).

*Missouri*.—State v. Allen, 45 Mo. App. 551 (1891).

*New York*.—Devine v. People, 20 Hun 98 (1880).

*Pennsylvania*.—Byers v. Com., 42 Pa. St. 89 (1862).

*South Carolina*.—Charleston v. Stelges, 10 Rich. 438 (1857).

2. The state of Illinois, however, appears to have intentionally added

the words (Gage v. Ewing, 107 Ill. 11 [1883]) to the language employed by its former constitution. Bullock v. Geomble, 45 Ill. 218 (1867); Ross v. Irving, 14 Ill. 171 (1852).

3. *Florida*.—Camp Phosphate Co. v. Anderson, 37 So. 722 (1904).

*Georgia*.—Flint River Steamboat Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248 (1848).

*Illinois*.—Ross v. Irving, 14 Ill. 171 (1852); Mahoney v. People, 98 Ill. App. 241 (1901).

*Indiana*.—Baltimore, etc., R. Co. v. Ketring, 122 Ind. 5, 23 N. E. 527 (1889).

*Kansas*.—Swarz v. Ramala, 63 Kan. 633, 66 Pac. 649 (1901).

*Minnesota*.—Whallon v. Bancroft, 4 Minn. 109 (1860).

*New Jersey*.—State v. Doty, 32 N. J. L. 403, 90 Am. Dec. 671 (1868).

*New York*.—People v. Fisher, 20 Barb. 652, 11 How. Pr. 554, 2 Park. Cr. 402 (1855).

*Ohio*.—Ammon v. Johnson, 3 Ohio Cir. Ct. 263, 2 Ohio Cir. Dec. 149 (1888).

*Oregon*.—Raymond v. Flavel, 27 Or. 219, 40 Pac. 158 (1895).

*Pennsylvania*.—Byers v. Com., 42 Pa. St. 89 (1862).

*South Carolina*.—Charleston v. Stelges, 10 Rich. 438 (1857).

the right existed to a trial by jury at the time of the adoption of the constitution, it exists at the present time,<sup>4</sup> and not otherwise.<sup>5</sup>

**§ 421. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Scope at Common Law.**—At common law the function of the jury is confined to an issue.<sup>1</sup> The right to a trial by jury was, as a rule, restricted to actions at law in which there was an issue of fact raised by means of pleadings.<sup>2</sup> In actions at law in contract, tort, replevin, real actions,<sup>3</sup> and the like, where the use of a jury was customary at common law, the right is, as a rule, secured to litigants by American constitutions or other statutes, state or federal.

**§ 422. ([4] *Right to Judgment of Court or Jury; General Right to Jury Trial; Scope at Common Law*); Civil Actions.**—A litigant may insist upon a trial by jury in all civil actions where the right existed at common law. In the absence of constitutional or statutory modifications, this rule applies equally whether the

*Tennessee.*—*Trigally v. Memphis*, 6 Coldw. 352 (1869).

*Wisconsin.*—*Gaston v. Babcock*, 6 Wis. 503 (1858).

4. *Florida.*—*Flint River, etc., Co. v. Roberts*, 2 Fla. 102, 48 Am. Dec. 178 (1848).

*Georgia.*—*Mattox v. State*, 115 Ga. 212, 41 S. E. 709 (1902).

*Indiana.*—*Reynolds v. State*, 61 Ind. 392 (1878).

*Iowa.*—*Reed v. Wright*, 2 Greens 15 (1849).

*Kentucky.*—*Carson v. Com.*, 1 A. K. Marsh. 290 (1818).

*New Hampshire.*—*East Kingston v. Towle*, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174 (1868).

*New Jersey.*—*Raphael v. Lane*, 56 N. J. L. 108, 28 Atl. 421 (1893).

*New York.*—*Kinne v. Kinne*, 2 Thoms. & C. 393 (1873).

*Pennsylvania.*—*Rhines v. Clark*, 51 Pa. St. 96 (1865).

*South Carolina.*—*White v. Kendrick*, 1 Brev. 469 (1805).

*Texas.*—*Cockrill v. Cox*, 65 Tex. 669 (1886).

5. *People v. City of Alton*, 233 Ill. 542, 84 N. E. 664 (1908).

1. *Supra*, § 275.

2. *California.*—*Taylor v. Ford*, 92 Cal. 419, 28 Pac. 441, 24 Pac. 942 (1890); *People v. Blake*, 19 Cal. 579 (1862); *Koppikus v. State Capitol Com'rs*, 16 Cal. 248 (1860).

*Nebraska.*—*Yeiser v. Broadwell*, 115 N. W. 293 (1908); *Lett v. Hammond*, 59 Neb. 339, 80 N. W. 1042 (1899).

*North Carolina.*—*Andrews v. Pritchett*, 66 N. C. 387 (1872).

*Ohio.*—*Clarke v. Huff*, 6 Ohio Dec. (Reprint) 771, 8 Am. L. Rec. 26 (1879).

*Pennsylvania.*—*Glone v. Arleth*, 162 Pa. St. 550, 29 Atl. 862 (1894).

*South Carolina.*—*Gregory v. Ducker*, 31 S. C. 141, 9 S. E. 780 (1889).

*Washington.*—*Johnson v. Goodtime*, 1 Wash. Terr. 484 (1875).

3. *Lee v. Conran*, 213 Mo. 404, 111 S. W. 1151 (1908) (alluvial deposits).

action is one in tort<sup>1</sup> or contract;<sup>2</sup> including money judgments.<sup>3</sup> It extends also, as at common law, to actions involving the title to any interest in lands,<sup>4</sup> to actions of replevin. The intervention of a jury is not required where the issue raised is one as to a proposition of law,<sup>5</sup> or is to be resolved by an examination of the record.<sup>6</sup>

**§ 423. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Scope at Common Law*); Compulsory References.**—The judicial machinery at the time of the adoption of various state constitutions included a provision for the ordering of a compulsory reference where there is a long and complicated account. Such an order, therefore, does not violate the right to trial by jury.<sup>1</sup>

1. *Kentucky Land, etc., Co. v. Crabtree*, 113 Ky. 922, 70 S. W. 31, 24 Ky. L. Rep. 743 (1902); *Bratton v. Catawba Power Co.*, (S. C. 1908) 60 S. E. 673 (punitive damages); *Righton v. Righton*, 1 Mill Const. 130 (1817) (assignment of owner).

2. *Michael v. Albright*, 126 Ind. 172, 25 N. E. 902 (1890); *Galway v. State*, 93 Ind. 161 (1883); *McCoy v. Oldham*, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208 (1890); *Bardwell v. Clare*, 47 Iowa 297 (1877); *Parker v. Slaughter*, 24 Iowa 252 (1868) (bond); *Van Raalte v. Epstein*, 202 Mo. 173, 99 S. W. 1077 (1906); *Sherman v. Randolph*, 13 Okl. 224, 74 Pac. 102 (1903).

3. *Arkansas*.—*Weaver v. Arkansas Nat. Bank*, 73 Ark. 462, 84 S. W. 510 (1904).

*California*.—*Platt v. Havens*, 119 Cal. 244, 51 Pac. 342 (1897).

*Minnesota*.—*Nordeen v. Buck*, 79 Minn. 352, 82 N. W. 644 (1900).

*Nebraska*.—*Lett v. Hammond*, 59 Neb. 339, 80 N. W. 1042 (1899).

*South Carolina*.—*Sloan v. Courtenay*, 54 S. C. 314, 32 S. E. 431 (1898).

*Wisconsin*.—*South Milwaukee Co. v. Murphy*, 112 Wis. 614, 88 N. W. 583, 58 L. R. A. 82 (1902).

4. *Alaska*.—*Seliner v. McKay*, 2 Alaska 564 (1905).

*New York*.—*Ryan v. Murphy*, 116 N. Y. App. Div. 242, 101 N. Y. Suppl. 553 (1906).

*South Carolina*.—*Bratton v. Catawba Power Co.*, 60 S. E. 673 (1908).

*West Virginia*.—*State v. Jackson*, 49 S. E. 465 (1904).

*United States*.—*Carlson v. Sullivan*, 146 Fed. 476, 77 C. C. A. 32 (1906).

**Condemnation proceedings** may be included. *State v. Jones*, 139 N. C. 613, 52 S. E. 240 (1905).

5. *Harrison v. Chiles*, 3 Litt. (Ky.) 194 (1823); *Wilson v. Forsyth*, 16 How. Pr. 448 (1857); *Seranton School Dist. v. Simpson*, 133 Pa. St. 202, 19 Atl. 359 (1890). See also *Averill v. Chadwick*, 153 Mass. 171, 26 N. E. 441 (1891).

6. *Johnston v. Atwood*, 2 Stew. 225 (1829); *Bank of Eau Claire v. Reed*, 232 Ill. 238, 83 N. E. 820 (1908); *State v. Martin*, 38 W. Va. 568, 18 S. E. 748 (1893); *Amory v. Amory*, 26 Wis. 152 (1870).

1. *Roughton v. Sawyer*, (N. C. 1907) 56 S. E. 480; *Smith v. Kurnert*, (N. D. 1908) 115 N. W. 76.

**§ 424. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Scope at Common Law* ); Judicial Powers Reserved.**—The power of the presiding judge to set aside verdicts,<sup>1</sup> order nonsuits<sup>2</sup> or other verdicts,<sup>3</sup> award sentence<sup>4</sup> and perform the other functions of his judicial office, are not, in the absence of express provisions,<sup>5</sup> affected by these enactments regarding jury trial. He may reasonably award compensation to officers acting under his orders, or, when permitted to do so under statutory authority.<sup>6</sup> But the court cannot find *facts* and so deprive a party of his right to a jury trial.<sup>7</sup> Nor are the rules of evidence, e. g., those relating to the existence of presumptions of fact<sup>8</sup> or law, nor the right of the court to instruct the jury as to them, in any way affected. A judge cannot by a *remittitur* to an excessive jury verdict, substitute his judgment for theirs.<sup>9</sup> The waiver, moreover, of the right to a jury trial implied in adopting alternative forms of trial, is strictly limited to the necessary implications. For example, a party does not, by agreeing to the appointment of a referee, authorize the judge to disregard the findings of the referee and make different ones of his own.<sup>10</sup>

**§ 425. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial* ); Statutory Construction.**—The same canon of interpretation is adopted in case of a statutory enactment regulating trial by jury. In the absence of further specification the system as it existed at the time of the constitution will be understood.<sup>1</sup>

1. *Supra*, §§ 306 *et seq.*

2. *Bohn v. Pacific Electric Ry Co.*, (Cal. App. 1907) 91 Pac. 115; *New England Trust Co. v. Boston Elevated Ry. Co.*, 191 Mass. 223, 77 N. E. 769 (1906).

3. *Moore & Jester v. H. B. Smith Mach. Co.*, 4 Ga. App. 151, 60 S. E. 1035 (1908) (where all defenses are stricken); *Jester v. Bainbridge State Bank*, 4 Ga. App. 469, 61 S. E. 926 (1908) (plaintiff's case admitted; answer set up no defense); *Central of Georgia Ry. Co. v. Price*, (Ga. 1906) 49 S. E. 683 [petition for rehearing *overruled*, 49 S. E. 683 (1905)]; *Tilley v. Cox*, 119 Ga. 867, 47 S. E. 219 (1904); *Cadwalader v. Springsteen*, 36 Pa. Sup. Ct. 134 (1908);

*Gunn v. Union R. Co.*, 27 R. I. 320, 62 A. 118 (1905).

4. *Ex parte Brown*, 39 Wash. 160, 81 Pac. 552 (1905).

5. *Reed & McCormick v. Gold*, (Va. 1903) 45 S. E. 868 (hear demurrers to evidence).

6. *Schutz v. Burges*, (Tex. Civ. App. 1908), 110 S. W. 494.

7. *Merritt v. State*, (Tex. Civ. App. 1906) 94 S. W. 372.

8. *Vance v. State*, 128 Ga. 661, 57 S. E. 889 (1907).

9. *Heimlich v. Tabor*, (Wis. 1905) 102 N. W. 10.

10. *U. S. v. Ramsey*, (Idaho 1907) 158 Fed. 488.

1. *Camp Phosphate Co. v. Anderson*, (Fla. 1904) 37 So. 722; *Risser*

*Court May Allow Jury Trial.*—That the judge may, in exercise of his administrative powers, employ a jury in cases where such a trial cannot be claimed as of right, is undoubted.<sup>2</sup>

**§ 426. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Statutory Construction*); Criminal Cases.**

—A person cannot be punished either by fine, imprisonment or committal to an institution for reformatory purposes,<sup>1</sup> without a trial by jury—in any case where, at common law, a person so accused would have had a right to claim a jury.<sup>2</sup> As may be seen elsewhere,<sup>3</sup> the legislature may provide otherwise in case of misdemeanors and minor offenses.<sup>4</sup> But unless it has seen fit to do so, the right attaches in all such instances.<sup>5</sup>

**§ 427. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Statutory Construction; Criminal Cases*); Waiver Forbidden.**—The defendant is not at liberty to waive such a right.<sup>1</sup> So strong a course is, however, intended only

*v. Hoyt*, 53 Mich. 185, 18 N. W. 611 (1884); *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609 (1897); *New York Fire Dept. v. Harrison*, 2 Hilt. 455, 9 Abb. Pr. 1, 17 How. Pr. 273, 18 How. Pr. 181 (1859); *Plimpton v. Somerset*, 33 Vt. 283 (1860).

2. *McLean v. Tompkins*, 18 Abb. Pr. 24 (1857).

1. *Pugh v. Bowden*, 54 Fla. 302, 45 So. 499 (1907); *Com. v. Fisher*, 27 Pa. Super. Ct. 175 (1905) (incorrigible child). The power to commit an infant to a reformatory institution has, however, been held to be not so much in the nature of a criminal as of an equitable nature. Accordingly the accused has no right to a jury trial. *Dinson v. Drosta*, (Ind. App. 1907) 80 N. E. 32. Such a proceeding is not so much a trial as an effort to prevent the necessity for one. Accordingly, a jury is not required. *Com. v. Fisher*, 213 Pa. 48, 62 A. 198 (1905); *State v. Packenham*, 40 Wash. 403, 82 Pac. 597 (1905).

2. *Hughes v. State*, 29 Ohio Cir. Ct. R. 237 (1907). It has been held that

any statute, which subjects an individual to a greater punishment for crime without the verdict of a jury than it was understood at the time of the adoption of the state constitution could be thus inflicted, is void. *Wilmarth v. King*, 74 N. H. 512, 69 Atl. 889 (1908).

3. *Infra*, § 452.

4. *Bray v. State*, (Ala. 1904) 37 So. 250; *Bowles v. District of Columbia*, 22 App. D. C. 321 (1903); *Kubach v. State*, 25 Ohio Cir. Ct. R. 488 (1904).

5. *City of Vineland v. Denoflio*, (N. J. 1907) 65 Atl. 837.

1. *Illinois*.—*Dallman v. People*, 113 Ill. App. 507 (1904).

*Iowa*.—*State v. Rea*, 101 N. W. 507 (1904).

*Nebraska*.—*Michaelson v. Beemer*, 101 N. W. 1007 (1904).

*Oklahoma*.—*In re McQuown*, 91 Pac. 689, 11 L. R. A. (N. S.) 1136 (1907).

*Texas*.—*Jones v. State*, 106 S. W. 345 (1907); *Archer v. State*, 100 S. W. 769 (1907).

*Wisconsin*.—*Jennings v. State*, 114 N. W. 492 (1908). This is true

for the protection of the accused in cases of serious felony. He may effectively make such waiver in case of misdemeanors, minor offenses,<sup>2</sup> or the like.<sup>3</sup> The same right of waiver obtains in certain special proceedings criminal in form; e. g., those designed to punish, under a statute, for failure to answer questions propounded by a court-martial,<sup>4</sup> the unlawful sale of oleomargarine,<sup>5</sup> bastardy proceedings, etc.<sup>6</sup>

**§ 428. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Statutory Construction*); Suits for Penalties.**—An action for a penalty conferred by statute may be a civil action;<sup>1</sup> and, accordingly, be without the scope of a provision securing trial by jury in criminal causes.

*Venue.*—Trial by jury means trial by jury in the county where the alleged offense was committed.<sup>2</sup>

*The power of the court* to perform its ordinary common law judicial functions, e. g., receive pleas of guilty,<sup>3</sup> determine the nature of the offense thus admitted,<sup>4</sup> instruct jury as to grades of

even where one jurymen absents himself and cannot be found. *Jennings v. State*, (Wis. 1908) 114 N. W. 492. One accused of an infamous crime, not a felony, cannot agree with effect that two jurors may be excused from service and that the verdict of ten jurors shall be that of the jury. *Dichinson v. U. S.* (Mass. 1908) 159 Fed. 801, 86 C. C. A. 625. For the same reasons a statute permitting a jury of six to award verdicts in case of crimes punishable by imprisonment has been held to be unconstitutional. *Robinson v. Wayne Circuit Judges*, 151 Mich. 315, 115 N. W. 682, 14 Detroit Leg. N. 945 (1908).

**2. California.**—*Goodman v. Sup. Ct. of Cal. in Santa Clara County*, (App. 1908) 96 Pac. 395.

**Georgia.**—*Moore v. State*, 124 Ga. 30, 52 S. E. 81 (1905); *Hollis v. State*, 118 Ga. 760, 45 S. E. 617 (1903) (vagrancy).

**Illinois.**—*Jacobs v. People*, 218 Ill. 500, 75 N. E. 1034 (1905).

**Iowa.**—*Town of Lovilia v. Cobb*, 102 N. W. 496 (1905).

**Kansas.**—*State v. Wells*, 77 Pac. 547 (1904).

**Ohio.**—*Simmons v. State*, 75 Ohio St. 346, 79 N. E. 555 (1906).

**Washington.**—*State v. Pakenham*, 40 Wash. 403, 82 Pac. 597 (1905).

**3. Otto v. State** (Tex. Cr. App. 1905) 87 S. W. 698 (Local Option Law).

**4. U. S. Praeger**, 149 Fed. 474 (1907).

**5. Broadwell v. United States**, 195 U. S. 65, Adv. S. U. S. 826, 24 S. Ct. 49 L. ed. (1904).

**6. Kanorowski v. People**, 113 Ill. App. 468 (1904).

**1. City of Chicago v. Knobel**, 232 Ill. 112, 83 N. E. 459 (1908).

**2. People v. Brock**, 149 Mich. 464, 112 N. W. 1116, 14 Detroit Leg. N. 506 (1907).

**3. Hollibaugh v. Hehn**, (Wyo. 1905) 79 Pac. 1044.

**4. People v. Chew Lan Ong**, 141 Cal. 550, 75 Pac. 186 (1904).



crime,<sup>5</sup> and the like,<sup>6</sup> is not affected by the constitutional guaranty of a jury trial. Such a right is not violated because few of the same race as the accused were put on the jury.<sup>7</sup> No right to a jury trial is infringed by permitting the judge, rather than the jury, to determine on the punishment for crime.<sup>8</sup>

*The right of an appellate court to order a lower court to impose a lesser sentence than that of which the accused stands convicted is not inconsistent with a right to trial by jury. Such a court may lawfully, for example, reduce a conviction of murder in the second degree to one of manslaughter.*<sup>9</sup>

**§ 429. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial* ); Incidental Hearings.**—The jury are not concerned with hearings prior, incidental or subsequent to the trial of the issue.

**§ 430. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial* ); Motions.**—They do not, for example, take part in the hearing upon motions,<sup>1</sup> e. g., for a *pluries* execution<sup>2</sup> or for an execution against a stockholder on the unsatisfied judgment against the corporation,<sup>3</sup> or similar matters.<sup>4</sup> Where, however, a motion raises the same issue of fact as would, if stated upon pleadings, be triable by a jury, one has been allowed.<sup>5</sup> But motions in general, such as those for the removal of a default,<sup>6</sup> to vacate an order for arrest,<sup>7</sup> for the granting of a

5. *State v. McPhail*, 39 Wash. 199, 81 Pac. 683 (1905).

6. *Barry v. Truax*, (N. D. 1904) 65 L. R. A. 762, 99 N. W. 769 (order change of venue).

7. *Miera v. Territory*, (N. M. 1905) 81 Pac. 586.

8. *State v. Eubanks*, 199 Mo. 122, 97 S. W. 876 (1906).

9. *Darden v. State*, 80 Ark. 295, 97 S. W. 449 (1906).

1. *Indiana*.—*Logansport, etc., R. Co. v. Patton*, 51 Ind. 487 (1875).

*Maryland*.—*Gittings v. State*, 33 Md. 458 (1871).

*Missouri*.—*Hensley v. Baker*, 10 Mo. 157 (1846); *Schaeffer v. Phoenix, etc., Co.*, 4 Mo. App. 115 (1877).

*New York*.—*McLean v. Tompkins*, 18 Abb. Pr. 24 (1857).

*North Carolina*.—*Pasour v. Lineberger*, 90 N. C. 159 (1884).

*Pennsylvania*.—*Banning v. Taylor*, 24 Pa. St. 289 (1855).

*Wisconsin*.—*Amory v. Amory*, 26 Wis. 152 (1870).

2. *Hobson v. Bein*, 2 Rob. (La.) 109 (1842).

3. *Erskine v. Lowenstein*, 11 Mo. App. 595 (1882); *Schaeffer v. Phoenix, etc., Co.*, 4 Mo. App. 115 (1877).

4. *Cassady v. Morris*, (Okl. 1907) 91 Pac. 888 (discharge property from attachment).

5. *Drea v. Carrington*, 32 Or. St. 595 (1877).

6. *Quick v. Lawrence, Nat. Bank*, 10 Ind. App. 523, 38 N. E. 73 (1894).

7. *Light v. Canadian County Bank*, 2 Okl. 543, 37 Pac. 1075 (1894).

new trial<sup>8</sup> and similar applications, are addressed to the administrative power of the court and do not, therefore, require the use of a jury.

**§ 431. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Proceedings Subsequent to Verdict.**— Nor have they anything to do with proceedings subsequent to the verdict; e. g., those which follow the judgment,<sup>1</sup> as opening the judgment,<sup>2</sup> settling of exceptions,<sup>3</sup> the taxing of costs<sup>4</sup> and the like.

**§ 432. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Special Proceedings.**— Where, at common law, a party was entitled to a trial by jury, as in case of *quo warranto*,<sup>1</sup> contempt,<sup>2</sup> writ of mandate,<sup>3</sup> or proceedings of a similar nature, he will be regarded as having the same right under the statutory or constitutional provisions. A certain measure of good faith is, however, required on the part of the claimant of a right to trial by jury in such a connection. One who at a preliminary stage of an offense would have had, at common law, no right to a jury, cannot proceed to complete his wrongful act for the purpose of gaining it.<sup>4</sup> Where, as in case of a criminal contempt,<sup>5</sup> a writ

8. *Houston v. Bruner*, 59 Ind. 25 (1877); *Carpenter v. Brown*, 50 Iowa 451 (1879).

1. *Banning v. Taylor*, 24 Pa. St. 289 (1855).

2. *Groninger v. Acker*, 32 Pa. Sup. Ct. 124 (1906).

3. *McGehee v. Brown*, 3 La. Ann. 272 (1848).

4. *Richardson v. City of Centerville*, (Iowa 1903) 114 N. W. 1071 (attorney's fee); *Forrester v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 397, 74 Pac. 1088 (1904).

1. *Wheeler v. Caldwell*, (Kan. 1904) 75 Pac. 1031; *Metz v. Maddox*, 189 N. Y. 460, 82 N. E. 507 (1907) [*order reversed*, 105 N. Y. S. 702]. A right to a jury may be claimed on an issue of fact. *Louisiana & Northwest R. Co. v. State*, (Ark. 1905) 88 S. W. 559; *Ohio Turnpike Co. v. Waechter*, 25 Ohio Cir. Ct. R. 605 (1903).

2. *Colorado*.—*People v. Tool*, 86 Pac. 224 (1905).

*Florida*.—*Johnson v. Price*, 36 So. 1031 (1904).

*Illinois*.—*O'Neil v. People*, 113 Ill. App. 195 (1904).

*Iowa*.—*Drady v. District Court of Polk County*, 102 N. W. 115 (1905).

*Missouri*.—*State ex inf. Crow v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903).

*Texas*.—*Ex parte Allison*, 90 S. W. 492 (1905).

3. *Nelson v. Steele*, (Idaho 1906) 88 Pac. 95.

4. *State ex rel. Attorney-General v. Canty*, 207 Mo. 439, 105 S. W. 1078 (1907).

5. *O'Flynn v. State*, 89 Miss. 850, 43 So. 82, 9 L. R. A. (N. S.) 1119 (1907); *Connell v. State*, (Neb. 1907) 114 N. W. 294.

of *habeas corpus*<sup>6</sup> or other special proceeding,<sup>7</sup> no jury trial could be had under the earlier law, none is available under the later. Even in such cases the presiding judge has the administrative power to submit an issue of fact to the jury.<sup>8</sup> In certain special proceedings, such as *scire facias*,<sup>9</sup> the issue of domicile as essential to jurisdiction,<sup>10</sup> determination of the right of a claimant to a garnisheed fund,<sup>11</sup> the right to a jury has been conferred by statute.

**§ 433. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Statutory Proceedings.**—Novel and special modes of trial such as the assessment of damages on condemnation proceedings,<sup>1</sup> the ascertainment of extra lateral mining rights,<sup>2</sup> destruction of intoxicating liquor intended for illegal sale<sup>3</sup> and the like<sup>4</sup> may or may not have the incident of a right to a jury trial, as the legislature may determine.

6. *Pittman v. Byars*, (Tex. Civ. App. 1908), 112 S. W. 102.

7. *Koppikus v. State Capitol Com'rs*, 16 Cal. 248 (1860); *Nelson v. Steele*, (Idaho 1906) 88 Pac. 95 (writ of mandate); *City of Hoboken v. O'Neill*, (N. J. 1906) 64 Atl. 981 (summary investigations into municipal expenditures); *Wearne v. France*, 3 Wyo. 273, 21 Pac. 703 (1889).

8. *Marler v. Wear*, (Tenn. 1906), 96 S. W. 447.

9. *Hollister v. United States*, (S. D. 1906) 145 Fed. 773.

10. *J. D. Hudgins & Bro. v. Low*, (Tex. Civ. App. 1906) 94 S. W. 411.

11. *Hubbard v. Lamburn*, 189 Mass. 296, 75 N. E. 707 (1905).

1. *Ingram v. Maine Water Co.*, 98 Me. 566, 57 Atl. 893 (1904); *City of St. Louis v. Lawton*, 189 Mo. 474, 88 S. W. 80 (1905); *State v. Jones*, 139 N. C. 613, 52 S. E. 240 (1905). But see, as to past damages, *City of Waterbury v. Platt Bros. & Co.*, 76 Conn. 435, 56 Atl. 856 (1904). It is within the option of the legislature to permit a person or corporation on whose behalf the right of eminent domain is exercised to enter into active possession

of the land before the question of damages is settled. *St. Louis, I. M. & S. Ry. Co. v. Pfau*, 212 Mo. 398, 111 S. W. 10 (1908). So far as the right to a jury trial extends, it may be regarded as paramount. *St. Louis, I. M. & S. Ry. Co. v. Pfau*, 212 Mo. 398, 111 S. W. 10 (1908).

2. *Hickey v. Anaconda Copper Min. Co.*, (Mont. 1905) 81 Pac. 806.

3. *Kirkland v. State*, (Ark. 1904) 78 S. W. 770.

4. *Arkansas*.—*Furth v. State* 78 S. W. 759 (1904) (destroy gambling instruments).

*Colorado*.—*Kite v. People*, 74 Pac. 886 (1903) (destruction of gambling devices).

*Illinois*.—*Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725 (1904) (liability of stock-holder).

*Indiana*.—*Tomlinson v. Bainaka*, 70 N. E. 155 (1904) (partition fences).

*Iowa*.—*Neff v. Manuel*, 97 N. W. 73 (1903) (claim of an intervenor in garnishment proceedings).

*Maine*.—*Ingram v. Maine Water Co.*, 98 Me. 566, 57 Atl. 893 (1904) (mills and mill dams).

*North Carolina*.—*Wallace v. Salisbury*, 147 N. C. 58, 60 S. E. 713

*Proceedings for the committal of insane persons may properly take place without the right to a trial by jury.*<sup>5</sup>

**§ 434. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Right Must Be Claimed before a Court.—**

Only in a "court" as that term was commonly understood at the common law, when the provisions regarding jury trials were adopted, can such a trial be lawfully demanded at the present time. The fact that a body of men as arbitrators<sup>1</sup> are exercising judicial powers confers no right to a trial by jury.

*Common Law Courts.*—A right to trial by jury, as usually limited, extends to all courts of general jurisdiction and record which proceed according to the course of the common law.<sup>2</sup> Thus in courts of admiralty,<sup>3</sup> equity<sup>4</sup> or probate<sup>5</sup> as no jury was employed at common law, so no just claim to one on the part of a litigant exists under the constitutional guaranties.

*Where no machinery is provided* or actually used in any court, it will be judicially assumed that a litigant cannot, merely by asking for a jury, obtain one.<sup>6</sup>

**§ 434a. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Admiralty Courts.—**

No right to trial by jury in courts of admiralty having existed at common law, none can properly be demanded under state or federal constitutions.<sup>1</sup> By statute, however, such a right may be conferred, either generally, or on the trial of specific issues, or as to causes arising in a

(1908) (validity of liquor election);  
Burke v. Jenkins, (N. C. 1908) 61  
S. E. 608 (removal from office);  
Porter v. Armstrong, 134 N. C. 447,  
46 S. E. 997 (1904).

*Nebraska.*—State v. Fleming, 97  
N. W. 1063 (1903).

*Pennsylvania.*—In re Poewel's Estate, 209 Pa. 76, 57 Atl. 1111 (1904) (issues before auditor).

*Rhode Island.*—In re School Committee of North Smithfield, 26 R. I. 164, 58 Atl. 628 (1904).

*Revocation of license.*—The revocation by a board of health of a physician's license is summary in its nature and the person affected is not entitled to a trial by jury. Munk v.

Frink, (Neb. 1908), 116 N. W. 525;  
Walker v. McMahan, (Neb. 1908)  
116 N. W. 528.

5. *Ex parte* Scudamore, (Fla. 1908) 46 So. 279.

1. Barker v. Jackson, 2 Fed. Cas. No. 989, 1 Paine 559 (1826).

2. Vaughn v. Scade, 30 Mo. 600 (1860).

3. *Infra*, § 434a.

4. *Infra*, § 438.

5. *Infra*, § 444.

6. De Lamar v. Dollar, 128 Ga. 57, 57 S. E. 85 (1907).

1. Gillet v. Pierce, Brown Adm. 553, 10 Fed. Cas. No. 5,437 (1875);  
Clark v. U. S., 2 Wash. (U. S.) 519,  
5 Fed. Cas. No. 2837 (1811).

particular way, e. g., in respect to interstate commerce on the great lakes and the navigable waters therewith connected.<sup>2</sup>

A litigant who would demand a jury by virtue of such provisions must allege in his pleadings<sup>3</sup> facts sufficient to bring him within the terms of the statute. Courts of admiralty, exercising an equitable jurisdiction for the doing of justice, rather than sitting for the purpose of applying procedural rules to certain states of fact, regard the verdict of a jury, even when authorized by statute as advisory, i. e., informing the conscience of the court, and may disregard it if unjust or unreasonable.<sup>4</sup> On the other hand, where a jury is employed in the trial of a cause in admiralty, the verdict, if a just one, will not be reversed;<sup>5</sup>— although there has been no authority for rendering it.

*Suits for penalties* are civil in their nature and a jury is not demandable in a court of admiralty upon the trial of such an issue.<sup>6</sup>

**§ 435. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Bankruptcy Courts.**— Proceedings in bankruptcy, not being according to the course of the common law, issues of fact raised in such courts do not involve the right to a jury trial.<sup>1</sup> Where, however, the suit is tried at law

2. The Western States, 159 Fed. 354, 86 C. C. A. 354 (1908) [decree affirmed (D. C. 1907) 151 Fed. 929]; *Gillet v. Pierce*, Brown Adm. 553, 10 Fed. Cas. No. 5437 (1875); U. S. Rev. Stat. (1878), § 566.

The action is limited to torts or contracts arising out of interstate commerce in the navigation of these lakes or waters. The Western States, 159 Fed. 354, 86 C. C. A. 354 (1908) [decree affirmed (D. C. 1907), 151 Fed. 929]; The City of Toledo, 73 Fed. 220 (1896); *Bigley v. The Venture*, 21 Fed. 880 (1884); The Erie Belle, 20 Fed. 63 (1883).

3. *Gillet v. Pierce*, Brown Adm. 553, 10 Fed. Cas. No. 5,437 (1875).

4. The Western States, 151 Fed. 929 (1907); The City of Toledo, 73 Fed. 220 (1896); The Empire, 19 Fed. 558 (1884).

5. *Lee v. Thompson*, 3 Woods (U. S.) 167, 15 Fed. Cas. No. 8,202 (1878).

6. The Sarah, 8 Wheat. (U. S.) 391, 5 L. ed. 644 (1823); *Whelan v. U. S.*, 7 Cranch (U. S.) 112, 3 L. ed. 286 (1812); *U. S. v. The Schooner Betsey and Charlotte*, 4 Cranch (U. S.) 443, 2 L. ed. 673 (1808); *U. S. v. La Vengeance*, 3 Dall. (U. S.) 297, 1 L. ed. 610 (1796); The Paolina S., 18 Blatchf. (U. S.) 315, 11 Fed. 171 (1880); *Clark v. U. S.*, 2 Wash. (U. S.) 519, 5 Fed. Cas. No. 2,837 (1811). See also *The Margaret*, 9 Wheat. (U. S.) 421, 6 L. ed. 125 (1824).

1. *Comingor v. Louisville Trust Co.*, 33 Ky. Law Rep. 53, 108 S. W. 950 (1908), [rehearing denied, 33 Ky. Law Rep. 884, 111 S. W. 681 (1908)] (compel assignee to settle his account). *In re Standard Telephone & Electric Co.*, (Wis. 1907) 157 Fed. 106. The right to a jury trial secured by the Constitution of the United States as affected by the seventh amendment is not infringed

and the relief sought is legal rather than equitable, a jury may be had.<sup>2</sup>

**§ 436. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Courts Martial.**—Military tribunals, at common law, were notoriously held without juries. Consequently the right to a jury trial does not extend to proceedings before such courts.<sup>1</sup> For the same reason the legislature may properly permit military courts to impose fines or other penalties for military offenses without violation of the constitutional provision guaranteeing trial by jury.<sup>2</sup> There is no right to a trial by jury in such a court.<sup>3</sup>

**§ 437. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Divorce Courts.**—Divorce hearings being equitable rather than legal in their nature, did not at common law carry a right to a jury trial. Nor, in the absence of statute, does such a right exist merely by virtue of a general guaranty of jury trial. It may, however, be provided by statute that certain issues, for example, that of adultery,<sup>1</sup> or, indeed, any issue<sup>2</sup> may be tried by jury.

**§ 438. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Equity Tribunals.**—No jury having been employed in English chancery proceedings, none can properly be claimed in connection with equity hearings at the present day.<sup>1</sup>

by the provisions of the Bankruptcy Act (Stat. July 1st, 1898, Ch. 541, § 60d 30; Stats. 562 of U. S. Comp. St. 1901, p. 3446) to re-examine and reduce payments and transfers of property to counsel made by a bankrupt in contemplation of bankruptcy proceedings. *In re Wood*, 210 U. S. 246, 28 S. Ct. 621, 52 L. ed. 1046 (1908).

2. *Stern v. Mayer*, 91 N. Y. Suppl. 292, 99 App. Div. 427 (1904).

1. *Merriman v. Bryant*, 14 Conn. 200 (1841).

2. *Merriman v. Bryant*, 14 Conn. 200 (1841).

3. *Rawson v. Brown*, 18 Me. 216 (1841); *State v. Wagener*, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749 (1898).

1. *Tietzel v. Tietzel*, 107 N. Y. Suppl. 878, 122 App. Div. 873 (1907).

2. *Wright v. Wright*, (Tex. Civ. App. 1908) 110 S. W. 158.

1. *Alabama*.—*Southern Steel Co. v. Hopkins*, 47 So. 274 (1908) (prevent multiplicity of suits).

*Arizona*.—*Cole v. Bean*, 1 Ariz. 377, 25 Pac. 538 (1878).

*California*.—*Meek v. De Latour*, (Cal. App. 1905) 83 Pac. 300 (1905); *Still v. Saunders*, 8 Cal. 281 (1857); *Walker v. Sedgwick*, 5 Cal. 192 (1855).

*Connecticut*.—*Meridan Sav. Bank v. McCormack*, 79 Conn. 260, 64 Atl. 338 (1906).

*Delaware*.—*U. S. v. Luce*, 141 Fed. 385 (1905).

*Florida*.—*Smith v. Croom*, 7 Fla. 180 (1857).

*Georgia*.—*Houston v. Polk*, 124 Ga. 103, 52 S. E. 83 (1905); *Hogan v. Walsh*, 122 Ga. 283, 50 S. E. 84 (1905).

For example, a trial by jury is not required in suits brought to enjoin and abate a public nuisance.<sup>2</sup> In equity questions of fact as well as those of law are determined by the judge.<sup>3</sup> In fact, as

*Idaho.*—Shields *v.* Johnson, 79 Pac. 391 (1904); Brady *v.* Yost, 6 Idaho 273, 55 Pac. 542 (1898).

*Illinois.*—Shedd *v.* Seefeld, 230 Ill. 118, 82 N. E. 580, 13 L. R. A. (N. S.) 709 (1907) [affirming decree, 126 Ill. App. 375 (1906)].

*Indiana.*—Small *v.* Binford, 83 N. E. 507 (1908) [rehearing denied 84 N. E. 19]; Burck *v.* Davis, 73 N. E. 192 (1905); Tomlinson *v.* Bainaka, 70 N. E. 155 (1904).

*Iowa.*—Sisson *v.* Board of Sup'rs of Buena Vista County, 104 N. W. 454 (1905).

*Kansas.*—State *v.* Thomas, 86 Pac. 499 (1906).

*Kentucky.*—Bailey *v.* Nichols, 8 Ky. Law Rep. 64 (1886).

*Massachusetts.*—Ross *v.* New England Mut. Ins. Co., 120 Mass. 113 (1876).

*Minnesota.*—Shipley *v.* Beldue, 93 Minn. 414, 101 N. W. 952 (1904).

*Missouri.*—Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171 (1904); Hagan *v.* Continental Nat. Bank, 182 Mo. 319 (1904); Gay *v.* Ihm, 69 Mo. 584 (1879).

*Montana.*—Demars *v.* Hudon, 82 Pac. 952 (1905).

*Nebraska.*—Daniels *v.* Mutual Ben. Ins. Co., 102 N. W. 458 (1905); Woodrough *v.* Douglas County, 98 N. W. 1092 (1904).

*New Hampshire.*—Sipola *v.* Winship, 74 N. H. 240, 66 Atl. 962 (1907); Curtice *v.* Dixon, 62 Atl. 492 (1905).

*Nevada.*—Costello *v.* Scott, 93 Pac. 1 (1908) [judgment modified on rehearing 94 Pac. 222].

*New York.*—Tucker *v.* Edison Electric Illuminating Co. of New York, 184 N. Y. 548, 76 N. E. 1110 (1906); Page *v.* Herkimer Lumber Co., 96 N. Y. Suppl. 272, 109 App. Div. 391 (1905); Tucker *v.* Edison Electric Illuminating Co., 91 N. Y. Suppl. 439,

100 App. Div. 407 (1905); Magnolia Metal Co. *v.* Drew, 68 N. Y. Suppl. 34, 68 App. Div. 47 (1902); Marshall *v.* De Cordova, 50 N. Y. Suppl. 294, 26 App. Div. 615 (1898).

*North Dakota.*—Avery Mfg. Co. *v.* Smith, 103 N. W. 410 (1905).

*Ohio.*—Fleuret *v.* Fletcher, 28 Ohio Cir. Ct. R. 841 (1903) [judgment affirmed, 73 Ohio St. 381, 78 N. E. 1125 (1905)].

*Oklahoma.*—Gulley *v.* Territory, 91 Pac. 1037 (1907).

*Pennsylvania.*—Frank's Appeal, 59 Pa. St. 190 (1868).

*South Carolina.*—Atlantic & C., etc., Ry. Co. *v.* Victor Mfg. Co., 79 S. C. 266, 60 S. E. 675 (1908); Bank of Spartanburg *v.* Chickasaw Soap Co., 70 S. C. 253, 49 S. E. 845 (1904); Brock *v.* Kirkpatrick, 69 S. C. 231, 48 S. E. 72 (1904); Pratt *v.* Timmerman, 69 S. C. 186, 48 S. E. 255 (1904).

*Washington.*—Wintermute *v.* Carner, 8 Wash. 585, 36 Pac. 490 (1894).

*Wisconsin.*—Harrigan *v.* Marsh, 121 Wis. 127, 99 N. W. 909 (1904).

*United States.*—*In re* Plant, 148 Fed. 37 (1906).

*Canada.*—Clairmonte *v.* Prince, 30 Nova Scotia 258 (1897); Fox *v.* Fox, (Can. 1896) 17 Ont. Pr. 161; Baldwin *v.* McGuire, (Can. 1893) 15 Ont. Pr. 305.

Having obtained jurisdiction, the judge may properly make such incidental findings of fact as would be in accordance with established equity practice. Slaughter *v.* McManigal, (Iowa 1908) 116 N. W. 726.

2. Reaves *v.* Territory, 13 Okl. 396, 74 Pac. 951 (1903).

3. Arkansas.—State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880 (1886).

*Illinois.*—Flaherty *v.* McCormick, 113 Ill. 538 (1885).

is elsewhere mentioned,<sup>4</sup> this distinction between legal and equitable proceedings obtains even where all special equity forms have been abolished and the rules of equity are applied in a common law court by a common law judge.<sup>5</sup> As far as a jurisdiction exercised by an equity judge, e. g., care and custody of delinquent or wayward children, is transferred to another court acting under the forms of common law, the establishment by the legislature of a jury of six to act in such cases violates no right to a jury trial.<sup>6</sup>

**§ 439. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Equity Tribunals* ); Code Procedure.—**

Under the blending of legal and equitable remedies in this system of procedure it is frequently provided that legal issues arising in equitable causes must, as of right, be tried by a jury; and, *per contra*, that equitable issues arising in a controversy essentially

*Nebraska*.—Sharmer v. McIntosh, 43 Neb. 509, 61 N. W. 727 (1895).

*New York*.—Rathbun v. Rathbun, 3 How. Pr. 139 (1847).

*South Carolina*.—Lucken v. Wichman, 5 S. C. 411 (1874).

*Wisconsin*.—Stilwell v. Kellogg, 14 Wis. 461 (1861).

*United States*.—Goodyear v. Providence, etc., Co., 10 Fed. Cas. No. 5583, 2 Cliff. 351 (1854).

4. *Infra*, § 440.

5. *California*.—Smith v. Rowe, 4 Cal. 6 (1853).

*Colorado*.—Rice v. Goodwin, 2 Colo. App. 267, 30 Pac. 330 (1892).

*Minnesota*.—Berkey v. Judd, 14 Minn. 394 (1869).

*Montana*.—Gallagher v. Basey, 1 Mont. 457 (1872).

*New York*.—Flanigan v. Skelly, 85 N. Y. Suppl. 4, 89 App. Div. 108 (1903); Toplitz v. Bauer, 49 N. Y. Suppl. 840, 26 App. Div. 125 (1898); Wheeler v. Falconer, 7 Rob. 45 (1867).

*South Carolina*.—Price v. Brown, 4 S. C. 144 (1872).

*Wisconsin*.—Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909 (1904).

*United States*.—Perego v. Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113 (1896); Basey v. Gallagher,

20 Wall. 670, 22 L. ed. 452 (1874).

Where an equitable remedy is invoked a jury is not a matter of right. Cushman v. Thayer Mfg., etc., Co., 76 N. Y. 365, 32 Am. Rep. 315 (1879) [*affirming* 7 Daly 330 (1878)].

North Carolina presents an anomalous rule to the effect that in dealing with *issues* of fact as distinguished from *questions* of fact arising in course of equity proceedings, the jury may be claimed as of right, Ely v. Early, 94 N. C. 1 (1886); Worthy v. Shields, 90 N. C. 192 (1884) [*disapproving* Goldsborough v. Turner, 67 N. C. 403 (1872)]. See also Taylor v. Person, 9 N. C. 298 (1822); Marshall v. Marshall, 4 N. C. 318 (1815).

6. Robinson v. Wayne Circuit Judges, 151 Mich. 315, 115 N. W. 682, 14 Detroit Leg. N. 945 (1908).

1. Dawson v. Town of Orange, 78 Conn. 96, 61 Atl. 101 (1905); Sandstrom v. Smith, (Idaho 1906) 86 Pac. 416; Morawick v. Martineck's Guardian, 32 Ky. L. Rep. 971, 107 S. W. 759 (1908); Kountze v. Hatfield, 99 S. W. 262, 30 Ky. L. Rep. 589 (1907). The right, however, may be waived. Costello v. Scott, (Nev. 1908) 93 Pac. 1 [*judgment modified* on rehearing 94 Pac. 222].



legal shall be determined by the judge.<sup>2</sup> In other cases, where the relief sought is partly legal and partly equitable, the right to a jury will depend upon what is the *gist* of the action.<sup>3</sup> In other words, a legal cause of action will be tried to a jury though incidental equitable relief is also asked.

*On the other hand*, a jury will be refused in an equitable action though damages or other legal remedy be also claimed.<sup>4</sup> In some jurisdictions the right to have a jury on all issues of fact in equity causes has been conferred by statute in unlimited terms.<sup>5</sup> In others, the right is given in connection with particular forms of proceeding or with special questions.<sup>6</sup>

2. *Peterson v. Philadelphia Mortgage & Trust Co.*, 33 Wash. 464, 74 Pac. 585 (1903).

3. *California*.—*Noble v. Learned*, 94 Pac. 1047 (1908).

*Idaho*.—*Robertson v. Moore*, 77 Pac. 218 (1904).

*Indiana*.—*Hoosier Const. Co. v. National Bank of Commerce of Seattle*, 73 N. W. 1006 (1905); *Muncie Pulp Co. v. Martin*, 72 N. E. 882 (1904); *Hoosier Const. Co. v. National Bank of Commerce*, 72 N. E. 473 (1904).

*Iowa*.—*Bradley v. Burkhart*, 115 N. W. 597 (1908); *Twogood v. Allee*, 99 N. W. 288 (1904).

*Kentucky*.—*Comingor v. Louisville Trust Co.*, 33 Ky. L. Rep. 53, 108 S. W. 950 (1908) [*rehearing denied*, 33 Ky. L. Rep. 884, 111 S. W. 681 (1908)].

*Minnesota*.—*Johnson v. Peterson*, 90 Minn. 503, 97 N. W. 384 (1903).

*Missouri*.—*Thompson v. Nat. Bank of Commerce*, 132 Mo. App. 225, 110 S. W. 681 (1908) (action on cheque where payment has been stopped by makers); *Magnuson v. Continental Casualty Co.*, 125 Mo. App. 206, 101 S. W. 1125 (1907).

*Montana*.—*Butte Consol. Min. Co. v. Barker*, 89 Pac. 302 (1907) [*affirmed in* 90 Pac. 177]; *Chessman v. Hale*, 79 Pac. 254 (1905).

*Nebraska*.—*Gandy v. Wiltse*, 112 N. W. 569 (1907).

*New Mexico*.—*Mogollon Gold & Copper Co. v. Stout*, 91 Pac. 724 (1907).

*New York*.—*People v. Equitable Life Assur. Soc. of U. S.*, 109 N. Y. Suppl. 453, 124 App. Div. 714 (1908) [*reversed*, 101 N. Y. Suppl. 354, 51 Misc. 339 (1906)]; *Ebling Brew. Co. v. Mimphius*, 109 N. Y. Suppl. 808, 58 Misc. 545 (1908); *Heughes v. Galusha Stove Co.*, 106 N. Y. Suppl. 606, 122 App. Div. 118 (1907).

*North Dakota*.—*Gorthy v. Jarvis*, 108 N. W. 39 (1906).

*Ohio*.—*Willson Imp. Co. v. Malone*, 78 Ohio St. 232, 85 N. E. 51 (1908); *Heintz v. Anthony*, 26 Ohio Cir. Ct. R. 380 (1904).

*Oklahoma*.—*Maas v. Dunmyer*, 96 Pac. 591 (1908).

*South Carolina*.—*Brattan v. Catawba Power Co.*, 60 S. E. 673 (1908); *Keenan v. Lesslie*, 79 S. C. 473, 60 S. E. 1114 (1908); *Atlantic & C., etc., Ry. Co. v. Victor Mfg. Co.*, 79 S. C. 266, 60 S. E. 675 (1908).

*South Dakota*.—*Burleigh v. Hecht*, 117 N. W. 367 (1908).

*West Virginia*.—*Cheurront v. Horner*, 59 S. E. 964 (1908).

*Wisconsin*.—*Harrigan v. Marsh*, 121 Wis. 127, 99 N. W. 909 (1904).

4. *Watt v. Barnes*, 41 Ind. App. 466, 84 N. E. 158 (1908).

5. *Call v. Perkins*, 65 Me. 439 (1876).

6. *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55 (1889); *Druse v. Horter*, 57 Wis. 644, 16 N. W. 14 (1883).

**§ 440. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Equity Tribunals*); General Rule.**—The distinction between law and equity is not, however, one of names or of phraseology employed in pleading,<sup>1</sup> but of certain essential differences in the nature of the right claimed or relief asserted. Therefore, where the essential nature of the action is equitable, the rule excluding a jury still prevails,<sup>2</sup> even where the precise form of procedure be novel and statutory, as the liability of solvent resident stockholders of a corporation for its indebtedness.<sup>3</sup> It is wise that this should be so, for purely equitable remedies are not cognizable, with advantage to the cause of justice, by a jury, however fitted they may be to find constituent facts as compared with a master in chancery.<sup>4</sup> Where the action is, in its nature, legal, a jury may, as a rule, be demanded wherever it could have been successfully claimed at common law. This general right may be increased or diminished by the action of the legislature. Even where an action is equitable in its nature, the right of the trial judge to have issues of fact tried by a jury is usually conceded. The case, under these circumstances, properly goes to a jury in the same way that an action at law is submitted.<sup>5</sup>

**§ 441. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Equity Tribunals*); Various Modifications of Rule.**—Various modifications of the right of jury trial in equity cases may be created by statute. On the other hand, many statutes, like that of Indiana,<sup>1</sup> are merely declaratory of the com-

1. *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763 (1888).

2. *Noble v. Learned*, (Cal. App. 1906) 87 Pac. 402; *Cowan v. Skinner*, (Fla. 1907) 42 So. 730; *Blakemore v. Cooper*, (N. D. 1906) 106 N. W. 566; *Hurley v. Walter*, 129 Wis. 508, 109 N. W. 558 (1906); *Spafford v. McNally*, 130 Wis. 537, 110 N. W. 387 (1907).

3. *Merrill v. Prescott*, 67 Kan. 767, 74 Pac. 259 (1903).

4. The computation of damages, even in equitable actions is frequently made the subject of the intervention of a jury. *Cowan v. Skinner*, (Fla. 1907) 42 So. 730. The matter, however, is usually in equity causes, determined by the court. *Rhoades v.*

*McNamara*, (Mich. 1904) 10 Detroit Leg. N. 915, 98 N. W. 392; *Miller v. Edison Electric Illuminating Co.*, 184 N. Y. 17, 76 N. E. 734 (1906); *Fernandez y Perez v. Perez y Fernandez*, 202 U. S. 80, 26 S. Ct. 561, 50 L. ed. 942 (1906).

5. *Voss v. Smith*, 84 N. Y. Suppl. 471, 87 App. Div. 395 (1903).

1. *Blair v. Curry*, 150 Ind. 99, 46 N. E. 672, 49 N. E. 908 (1897); *Wright v. Fultz*, 138 Ind. 594, 38 N. E. 175 (1894); *Monnett v. Turpie*, 132 Ind. 482, 32 N. E. 328 (1892). See, for example, *Wormley v. Hamburg*, 46 Iowa 144 (1877); *Wadsworth v. Wadsworth*, 40 Iowa 448 (1875); *Benedict v. Hunt*, 32 Iowa 27 (1871).

mon law rules on the subject.<sup>2</sup> Where issues at law and those in equity are joined, the latter are to be tried by the court, the former by a jury.<sup>3</sup> Statutory injunctions not known to the common law, e. g., those in aid of the restriction of gaming,<sup>4</sup> prostitution, the sale of intoxicating liquor,<sup>5</sup> oleomargarine,<sup>6</sup> and similar offenses may be awarded without a trial by jury.

**§ 442. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Equity Tribunals*); Issues out of Chancery.**—While the modern equity judge, following the historical course of the English Lord Chancellor, sits, as a rule, for the determination of issues of fact, by the aid of masters' reports and similar assistance, he may, in pursuance of his administrative powers, send an issue of fact, framed by his court, to be tried by a jury at law.<sup>1</sup> Certain issues he is required to treat in this way. These are issues relating to matters strictly of legal right, as where, for example, devisees under a will bring an action in equity against the heir-at-law, asking that he be enjoined from bringing suit against them under his claim as heir. "In every case of this sort courts of equity will, unless the heir waives it, direct an issue of *devisavit vel non* (as it is technically although according to Mr. Wooddeson barbarously expressed) to ascertain the validity of the will."<sup>2</sup>

A second case is now practically obsolete; i. e., where a rector claimed at common law the right to tithes<sup>3</sup> or a *modus* was claimed against him. As was said by the supreme court of Oregon:<sup>4</sup> "It was the privilege of an heir at law, and of a rector or vicar, in suits to establish a will or *modus*, to demand a hearing before a jury, and this was granted as a matter of right. Aside from these exceptions, the granting of an issue at common

2. Canada has enacted a similar statute. *Clairmonte v. Prince*, 30 Nova Scotia 258 (1897); *Sawyer v. Robertson*, 19 Ont. Pr. 172 (1900).

3. *Field v. Brown*, 146 Ind. 293, 45 N. E. 464 (1896); *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763 (1888).

4. *Ex parte Allison*, (Tex. 1906) 90 S. W. 492.

5. *Cowdery v. State*, (Kan. 1905) 80 Pac. 953.

6. *Com. v. Andrews*, 24 Pa. Super. Ct. 571 (1904).

1. There is no right to a trial by

jury on issues of fact arising in a suit in equity. *Twogood v. Allee*, (Iowa 1904) 99 N. W. 288.

2. 2 Story's Eq. Jurisp., § 1447. See also *Bates v. Graves*, 2 Ves. Ch. Rep. 287 (1793).

3. "If the right is disputed, it must be first ascertained at law before an account will be decreed." 1 Story's Eq. Jurisp., § 519. See also *Hughes v. Davies*, 5 Sim. 331, 349 (1832).

4. *Raymond v. Flavel*, 27 Or. 219, 40 Pac. 158 (1895).

law was discretionary with the court; it was not 'demandable as of right.' <sup>5</sup> In other cases, as has been said, the submission of an issue of fact to a jury is purely a matter of administration.<sup>6</sup> The judge, therefore, is by no means bound by the verdict as he would have been in an action at law.<sup>7</sup> Where he concludes to act in whole or in part, upon the jury's verdict, he carries it into effect by such decrees or orders as seem to him judicious.<sup>8</sup>

5. *Pacific Railway Co. v. Wade*, 91 Cal. 449, 456, 25 Am. St. Rep. 201, 13 L. R. A. 754, 27 Pac. 768 (1891); *Koons v. Blanton*, 129 Ind. 383, 393, 27 N. E. 334 (1891); *Brown v. Buck*, 75 Mich. 274, 5 L. R. A. 226, 42 N. W. 827, 13 Am. St. Rep. 438 (1889); *Barton v. Barbour*, 104 U. S. 126, 133 (1881); *Adams on Equity*, \* 377; 2 *Daniel on Chancery Practice*, § 1080.

6. *Alabama*.—*Alexander v. Alexander*, 5 Ala. 517 (1843).

*Arkansas*.—*State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880 (1886).

*Florida*.—*Smith v. Croom*, 7 Fla. 180 (1857).

*Indiana*.—*Helm v. Huntington, etc.*, Bank, 91 Ind. 44 (1883).

*Kentucky*.—*Bailey v. Nichols*, 8 Ky. L. Rep. 64 (1886).

*Minnesota*.—*Cochran v. Cochran*, 96 Minn. 523, 105 N. W. 183 (1905).

*Missouri*.—*Weil v. Kume*, 49 Mo. 158 (1871).

*New York*.—*Cantoni v. Forster*, 33 N. Y. Suppl. 565, 12 Misc. 343 (1895); *Smith v. Carll*, 5 Johns. Ch. 118 (1821).

*Oregon*.—*Raymond v. Flavel*, 27 Or. 219, 40 Pac. 158 (1895).

*United States*.—*Herdsmen v. Lewis*, 9 Fed. 853, 20 Blatchf. 266 (1882); *Ely v. Monson, etc.*, Mfg. Co., 8 Fed. Cas. No. 4,431 (1860). "The course of this practice has been uniform, and its propriety has never been, so far as I can learn, judicially criticised or questioned." *Newark, etc., R. Co. v. Mayor of Newark*, 23 N. J. Eq. 515 (1872), per Beasley, C. J. "Courts of equity have an original jurisdiction, which, I agree, must be exercised according to a sound discretion, to try questions of fact without the in-

tervention of a jury; and which aid is sought, according to the common expression, for the purpose of informing the conscience of the court. I agree that a mistake in refusing to send the case to a jury is a just ground of appeal, if the court of appeal should think that the contrary decision would have been a sounder exercise of discretion; but it is a competent exercise of the authority and duty of the court, in every case, and throughout every case, and in every stage, to determine, according to its discretion, whether it does or not want that assistance." *Hampson v. Hampson*, 3 Ves. and B. Ch. 42 (1814), per Lord Chancellor Eldon.

Under Code practice, this may still be done. *Omaha F. Ins. Co. v. Thompson*, 50 Neb. 580, 70 N. W. 30 (1897).

7. *Arkansas*.—*State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880 (1886).

*Idaho*.—*Brady v. Yost*, 6 Idaho 273, 55 Pac. 542 (1898).

*Illinois*.—*Gaby v. Hankins*, 86 Ill. App. 529 (1899).

*Missouri*.—*James v. Oliver*, 129 Mo. App. 86, 107 S. W. 1012 (1908); *Gay v. Ihm*, 69 Mo. 584 (1879).

*United States*.—*Ely v. Monson, etc.*, Mfg. Co., 8 Fed. Cas. No. 4,431 (1860); *Goodyear v. Providence, etc., Co.*, 10 Fed. Cas. No. 5583, 2 Cliff. 351 (1864). In an equity action the court may disregard a special verdict of the jury and make its own findings of fact and conclusions of law. *Ostrom v. De Yoe*, (Cal. App. 1906) 87 Pac. 811.

8. *Capron v. Devries*, 83 Md. 220, 34 Atl. 251 (1896); *Lowe v. Riley*, 57 Neb. 252, 77 N. W. 758 (1898); *Ex p. Cotten*, 62 N. C. 79 (1867).

*In the federal courts* the rule is the same. As was said by Mr. Justice Clifford,<sup>9</sup> "The federal courts under the constitution of the United States and the laws of congress, as now existing, have the power of deciding every question of law or fact which may arise in equity suits over which they have complete jurisdiction, and consequently it is not indispensably necessary as matter of law in any case that any question in an equity suit should be sent to a jury."<sup>10</sup>

"Formerly an issue was directed only in cases where there was a want of evidence, or wherein the testimony was contradictory, or so nearly balanced that it was necessary to have an open and rigid cross-examination of the witnesses where they could be seen and heard by the jury, who were to decide the questions of fact submitted to them. The awarding of an issue was merely a matter of discretion resting with the chancellor, and its purpose was to inform his conscience.<sup>11</sup> But in all cases where there was sufficient evidence to satisfy the conscience of the chancellor, or where the evidence, though somewhat conflicting and contradictory, unless it created a doubt in his mind, by reason whereof he was unable to come to a satisfactory conclusion of his own, an issue was not directed.<sup>12</sup>

*Unless removed by statute*, the administrative power of the judge to submit issues of fact to a jury in a cause exclusively equitable continues to exist.<sup>13</sup> Such issues must be tried at law as directed out of chancery;—and, of course, with a jury.

**§ 443. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial* );** *Inferior Courts.*—A jury of not less than twelve cannot, it is said, be provided for courts of limited juris-

9. *Goodyear v. Providence, etc., Co.*,  
10 Fed. Cas. No. 5,583, 2 Cliff. 351  
(1864).

10. *Fornhill v. Murray*, 1 Bland  
479, 485 (1828); *Ward v. Hill*, 4  
Gray 593 (1855).

11. *State v. Churchill*, 48 Ark. 426,  
436, 3 S. W. 352, 800 (1886); *Clark*  
*v. First Congregational Society*, 45 N.  
H. 331, 336 (1864); *Townsend v.*  
*Graves*, 3 Paige on Chancery, 453, 456  
(1832); 2 *Daniel on Chancery Prac-*  
*tise*, \* 1078. See also *Sporza v. Ger-*  
*man Sav. Bank*, 192 N. Y. 8, 84 N. E.  
406 (1908) [*affirmed*, 104 N. Y.  
Suppl. 260, 119 App. Div. 172 (1907)]  
(commitment of person as insane).

12. *New Jersey.*—*Newark, etc., R.*  
*Co. v. Mayor of Newark*, 23 N. J. Eq.  
515 (1872).

*New York.*—*Le Guen v. Gouverneur*,  
1 Johns. Cas. 436, 500, 1 Am. Dec.  
121 (1800).

*Virginia.*—*Reed v. Cline's Heirs*, 9  
Gratt. 136 (1852).

*United States.*—*Harding v. Handy*,  
11 Wheat. 103, 125 (1826).

*England.*—*Beaumont v. Bramley* 1  
Turn. & R. 41, 55 (1822); 2 *Daniel*  
on Chancery Practice, \* 1072–3.

13. *Helm v. Huntington, etc., Bank*,  
91 Ind. 44 (1883).

diction, by virtue of any common-law provision,<sup>1</sup> as no arrangement of this sort for inferior courts existed under that form of jurisprudence. A jury of this nature can only be had by virtue of a statutory provision.<sup>2</sup> But it by no means follows that it is essential that there should be a trial by jury at all in such courts. The intervention of a jury may properly be confined to courts of general jurisdiction.<sup>3</sup> This is equally true in criminal cases within the jurisdiction of such courts, e. g., for violating a municipal ordinance.<sup>4</sup> The judge of such a court may legally be empowered summarily to try and punish, without a jury, infractions of local laws.<sup>5</sup>

**§ 444. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial* ); Probate Courts.**—As no right to a trial by jury existed, at common law, in those ecclesiastical tribunals which possessed the functions and jurisdiction now exercised by probate courts, surrogates' or orphans' courts, no right exists at the present time unless expressly conferred by statute.<sup>1</sup> This has

1. *Connecticut*.—Goddard v. State, 12 Conn. 448 (1838).

*Maryland*.—State v. Glenn, 54 Md. 572 (1880).

*New York*.—People v. Justices Ct. Spec. Sess., 74 N. Y. 406 (1878); Knight v. Campbell, 62 Barb. 16 (1872).

*Ohio*.—Inwood v. State, 42 Ohio St. 186 (1884).

*Pennsylvania*.—Byers v. Com., 42 Pa. St. 89 (1862).

2. Ward v. Edmunds, 110 Mass. 340 (1872); MacKenzie v. Gilbert, 69 N. J. L. 184, 54 Atl. 524 (1903); State v. Nash, 51 S. C. 319, 28 S. E. 946 (1897); State v. Larkins, 44 S. C. 362, 22 S. E. 409 (1895); Beaufort v. Ohlandt, 24 S. C. 158 (1886).

3. Harriss v. Hampton, 52 N. C. 597 (1860); Thompson v. Floyd, 47 N. C. 313 (1855).

4. Duren v. City of Thomasville, 125 Ga. 1, 53 S. E. 814 (1906); Pearson v. Wimbish, 124 Ga. 701, 52 S. E. 751 (1906).

5. State v. Marciniak, (Minn. 1906) 105 N. W. 965.

1. *Alabama*.—Reynolds v. Reynolds,

11 Ala. 1023 (1847); Willis v. Willis, 9 Ala. 330 (1846).

*California*.—In re Dolbeer's Estate, 96 Pac. 266 (1908); Moore's Estate, 72 Cal. 335, 13 Pac. 880 (1887).

*Florida*.—Lavey v. Doig, 25 Fla. 611, 6 So. 259 (1889).

*Illinois*.—Clifford v. Gridley, 113 Ill. App. 164 (1903); Moody v. Found, 208 Ill. 78, 69 N. E. 831 (1904); Seavey v. Seavey, 30 Ill. App. 625 (1889).

*Iowa*.—Duffield v. Walden, 102 Iowa 676, 72 N. W. 278 (1897).

*Kentucky*.—Wills v. Lochnane, 9 Bush 547 (1873).

*Maine*.—Bradstreet v. Bradstreet, 64 Me. 204 (1874).

*Massachusetts*.—Fay v. Vanderford, 154 Mass. 498, 28 N. E. 681 (1891).

*Missouri*.—Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113 (1904) (removal of administrators); Bradley v. Woerner, 46 Mo. App. 371 (1891).

*New Jersey*.—Wood v. Tallman, 1 N. J. L. 153 (1793).

*South Carolina*.—Frierson v. Jenkins, 75 S. C. 471, 55 S. E. 890 (1906).

been done in certain states,<sup>2</sup> for the granting or revocation of the probate of wills, the conferring of administration and other branches of recognized probate jurisdiction. No right to a jury trial is conferred upon one litigating in a probate court by some general constitutional provision.<sup>3</sup> Such a statutory regulation may apply either generally, as to all issues of fact,<sup>4</sup> or to certain specific matters,<sup>5</sup> as proof of claims against an estate.<sup>6</sup>

*Probate Appeals.*—Trials of issues raised on appeal from a decree or order of a probate court stand in the same general position with regard to a jury trial as do original proceedings in such courts.<sup>7</sup>

*South Dakota.*—*In re McClellan's Estate*, 107 N. W. 681 (1906) (petition for letters of administration).

*Vermont.*—*In re Welch*, 69 Vt. 127, 37 Atl. 250 (1896).

*United States.*—*Esterly v. Rua*, 122 Fed. 609, 58 C. C. A. 548 (1903).

2. *District of Columbia.*—*In re Atwood*, 2 App. Cas. 74 (1893).

*Illinois.*—*Mascall v. Drainage Dist. Com'rs*, 122 Ill. 620, 14 N. E. 47 (1887).

*Indiana.*—*Clem v. Durham*, 14 Ind. 263 (1860).

*Maryland.*—*Pegg v. Warford*, 4 Md. 385 (1853); *Barroll v. Reading*, 5 Harr. & J. 175 (1821).

*Missouri.*—*Schaaf v. Peters*, 111 Mo. App. 447, 90 S. W. 1037 (1901) (will or no will).

*Montana.*—*In re Tuohy's Estate*, 83 Pac. 486 (1905).

*Pennsylvania.*—*In re Colt*, 215 Pa. St. 333, 64 Atl. 597 (1906) (appointment of a guardian).

*Texas.*—*Tolle v. Tolle*, 104 S. W. 1049 (1907). See also *Richardson v. Daggett*, 24 App. D. C. 440 (1904). The right to a jury trial may be limited as shall seem wise to the legislature, no constitutional provisions being involved. *In re Dolbeer's Estate*, (Cal. 1908) 96 Pac. 266.

On the commitment of insane persons a trial by jury is frequently provided. *Sporza v. German Sav. Bank*, 192 N. Y. 8, 84 N. E. 406 (1908) [*affirmed* 104 N. Y. Suppl.

260, 119 App. Div. 172 (1907)]. The right, however, may be made personal to the alleged incompetent person or his relatives and need not be extended to his debtors. *Sporza v. German Sav. Bank*, 192 N. Y. 8, 84 N. E. 406 (1908) [*affirmed*, 104 N. Y. Suppl. 260, 119 App. Div. 172 (1907)].

In probate appeals a jury trial may be granted. *Nowland v. Rice's Estate*, (Mich. 1904) 11 Detroit Leg. N. 523 101 N. W. 214.

3. *Moore's Estate*, 72 Cal. 335, 13 Pac. 880 (1887); *Lavey v. Doig*, 25 Fla. 611, 6 So. 259 (1889); *Seavey v. Seavey*, 30 Ill. App. 625 (1889); *Wood v. Tallman*, 1 N. J. L. 153 (1793).

4. *Clem v. Durham*, 14 Ind. 263 (1860).

5. *Reynolds v. Reynolds*, 11 Ala. 1023 (1847); *Bradley v. Woerner*, 46 Mo. App. 371 (1891).

6. *Ingham v. Dudley*, 60 Iowa 16, 14 N. W. 82 (1882); *Ribble v. Furmin*, (Neb. 1904) 98 N. W. 420. But see *Mascall v. Drainage Dist. Com'rs*, 122 Ill. 620, 14 N. E. 47 (1887).

Jurisdictional facts of this nature must be made to appear upon the record. *Reynolds v. Reynolds* 11 Ala. 1023 (1847); *Willis v. Willis*, 9 Ala. 330 (1846).

7. *Moody v. Found*, 208 Ill. 78, 69 N. E. 831 (1904). Any written words conveying the idea that the supposed right of a jury trial is insisted upon

§ 445. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Trials by Judge Without Jury; At Common Law.—As is well known, many classes of actions involving the trial of issues of fact, did not, at common law, require the intervention of a jury.<sup>1</sup> All cases tried without a jury prior to the adoption of a constitution may, in the absence of affirmative provision to the contrary, still be so tried.<sup>2</sup>

§ 446. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Trials by Judge Without Jury*); Under Codes and Statutes.—In the later jurisprudence, a limited right of trial by the judge sitting without a jury has been provided. For example, in Georgia, the court may try causes dependent upon the constituent fact of an unconditional contract in writing where no issuable defenses have been filed on oath.<sup>1</sup> In general, a judge

is sufficient for the claiming of the appeal. *Arnold v. Regan*, (R. I. 1908) 69 Atl. 292.

1. *Arkansas*.—*State v. Johnson*, 26 Ark. 281 (1870).

*New York*.—*Metropolitan Bd of Health v. Heister*, 37 N. Y. 661 (1868); *Sands v. Kimbark*, 27 N. Y. 147 (1863) [*affirming* 39 Barb. 108 (1863)].

*Oklahoma*.—*Light v. Canadian County Bank*, 2 Okl. 543, 37 Pac. 1075 (1894).

*Rhode Island*.—*Crandall v. James*, 6 R. I. 144 (1859).

*Texas*.—*Janes v. Reynolds*, 2 Tex. 250 (1847).

2. *Arkansas*.—*Williams v. Citizens*, 40 Ark. 290 (1883).

*Florida*.—*Blanchard v. Raines*, 20 Fla. 467 (1884).

*Illinois*.—*Ross v. Irving*, 14 Ill. 171 (1852).

*Indiana*.—*Allen v. Anderson*, 13 Ind. App. 451 (1883).

*Kentucky*.—*Caldwell v. Com.*, Ky. Dec. 129 (1902).

*Maine*.—*Coffin v. Coffin*, 55 Me. 361 (1868).

*Massachusetts*.—*Bigelow v. Bigelow*, 120 Mass. 320 (1876); *Shirley v. Lunenburgh*, 11 Mass. 379 (1814).

*Minnesota*.—*Whallon v. Bancroft*, 4 Minn. 109 (1860).

*New Jersey*.—*State v. Doty*, 32 N. J. L. 403, 90 Am. Dec. 671 (1868).

*New York*.—*Metropolitan Bd. of Health v. Heister*, 37 N. Y. 661 (1868); *People v. Fisher*, 20 Barb. 652, 11 How. Pr. 554, 2 Park. Cr. 402 (1855).

*Ohio*.—*Ammon v. Johnson*, 3 Ohio Cir. Ct. 263, 2 Ohio Cir. Dec. 149 (1888).

*Oregon*.—*Raymond v. Flavel*, 27 Oreg. 219, 40 Pac. 158 (1895).

*Pennsylvania*.—*Byers v. Com.*, 42 Pa. St. 89 (1862).

*South Carolina*.—*Charleston v. Stelges*, 10 Rich. 438 (1857); *New Town Cut v. Seabrook*, 2 Strobb. 560 (1846).

*Tennessee*.—*Trigally v. Memphis*, 6 Coldw. 382 (1869).

*Vermont*.—*Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366 (1893).

*Virginia*.—*Pillow v. Southwest Virginia Imp. Co.*, 92 Va. 144, 23 S. E. 32, 52 Am. St. Rep. 804 (1895).

1. *W. B. Parham & Co. v. Potter-Thompson Liquor Co.*, 127 Ga. 303, 56 S. E. 460 (1907).



cannot try an issue in a common law action unless the benefit of a jury is waived.<sup>2</sup>

**§ 447. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Who May Claim Right.**—The condition of the scope of the right to a trial by jury, as it existed at the time of the adoption of the constitution, limits not only the classes of actions in which, in the absence of express regulation, the right may be claimed, and the court in which such right may be exercised, but also the classes of legal persons who may properly claim to exercise it.<sup>1</sup> For instance, where the state had, at common law, no right to claim a jury trial in certain proceedings, none may be properly demanded by it under the constitution.<sup>2</sup> Parties subsequently joined to a pending suit have the same right to a jury trial as was enjoyed by the primary parties. Such was the original rule.<sup>3</sup>

*The power of the legislature to extend the right to new classes of legal persons cannot be doubted.*<sup>4</sup>

**§ 448. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Who May Claim Right*); Status of Municipalities.**—Cities, towns and other municipal corporations are not entitled to claim a jury trial, as they possessed no right to one at the time of the adoption of the constitution.<sup>1</sup> The legislature

2. *Puffer v. American Central Ins. Co.*, 48 Or. 475, 87 Pac. 523 (1906).

**Code and statutory Procedure, Pleading or Practice distinguished.**—While it is difficult to draw any satisfactory line between matters which differ from each other only in the degree of their departure from a given base, it has seemed convenient to distinguish, in a general way, between code pleading, procedure or practice and those which are denominated statutory. Many code provisions are well known to be simply declaratory of the common law upon the subject. Nevertheless, where the departure from the common-law rules on pleading, procedure or practice has been general and undertaken in a comprehensive spirit of seeking to cover the entire ground the result has been spoken of as that of a code. On the

other hand, where changes from the common law, in these branches of procedure are sporadic and specific they have been mentioned as statutory.

1. *Harris v. Wood*, 6 T. B. Mon. 641 (1828); *Caldwell v. Com.*, Ky. Dec. 129 (1802); *State v. Dick*, 4 La. Ann. 182 (1849); *Dowell v. Boyd*, 3 Smedes & M. 592 (1844).

2. *In re New State House*, 19 R. I. 326, 33 Atl. 448 (1895).

3. *Lacroix v. Menard*, 3 Mart. (N. S.) 339, 15 Am. Dec. 161 (1825).

4. *In re New State House*, 19 R. I. 326, 33 Atl. 448 (1895).

1. *Stone v. Charlestown*, 114 Mass. 214 (1873); *Kimball v. Bridgewater*, 62 N. H. 694 (1882); *Wooster v. Plymouth*, 62 N. H. 193 (1882); *State v. Jersey City*, 38 N. J. L. 259 (1876); *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248, 28 How.

may dispose of the wealth of such agencies of government by partition in such manner as seems to it equitable, and the municipality affected cannot claim a jury trial, not only because it is not a fit case for such a claim, but also, it has been said, because a municipality is not entitled to a jury trial.<sup>2</sup> The real reason for declining to allow a trial by jury to a municipality under these circumstances is somewhat different. Municipalities are agencies designated by the legislature or constitution for the convenient discharge of the functions of government. As is said by the supreme judicial court of Massachusetts:<sup>3</sup> "The power to alter the boundaries of the counties, towns and cities, into which the territory of the commonwealth has been divided for political and municipal purposes, is an inherent attribute of the legislature, to be exercised according to its own views of public expediency, unless restrained by express constitutional provision." The powers which the legislature has conferred, it may, in the absence of some controlling legal provision, revoke. The creature cannot arbitrate by means of a jury its equities against its creator—the legislature. Nor can it object if the legislature permits claims against the sovereign as represented by the municipality, without the intervention of a jury.<sup>4</sup>

**§ 449. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Option of the Legislature.**—The constitutional guarantee is much less serious as a controller of legislative power than the solemnity and universality of the provision might lead one to infer. Where the precise case arises in which at common law a jury might have been claimed as a matter of right, the constitutional provision is given full effect.<sup>1</sup> But where one is

Pr. 352 (1865). But see *Baldwin v. New York*, 45 Barb. 359 (1865) [*affirming* 42 Barb. 549 (1864)]; *People v. Haws*, 37 Barb. 440, 15 Abb. Pr. 115 (1862); *Champaign County Com'rs v. Church*, 62 Ohio St. 318, 57 N. E. 50, 73 Am. St. Rep. 718, 48 L. R. A. 738 (1900); *Dunmore's Appeal*, 52 Pa. St. 374 (1866). Whether one who has a right against a corporation can be compelled to forego a jury trial as a condition for collecting his claim may be more doubtful. *Darlington v. New York*, 13 N. Y. 164, 88 Am. Dec. 248, 28 How. Pr. 352 (1865).

2. *Dunmore's Appeal*, 52 Pa. St. 374 (1866).

3. *Stone v. Charlestown*, 114 Mass. 214, 220 (1873), per Gray, C. J.

4. *State v. Jersey City*, 38 N. J. L. 259 (1876); *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248, 28 How. Pr. 352 (1865); *Dunmore's Appeal*, 52 Pa. St. 374 (1866). But see *Baldwin v. New York*, 42 Barb. 549 (1864) *People v. Haws*, 37 Barb. 440, 15 Abb. Pr. 115 (1862).

1. *Lucas v. State*, (Neb. 1905) 105 N. W. 976.

presented which is merely *similar* to the jury-claiming trial at common law, the power of the legislature is entirely unaffected.<sup>2</sup>

A *fortiori* where a new class of action is provided, as with relation to election contests,<sup>3</sup> the statute may provide, at the option of the legislature, either a trial by jury or a summary process. So where a distinct class of crime is created or forbidden;<sup>4</sup>—as where an appellate court is given certain special powers in the finding of facts,<sup>5</sup> the right to a jury trial may be excluded. The constitution applies not to specific cases, but to classes, species or groups of issues or their mode of settlement in court.<sup>6</sup> Such a circumstance as that, at the time of the adoption of the constitution, trial by jury existed, in respect to a certain class of actions, only locally, will not affect the right of the legislature to pass a general law at a later time extending trial by jury to cases of this nature throughout its jurisdiction.<sup>7</sup>

**§ 450. ( [4] *Right to Judgment of Court or Jury; General Right to a Jury Trial* ); Reasonable Limitations Permitted; Demand.**

—The legislature may, with entire propriety, require a litigant to avail himself of a right to jury trial under reasonable conditions. It may, for example, properly be provided that one entitled to a jury trial should specifically demand it, either on the original case<sup>1</sup> or on an appeal from an inferior court,<sup>2</sup> or upon a

**2. Illinois.**—*Frost v. People*, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352 (1901); *People v. Hill*, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634 (1896).

**Kentucky.**—*Harris v. Wood*, 6 T. B. Mon. 641 (1828).

**New Jersey.**—*Carter v. Camden District Ct.*, 49 N. J. L. 600, 10 Atl. 108 (1887).

**New York.**—*Sands v. Kimbark*, 27 N. Y. 147 (1863) [*affirming* 39 Barb. 108 (1863)].

**South Carolina.**—*Frazee v. Beattie*, 26 S. C. 348, 2 S. E. 125 (1886).

**3. Metz v. Maddox**, 121 N. Y. App. Div. 147, 105 N. Y. Suppl. 702 (1907).

**4. Com. v. Andrews**, 211 Pa. 110, 60 Atl. 554 (1905).

**5. Terminal R. Ass'n v. Larkins**, 112 Ill. App. 366 (1904).

**6. Sands v. Kimbark**, 27 N. Y. 147

(1863) [*affirming* 39 Barb. 108 (1863)].

**7. Riggs v. Shannon**, 16 N. Y. Suppl. 939, 21 N. Y. Civ. Proc. 434, 27 Abb. N. Cas. 456 (1891).

**1. Alabama.**—*Baker v. Jackson*, 40 So. 348 (1906).

**California.**—*Maddux v. Walthall*, 141 Cal. 412, 74 Pac. 1026 (1903).

**Georgia.**—*Miller v. Georgia R. Bank*, 120 Ga. 17, 47 S. E. 525 (1904).

**Massachusetts.**—*Clark v. Baker*, 78 N. E. 455 (1906).

**New York.**—*People v. Halwig*, 84 N. Y. Suppl. 221, 41 Misc. Rep. 227 (1903).

**South Carolina.**—*Town of Clinton v. Leake*, 71 S. C. 22, 50 S. E. 541 (1905).

**Tennessee.**—*Harris v. Bogle*, 115 Tenn. 701, 92 S. W. 849 (1906).

proceeding for the assessment of damages.<sup>3</sup> A request for a jury after the trial of the issue has begun may be too late.<sup>4</sup> On the other hand, where a party in an inferior court has the right to a jury trial and seasonably claims it, the presiding judge, in the event of a denial of the right, has no jurisdiction to proceed further in the matter.<sup>5</sup>

**§ 451. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Reasonable Limitations Permitted*); Time of Application.**—It may properly be required that an application for a jury in either a civil or criminal<sup>1</sup> case should be made within a limited reasonable time. Unless application for a jury is made within the time specified, the right will be deemed to have been waived.<sup>2</sup> A similar result may be prescribed by statute.<sup>3</sup> Failure to claim in time as to certain of several defendants is not cured, as to them, by a seasonable claim made by the others.<sup>4</sup>

*When one party seasonably claims a jury trial* he preserves the rights of both parties and cannot later, by withdrawing his claim or waiving it, prevent a jury trial, unless his opponent also consents.<sup>5</sup>

**§ 452. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Reasonable Limitations Permitted*); Minor Criminal Offenses.**—Misdemeanors may, in the discretion of the legislature, be tried without a jury.<sup>1</sup> The same rule applies

*Texas.*—Nalle v. City of Austin, 93 S. W. 141 (1906).

*Washington.*—State v. Neterer, 33 Wash. 535, 74 Pac. 668 (1903).

2. Harrison v. City of Anniston, (Ala. 1908) 46 So. 980 (recorder's court).

3. Clark v. Baker, (Mass. 1906) 78 N. E. 455; Pointer v. Jones, (Wyo. 1906) 85 Pac. 1050.

4. *In re* Wickersham's Estate, (Cal. 1908) 96 Pac. 311.

5. New Jersey Soc. for Prev. of Cruelty to Animals v. Wilbur, (N. J. Suppl. 1908) 69 Atl. 1010.

1. Merriweather v. State, (Ala. 1908) 45 So. 420; Jones v. State, (Ala. 1906) 41 So. 299.

2. Hammond v. State, (Ala. 1908) 45 So. 654; Stafford v. State, (Ala. 1908) 45 So. 673; Mills & Williams

v. Ivey, 3 Ga. App. 557, 60 S. E. 299 (1908).

3. Ross v. McCaldin, 107 N. Y. S. 381, 123 App. Div. 13 (1907); Ettlinger v. Trustees of Sailors' Snug Harbor, etc., 107 N. Y. S. 779, 122 App. Div. 681 (1907).

4. Spencer v. Adams Dry Goods Co., 54 Misc. (N. Y.) 614, 104 N. Y. Suppl. 867 (1907).

5. Elmore v. New York City Ry. Co., 51 Misc. (N. Y.) 675, 100 N. Y. Suppl. 1019 (1906); Allworth v. Interstate Consol. Ry. Co., 27 R. I. 106, 60 Atl. 834 (1905).

1. People v. Flaherty, 119 N. Y. App. Div. 462, 104 N. Y. Suppl. 173 (1907). Where at the time of the adoption of a state constitution justices of the peace exercised jurisdiction over offenses punishable by public

to other lesser criminal offenses. The violator, for example, of a municipal ordinance which is not also part of the criminal laws of the state, is not entitled to a jury trial.<sup>2</sup> On the other hand, where he has an option to claim a jury he cannot be forced to a jury trial against his will.<sup>3</sup>

**§ 453. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Reasonable Limitations Permitted*); Number of Jurors.**—While “jury,” as the term is used in state constitutions, means twelve men voting unanimously, various statutory modifications have been permitted. For example, nine<sup>1</sup> may return a valid verdict. No provision of the Federal Constitution is violated by such legislation on the part of a state.<sup>2</sup>

*On the other hand*, in a criminal case, a statute permitting a jury of six to render a verdict in a case of a juvenile offender which may involve a sentence of imprisonment, has been held to be unconstitutional.<sup>3</sup>

**§ 454. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial; Reasonable Limitations Permitted*); Payment of Jury Fees.**—It is not unreasonable that a party who claims a jury should be required to deposit a reasonable sum, not exceeding the amounts actually paid the jury, as a condition precedent to the allowance of his right to a jury trial in a municipal<sup>1</sup> or other inferior court. The same requirement may be made on each continuance of such a jury trial granted at the request of a party.<sup>2</sup> One who demands a jury without depositing officers’ and

whipping and setting in the stocks, it cannot be said, as matter of law, that statutes conferring upon them jurisdiction over criminal offenses punishable by imprisonment not exceeding six months is an infringement of the constitutional right to a jury trial on the ground that the modern penalty is the more severe. *Wilmarth v. King*, 74 N. H. 512, 69 Atl. 889 (1908).

2. *Miller v. City of Birmingham*, (Ala. 1907) 44 So. 388.

3. *Wadkins v. State*, 127 Ga. 45, 56 S. E. 74 (1906).

1. *Logan v. Field*, (Mo. 1905) 90 S. W. 127; *Taussig v. St. Louis & K. R. Co.*, 186 Mo. 269, 85 S. W. 378 (1905).

2. *Franklin v. St. Louis & M. R. R. Co.*, 188 Mo. 533, 87 S. W. 930 (1905).

3. *Robinson v. Wayne Circuit Judges*, 151 Mich. 315, 115 N. W. 682, 14 Detroit Leg. N. 945 (1908).

1. *Williams v. Gottschalk*, 231 Ill. 175, 83 N. E. 141 (1907) (\$6); *Humphrey v. Eakley*, 72 N. J. L. 424, 60 Atl. 1097 (1905) [*affirmed* in 65 Atl. 1118 (1907)]; *Humphrey v. Eakley*, (N. J. Suppl. 1905) 60 Atl. 1097; *Cohen v. New York City Ry. Co.*, 106 N. Y. Suppl. 561, 121 App. Div. 803 (1907) (\$4.50 per day).

2. *Cohen v. New York City Ry. Co.*, 106 N. Y. Suppl. 561, 121 App. Div. 803 (1907).

jury fees as prescribed by law, waives his demand.<sup>3</sup> There must, however, be statutory authority for making such a requirement.<sup>4</sup>

*On the other hand*, it has been held that the timely demand by a defendant in a justice's court for a jury cannot be denied because of his refusal to advance the *venire* fees.<sup>5</sup>

**§ 455. ([4] Right to Judgment of Court or Jury; General Right to a Jury Trial; Reasonable Limitations Permitted); Restricted Appeals.**—It is a reasonable regulation upon the right to a jury trial that a court of first instance should hear and determine issues of fact, in civil actions involving a limited amount, in *quasi criminal* actions, as those for forfeiture of liquor kept contrary to law,<sup>1</sup> and, in criminal cases, on misdemeanors or minor crimes;<sup>2</sup>—*provided* that the party is given, as of right, an appeal to a higher court in which a trial by jury is preserved to him. Under both the state and federal<sup>3</sup> constitutions, such an appeal does not satisfy the right under consideration in a case of treason, felony or other serious crime. While this appeal must be as of right, it need not be *unconditioned* or unlimited. The legislature may provide certain reasonable restrictions. For example, the appellant may be required to content himself with a hearing upon the matters which he specifies on his appeal.<sup>4</sup>

*Bond Required.*—In either a civil or criminal action<sup>5</sup> the appellant may be required to furnish a bond.

**§ 456. ([4] Right to Judgment of Court or Jury; General Right to a Jury Trial); Unreasonable Limitations Unconstitutional.**—The constitutional provision is violated by any monetary qualification likely to prove an unreasonable impediment upon the right to a jury trial; e. g., that the claim must amount to at least \$50.<sup>1</sup>

3. *Martin v. Borden*, 107 N. Y. Suppl. 725, 123 App. Div. 66 (1907).

4. *Scott v. Young*, 113 Mo. App. 46, 87 S. W. 544 (1905); *City of Vine-land v. Denoffio*, (N. J. 1907) 65 Atl. 837; *Story v. Walker*, (N. J. Suppl. 1904) 58 Atl. 349.

5. *New Jersey Soc. for Prev. of Cruelty to Animals v. Wilbur*, (N. J. Suppl. 1908), 69 Atl. 1010.

1. *Stahl v. Lee*, (Kan. 1905) 80 Pac. 983.

2. *Little v. State*, 123 Ga. 503, 51 S. E. 501 (1905); *Stone v. City of*

*Paducah*, 27 Ky. L. Rep. 717, 86 S. W. 531 (1905); *State v. Lytle*, 138 N. C. 738, 51 S. E. 66 (1905); *Bettge v. Terr.*, 17 Okl. 85, 87 Pac. 897 (1906).

3. *Bettge v. Territory*, 17 Okl. 85, 87 Pac. 897 (1906).

4. *Mead v. Cutler*, (Mass. 1907) 80 N. E. 496.

5. *City of Topeka v. Kersch*, 80 Pac. 29 (Kan. 1905).

1. *De Lamar v. Dollar*, 128 Ga. 57, 57 S. E. 85 (1907).

It has been further held that to permit a litigant to obtain a final hearing in the supreme court upon a matter of fact upon controverted evidence only upon stipulating that a judgment may be entered in the supreme court against him unless he prosecutes his appeal, is unconstitutional, as unreasonably abridging the right of trial by jury.<sup>2</sup>

**§ 457. ([4] *Right to Judgment of Court or Jury; General Right to a Jury Trial*); Waiver and Estoppel.**—A waiver may be created not only by express agreement,<sup>1</sup> but by failure to claim a jury at a proper time, neglecting to appear at the trial,<sup>2</sup> or otherwise evidencing an intention not to claim a jury.<sup>3</sup> Even where the form of pleadings would call for a jury, the parties may so describe their contention to the court that the judge commits no error in refusing one to them.<sup>4</sup> A waiver of a jury, as abundantly appears *passim* need not be in writing,<sup>5</sup> unless the more formal

2. *Patterson v. Warfield*, 233 Ill. 147, 84 N. E. 176 (1908).

1. *Goodman v. Sup. Ct. of Cal. in Santa Clara County*, (Cal. App 1908) 96 Pac. 395; *Lindstrom v. Hope Lumber Co.*, (Idaho 1906) 88 Pac. 92; *Ramsden v. Keene Five Cent. Sav. Bank*, (Kan. 1904) 132 Fed. 721; *Maass v. Rosenthal*, 109 N. Y. Suppl. 917, 125 App. Div. 452 (1908).

Implied agreement as a consent to a reference may have the same effect. *Reynolds v. Wynne*, 111 N. Y. Suppl. 248, 127 App. Div. 69 (1908); *Bruce v. Carolina Queen Consol. Min. Co.*, (N. C. 1908) 61 S. E. 579; *Williams v. Weeks*, 70 S. C. 1, 48 S. E. 619 (1904).

2. *Cerussite Min. Co. v. Anderson*, (Colo. App. 1903) 75 Pac. 158.

3. *Juvinall v. Jamesburg Drainage Dist.*, 204 Ill. 106, 68 N. E. 440 (1903); *Blanton v. Howard*, 25 Ky. Law Rep. 929, 76 S. W. 511 (1903); *Horton v. Simon*, (Neb. 1903) 97 N. W. 604; *Albemarle Steam Nav. Co. v. Worrell*, 133 N. C. 93, 45 S. E. 466 (1903). This may be done even on a question of insanity. *Sporza v. German Sav. Bank*, 192 N. Y. 8, 84 N. E. 406 (1908) [*affirmed* in 104 N. Y. Suppl. 260, 119 App. Div. 172 (1907)]. To deny a jury trial on an action where

a jury might have been moved is error only and not action in excess of jurisdiction. *Goodman v. Sup. Ct. of Cal. in Santa Clara County*, (Cal. App. 1908) 96 Pac. 395. A party improperly refused a jury in a town court but who, on appeal, enjoys the benefit of his privilege in this respect has no cause of complaint on account of the earlier error. *New Jersey Soc. for Prev. of Cruelty of Animals v. Atkinson*, (N. J. Suppl. 1908) 69 Atl. 976.

4. *Wiscomb v. Cubberly*, 51 Kan. 580, 33 Pac. 320 (1893).

5. *Arkansas*.—*Gerstle v. Vandergriffe*, 79 S. W. 776 (1904).

*Colorado*.—*Frank v. Bauer*, 75 Pac. 930 (1903).

*Indiana*.—*Boonville Nat. Bank v. Blakey*, 76 N. E. 529 (1906).

*New York*.—*Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 93 N. Y. Suppl. 849, 105 App. Div. 88 (1905).

*North Carolina*.—*Roughton v. Sawyer*, 56 S. E. 480 (1907).

*Washington*.—*Zilke v. Woodley*, 36 Wash. 84, 78 Pac. 299 (1904).

*United States*.—*Brock v. Fuller Lumber Co.*, 153 Fed. 272, 82 C. C. A. 402 (1907).

method be expressly prescribed by statute.<sup>6</sup> That the conduct by which the waiver was accomplished is irregular in point of procedure,<sup>7</sup> is of no consequence. It has been held, however, that a waiver of the right to a jury must be strictly construed;<sup>8</sup> and limitations upon any exercise of the right of waiver may be prescribed by statute.<sup>9</sup> Where a party neglects to insist upon his right to a jury at each appropriate stage, he will be regarded as waiving it.<sup>10</sup>

*Estoppel.*—Waiver may become reinforced by *estoppel* where good faith requires that a party who has failed to claim a jury should not be permitted to obtain one at a later stage.<sup>11</sup>

*Retrials.*—Waiver of a jury on his original case does not prevent a party from claiming a jury on a retrial.<sup>12</sup>

§ 458. (5) **Right to Confrontation.**—Prominent among rights with which the substantive law has endowed a litigant is that of *confrontation*;—the privilege of meeting the witnesses against him face to face. In other words, the object to be secured is that the *witness* should give his evidence in presence<sup>1</sup> of the ad-

6. *Albien v. Smith*, (S. D. 1905) 103 N. W. 655. The administrative power of the judge extends to permitting the withdrawal of a written stipulation waiving a jury. *Hartford Fire Ins. Co. v. Redding*, (Fla. 1904) 37 So. 62.

7. *Sharrock v. Kreiger*, (Indian Terr. 1906) 98 S. W. 161.

8. *Sharrock v. Kreiger*, (Indian Terr. 1906) 98 S. W. 161; *Simmons v. State*, 75 Ohio St. 346, 79 N. E. 555 (1906); *Allworth v. Interstate Consol. Ry. Co.*, 27 R. I. 106 60 Atl. 834 (1905). See also *Howard v. Maxwell's Ex'r*, 98 S. W. 1013, 30 Ky. L. Rep. 448 (1907).

9. *Chessman v. Hale*, (Mont. 1905) 79 Pac. 254; *Lipscomb's Adm'r v. Condon*, (W. Va. 1904) 67 L. R. A. 670, 49 S. E. 392.

10. *Ogden v. Apalachian Land & Lumber Co.*, (N. C. 1907) 59 S. E. 1027.

11. *Brook v. Fuller Lumber Co.*, 153 Fed. 272, 82 C. C. A. 402 (1907).

12. *Freifeld v. Sire*, 84 N. Y. Suppl. 144, 13 N. Y. Ann. Cas. 359 (1903); *Worthington v. Nashville, C. & St. L.*

*Ry.*, 114 Tenn. 177, 86 S. W. 307 (1905).

1. The meaning of "presence," or "face to face" in this connection has received a common sense construction. It does not require that the witness should look at the party. He may look in another direction, as to the Court, while giving his testimony. As was said to Earl Stafford, who complained that a witness had averted his face from him: "My lord, do you see the witness; that is enough for face to face." *Earl of Stafford's Trial*, 7 How. St. Tr. 1293, 1341 (1680). A mere temporary absence from the court room of the witness while testifying should not be deemed an infraction of the Constitution. *Skaggs v. State*, 108 Ind. 571 N. E. 695 (1886). With regard to the temporary absence of the *party* from the court room, apparently misplaced sympathy for the accused has carried the court at times to extreme lengths. Thus a conviction was reversed because a witness was allowed to proceed while the accused was in the water-closet. *Bennett v. State*, 62 Ark. 516, 36 S. W.



verse party.<sup>2</sup> In the broadest and most sweeping terms the organic law of every state in the American Union purports to confer it upon all parties to a legal process. This effort is especially

947 (1896). In another case, prejudicial error was held to have been committed by a trial court in removing an accused to the back of the room while a timid witness was testifying. *State v. Mannion*, 19 Utah 505, 57 Pac. 543 (1899). Where a witness is too ill to be cross-examined, it has been held to be reversible error to permit him to be interrogated on a single point, i. e., whether he [witness] killed deceased;—although the court did not decline to permit the cross-examination and it was the claim of the accused that deceased killed himself. *Wray v. State*, (Ala. 1908) 45 So. 697. The constitutional right of one accused of an offense against the laws of the state, to be confronted with witnesses, contemplates that they should be examined in his presence and subjected to cross-examination. *Ralph v. State*, 124 Ga. 81, 52 S. E. 298 (1905). That a witness, however, in response to an attachment, appeared before a judge and testified in the absence of accused suggests no adequate ground for the granting of writs of *certiorari* or prohibition. *State v. Kiernan*, 116 La. Ann. 739, 41 So. 55 (1906); *In re Kiernan*, 116 La. Ann. 739, 41 So. 55 (1906).

**Substituted means of communication.**—Where accused is deaf and dumb and is thereby prevented from hearing the evidence of the state's witnesses, it becomes the administrative duty of the presiding judge to have their evidence made known to him. *Ralph v. State*, 124 Ga. 81, 52 S. E. 298 (1905). Allowing defendant's counsel to write out and submit to the perusal of his client the adverse testimony during the progress of the trial is a reasonable method of accomplishing this result. *Ralph v. State*, 124 Ga. 81, 52 S. E. 298 (1905). See *supra*, §§ 350 *et seq.*

**Under federal constitution**, the right

is fully secured. *Morris v. U. S.*, 149 Fed. 123 (1907). The provision of necessity is limited in its effect by the nature of the federal jurisdiction. Thus, the amendment to the Constitution of the United States (Amend. VI) providing that in all criminal prosecutions the accused shall enjoy the right to be confronted by the witnesses against him, does not apply to prosecutions in state courts. *People v. Welsh*, 84 N. Y. Suppl. 703, 88 App. Div. 65 (1903).

2. *Woodside v. State*, 2 How. (Miss.) 665 (1837); *State v. Houser*, 26 Mo. 437 (1858).

**An untenable suggestion.** It has been suggested that the constitutional right of confrontation is satisfied, in case of a dying declaration, by the production of the reporting witness. "The argument for the exclusion of the testimony, proceeds upon the idea that the deceased is the witness, when in fact it is the individual who swears to the statements of the deceased, who is the witness. And it is as to him that the privileges of an oral and cross-examination are secured." *Campbell v. State*, 11 Ga. 353, 374 (1852).

"This objection is founded in a misconception of fact. The accused is confronted by the witness on his trial. The deceased person is not the witness, but the person who can relate, on the trial, the death-bed declarations, is the witness. The objection, if there be one, is to the competency of the evidence, and not to the want of the personal presence of the witness, and it appears to be well settled, that dying declarations, within the restricted rule prescribed, fall within the exceptions to the general rule that hearsay is not evidence." *Robbins v. State*, 8 Ohio St. 131, 163 (1857). This seems to be an attempt to evade rather than to

marked in favor of the accused in a criminal action. In the absence of a written constitution, the right is fundamental in the jurisprudence of all countries in which the common law of England is largely operative. In the view of that system of jurisprudence it is almost an elementary principle of natural justice. The duty of the court to give it full effect, in accordance with its proper scope, is unquestionable. The point of difficulty lies in determining what are its limitations. That it has them is as obvious as is the right itself. The absence of limitation in the statement of the constitutional provisions cannot be accorded any special weight in this connection. It is a peculiarity, necessitated by the requirement of a reasonable brevity, that a constitution should deal in generalities—broad declarations of principle—with no attempt at stating precise boundaries, but leaving these to be drawn from knowledge of the existing state of the law or the operation of other principles laid down by the instrument in the same way. In dealing with the administration of justice, constant reference is implied to the existence of a large number of rules of law or canons of administration without which the precept of the written constitution would be unworkable and even, at times, unintelligible. No attempt was made to alter the then existing state of the law of evidence by means of the present provision. The object was rather to emphasize and enforce certain rights regarded as already existing and having a recognized place in the entire system of jurisprudence which it was not intended to disturb.

**§ 459. ( [5] *Right to Confrontation* ); Limitations on the Right.**

— So of the right of confrontation. The language in which it is announced is broad enough to forbid the use of any evidence where the declarant is not produced in court. Yet, notwithstanding this language, it is entirely settled, by the great weight of

interpret the constitutional guaranty. "[In dying declarations] the murdered individual is not a witness. . . . His declarations are regarded as facts or circumstances connected with the murder. . . . It is the individual who swears to the statements of the deceased that is the witness, not the deceased." *Woodside v. State*, 2 How. (Miss.) 665 (1837).

This view has been earnestly op-

posed as a mere subterfuge. "To say that the witness who must meet the accused 'face to face' is he who repeats what the dying man has said, is a mere evasion." . . . "The living witness is but a conduit-pipe,—a mere organ through whom this evidence is conveyed to the Court and jury." *State v. Houser*, 26 Mo. 437 (1858).

authority, that depositions may be received in evidence against a party,<sup>1</sup> although the use of a deposition in a criminal case has,

**1. Alabama.**—*Horton v. State*, 18 Ala. 488, 495 (1875).

**Arkansas.**—*McNamara v. State*, 60 Ark. 400, 30 S. W. 762 (1895).

**California.**—*People v. Cady*, 117 Cal. 10, 48 Pac. 908 (1897).

**Colorado.**—*Ryan v. People*, 21 Colo. 119, 40 Pac. 775 (under Const. art. 2, §§ 16, 17) (1895).

**Delaware.**—*State v. Oliver*, 2 Houst. 589 (1855).

**Georgia.**—*Williams v. State*, 19 Ga. 403 (1856).

**Idaho.**—*Terr. v. Evans*, 2 Ida. 627, 632 (1890).

**Illinois.**—*Gillespie v. People*, 176 Ill. 238, 52 N. E. 250 (1898).

**Iowa.**—*State v. Fitzgerald*, 63 Ia. 272, 19 N. W. 202 (1884).

**Kentucky.**—*Walston v. Com.*, 16 B. Monr. 35 (1855).

**Louisiana.**—*State v. Banks*, 111 La. 22, 35 So. 370 (1903).

**Massachusetts.**—*Com. v. Richards*, 18 Pick. 437 (1836).

**Michigan.**—*People v. Case*, 105 Mich. 92, 62 N. W. 1017 (1895).

**Minnesota.**—*State v. George*, 60 Minn. 503, 63 N. W. 100 (1895).

**Mississippi.**—*Dukes v. State*, 80 Miss. 353, 31 So. 744 (1902).

**Montana.**—*State v. Byers*, 16 Mont. 565, 41 Pa. 708 (1895).

**Nevada.**—*State v. Johnson*, 12 Nev. 123 (1877).

**New York.**—*People v. Elliott*, 172 N. Y. 146, 64 N. E. 537 (1902); *Howard v. Moot*, 64 N. Y. 262, 268 (1876). (perpetuating testimony without cross-examination, held constitutional).

**Ohio.**—*Robbins v. State*, 8 Ohio St. 163 (1857).

**Pennsylvania.**—*Com. v. Cleary*, 148 Pa. 26, 38, 23 Atl. 1110 (1892).

**Tennessee.**—*Baxter v. State*, 13 Lea 660 (1885).

**Texas.**—*Steagald v. State*, 22 Tex. 464, 490 (1887).

**Utah.**—*U. S. v. Reynolds*, 1 Utah 322 (1876).

**Washington.**—*State v. Cushing*, 17 Wash. 544, 50 Pac. 412 (1897).

**West Virginia.**—*Carrico v. R. Co.*, 39 W. Va. 86, 89, 19 S. E. 571 (1894).

**Wisconsin.**—*Jackson v. State*, 81 Wis. 127, 130, 51 N. W. 89 (1892).

**United States.**—*Robertson v. State*, 165 U. S. 275, 17 Suppl. 326 (1897); *Mattox v. U. S.*, 156 U. S. 237, 15 Suppl. 337 (1895).

**Affidavits.**—On the issue of a criminal action it has been held that an affidavit will not be admitted. So, in general, it has been decided that in a criminal case neither a deposition regularly taken nor an *ex parte* affidavit can be introduced as evidence by the prosecution. *Com. v. Zorambo*, 205 Pa. 109, 54 Atl. 716 (1903). In the same way, where a question arose on a trial for murder over occurrences between the state's attorney and certain witnesses in his office, that the facts could not be shown by *ex parte* affidavits but that the witnesses themselves should have been put upon the stand and made subject to cross-examination. *Wilburn v. State*, (Tex. Cr. App. 1903) 77 S. W. 3.

On the other hand, in any case where an affidavit is not offered as evidence on the issue no constitutional guaranty is violated by its reception. Thus, using affidavits in aggravation of the offense on a hearing for sentence invades no right of confrontation or to cross-examine, as the affidavits cannot offset the verdict of the jury. *State v. Reeder*, 79 S. C. 139, 60 S. E. 434 (1908). In the same way, a presiding judge may force a defendant to trial by receiving as true the facts stated by him in an affidavit as to what an absent witness if present, would state in evidence. *Risner v. Com.*, (Ky. 1909) 117 S. W. 318; *Davis v. Com.*, 25 Ky. L. Rep. 1426, 77 S. W. 1101 (1904). A conviction for a criminal contempt, based on affidavits, is not a deprivation of the

however, been deemed, by certain courts, to be in violation of the constitutional provision.<sup>2</sup> In like manner, exceptions to the "hearsay rule,"<sup>3</sup> as declarations concerning pedigree,<sup>4</sup> against proprietary or pecuniary interest,<sup>5</sup> dying declarations,<sup>6</sup> official

constitutional privilege of an accused to meet his witnesses face to face. *O'Neil v. People*, 113 Ill. App. 195 (1904).

2. *Alabama*.—*Anderson v. State*, 89 Ala. 12, 7 So. 429 (1889).

*Arkansas*.—*Woodruff v. State*, 61 Ark. 157, 32 S. W. 102 (1895).

*Illinois*.—*Tucker v. People*, 122 Ill. 583, 593, 13 N. E. 809 (1887).

*Iowa*.—*State v. Collins*, 32 Iowa 36, 40 (1871).

*Kansas*.—*State v. Tomblin*, 57 Kan. 841, 48 Pac. 144 (1897).

*Kentucky*.—*Kaelin v. Com.*, 84 Ky. 354, 368, 1 S. W. 594 (1886).

*Montana*.—*State v. Lee*, 13 Mont. 218, 33 Pac. 690 (1893).

*Oklahoma*.—*Watkins v. U. S.*, 5 Okl. 729, 50 Pac. 88 (1897).

*Texas*.—*Cline v. State*, 36 Tex. Cr. App. 320, 36 S. W. 1099 (1896).

*Virginia*.—*Com. v. Brogy*, 10 Gratt. 722, 732 (1853); *Finn v. Com.*, 5 Rand. 708 (1827).

As appears by the foregoing part of this note, many of these decisions were subsequently overruled.

3. *State v. Wing*, 66 Oh. St. 407, 64 N. E. 514 (1902).

Entries in the course of official business have been excluded on this principle. *State v. Reidel*, 26 Iowa 430, 436 (1868) (notarial certificate of protest); *People v. Foster*, 64 Mich. 715, 31 N. W. 596 (1887) (signal service record); *Cutler v. Terr.*, 8 Okl. 101, 56 Pac. 861 (1899) (official stenographer).

4. *Infra*, §§ 2910 *et seq.*

5. *Infra*, §§ 2762 *et seq.*

6. *Alabama*.—*Green v. State*, 66 Ala. 40, 41 Am. Rep. 744 (1880).

*California*.—*People v. Glenn*, 10 Cal. 36 (1858).

*Delaware*.—*State v. Oliver*, 2 Houst. 585 (1871).

*Georgia*.—*Campbell v. State*, 11 Ga.

374 (1852), per Lampkin, J. See also *Jones v. State*, 130 Ga. 274, 60 S. E. 840 (1908).

*Hawaii*.—*Govt. v. Herring*, 9 Haw. 181, 189 (1893).

*Iowa*.—*State v. Nash*, 7 Iowa 377 (1858).

*Kentucky*.—*Walston v. Com.*, 16 B. Monr. 34 (1855).

*Louisiana*.—*State v. Brunetto*, 13 La. Ann. 45 (1858); *State v. Price*, 6 La. Ann. 697 (1851).

*Massachusetts*.—*Com. v. Carey*, 12 Cush. 246 (1853).

*Mississippi*.—*Lambeth v. State*, 23 Miss. 322, 357 (1852); *Woodside v. State*, 2 How. 665 (1837). See also *McDaniel v. State*, 8 Sm. & M. 401 (1847).

*Missouri*.—*State v. Vansant*, 80 Mo. 67 (1883).

*New York*.—*People v. Corey*, 157 N. Y. 332, 51 N. E. 1024 (1898).

*North Carolina*.—*State v. Tilghman*, 11 Ired. 513, 554 (1850).

*Ohio*.—*State v. Kindle*, 47 Ohio St. 361, 24 N. E. 485 (1890); *Robbins v. State*, 8 Ohio St. 131 (1858).

*Oregon*.—*State v. Saunders*, 14 Or. 300, 12 Pac. 441 (1886).

*Pennsylvania*.—*Com. v. Winkelman*, 12 Pa. Super. Ct. 497 (1900); *Brown v. Com.*, 73 Pa. St. 321 (1873).

*Rhode Island*.—*State v. Jeswell*, 22 R. I. 136, 46 Atl. 405 (1900).

*Tennessee*.—*Anthony v. State*, Meigs 265, 33 Am. Dec. 143 (1838).

*Texas*.—*Black v. State*, 1 Tex. App. 368, 384 (1876). See also *Payne v. State*, (Tex. Cr. App. 1904) 78 S. W. 934; *Burrell v. State*, 18 Tex. 713 (1857).

*Virginia*.—*Hill v. Com.*, 2 Gratt 594 (1845).

*Washington*.—*State v. Baldwin*, 15 Wash. 15, 45 Pac. 650 (1896).

*Wisconsin*.—*Jackson v. State*, 81 Wis. 130, 137, 51 N. W. 89 (1892);

certificates of public records,<sup>7</sup> former testimony of an unavailable

*State v. Dickinson*, 41 Wis. 299 (1877). "The constitution does not alter the rules of evidence, or determine what shall be admissible testimony against the prisoner, but it only secures to him the right to confront the witnesses who may be introduced to prove such matters as, according to the settled principles of law, are evidence against him. This objection, if carried out fully, would result in the rejection of all declarations, even where they constitute part of the *res gestæ*. The law determines the admissibility of testimony—the constitution secures to the accused the right to meet the witness who deposes face to face. But what the witness, when thus confronted, shall be allowed to state as evidence, the constitution does not undertake to prescribe, but leaves it to be regulated by the general principles of the law of evidence. When the declarations of the deceased are offered to the jury, they constitute facts in legal contemplation, which tend to establish the truth of the matter to which they relate. The position, therefore, that their admission as evidence infringes upon the constitutional right of the prisoner to confront the witnesses against him, is wholly without foundation, and cannot be maintained." *Walston v. Com.*, 16 B. Monr. 15, 35 (1855).

*United States*.—*Robertson v. Baldwin*, 165 U. S. 275, 17 Suppl. 326 (1897); *Mattox v. U. S.*, 156 U. S. 237, 243, 15 Suppl. 337 (1895). "The rule, however, was well settled before the adoption of our constitution, that the declarations of a dying person were admissible in cases of homicide 'where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations;' and we have no idea that it was the object of this provision in the bill of rights to abrogate this rule

of evidence." *Miller v. State*, 25 Wis. 384 (1870).

*Infra*, §§ 2811 *et seq.*

7. *Tucker v. People*, 122 Ill. 583, 593, 13 N. E. 809 (1887) (marriage certificate); *State v. Smith*, 74 Ia. 580, 583, 38 N. W. 492 (1888); *State v. Matlock*, 70 Ia. 229, 30 N. W. 495 (1896) (record of marriage); *State v. Behrman*, 114 N. C. 797, 804, 19 S. E. 220 (1894) (marriage certificate; excluded on other grounds); *Reeves v. State*, 7 Coldw. 96, 101, 108 (1869).

A certificate by a proper officer that no record of a certain nature appears in his office has been rejected as a violation of the constitutional provision. *People v. Goodrode*, (Mich. 1903) 94 N. W. 14.

*Documents, writings, etc.*—Nothing in the constitutional provisions conferring the right to confrontation, or in the legislation enforcing the same, prevents the use of documents, public or private, according to the general rules of evidence. Thus, for example, where certified copies of public records, state or national, are admissible in evidence under a statute and the custodian of the records is forbidden by law to testify orally as to the records of his office, a certified copy of a list of persons paying special internal revenue taxes in a certain collection district may be received in evidence without violating the right of accused to confront the witnesses against him. *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002 (1907); *State v. Toler*, 145 N. C. 440, 58 S. E. 1005 (1907). In such a connection, a witness who has copied the internal revenue records may testify as to the accuracy of his copy and no constitutional right of the accused is infringed by his so doing. *King v. State*, (Tex. Cr. App. 1908) 109 S. W. 182. Nor is it objectionable that the statute permits the use of a copy of the internal revenue license. The

witness,<sup>8</sup> proof of reputation,<sup>9</sup> and the like,<sup>10</sup> must be received in evidence.

provision in favor of confrontation does not prevent the use of any competent documentary evidence. *Runde v. Com.*, (Va. 1908) 61 S. E. 792. In the same way, the admission of record proof of marriage in a prosecution for bigamy does not violate the constitutional guaranty to persons accused of crime of meeting witnesses face to face. *Sokel v. People*, 212 Ill. 238, 72 N. E. 332 (1904). The official certificate of the custodian of certain public documents to the effect that there is no record in his office to a given purport will not be received in evidence. *People v. Goodrode*, (Mich. 1903) 94 N. W. 14, 10 Detroit Leg. N. 19. On rebuttal of certain evidence by A. now deceased, as to the age of accused, a school census signed by A. assigning a different age for accused, is competent. *McAnally v. State*, (Tex. Cr. App. 1903) 73 S. W. 404.

**Private writings** stand in the same position, in this respect, as public documents. For this reason a witness may, at the request of counsel for accused, give an answer in writing to a specific question asked by him. No right of confrontation is infringed in so doing.

**Non constat** that the court would not, if defendant's counsel had insisted, have required that the witness answer orally. *People v. White*, (Cal. App. 1907) 90 Pac. 471.

8. *Infra*, §§ 1629 *et seq.*

**Former evidence.**—The right to confrontation in no way affects the procedural rules regulating the admissibility of evidence given at a former or preliminary trial.

**Absence or ignorance of whereabouts.**—Thus, the testimony of witnesses, now absent from the state, given at a preliminary hearing, is admissible against accused. *Butler v. State*, (Ark. 1907) 103 S. W. 382 (although not represented by counsel); *State v. Harmon*, (Kan. 1904) 78 Pac. 803;

*State v. Nelson*, (Kan. 1904) 75 Pac. 505; *State v. Banks*, 111 La. Ann. 22, 35 So. 370 (1903); *State v. Kline*, 109 La. Ann. 603, 33 So. 618 (1903); *State v. King*, 24 Utah 482, 68 Pac. 418 (1902). Unavailing search, with due diligence is deemed equivalent to proof of absence from the jurisdiction. *State v. King*, 24 Utah 482, 68 Pac. 418 (1902). The statute allowing the admission in evidence at trial of reporter's notes of testimony taken at the preliminary examination of defendant is constitutional. *People v. Plyer*, 126 Cal. 379, 58 Pac. 904 (1899) [*citing People v. Oiler*, 66 Cal. 101, 4 Pac. 1066 (1884); *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697 (1895); *People v. Sierp*, 116 Cal. 249, 250, 48 Pac. 88 (1897); *People v. Cady*, 117 Cal. 10, 48 Pac. 908 (1897)]. On the other hand, it has been held that where certain of the state's witnesses are absent from the jurisdiction at the time of trial it is error to read to the jury from the stenographer's minutes the testimony of these witnesses given at a preliminary hearing of the cause. *State v. Heffernan*, (S. D. 1908) 118 N. W. 1027. In the same way, where a witness is absent without the procurement or connivance of the accused, but rather by reason of the negligence of the prosecution, his evidence given at a preliminary trial will not be admitted. *Motes v. U. S.*, 173 U. S. 458, 20 S. Ct. 993, 44 L. ed. 1150 (1900).

**Sickness.**—The rule is the same where a witness on a preliminary trial was at the time of hearing dangerously ill, with no hope of recovery. *Spencer v. State*, (Wis. 1907) 112 N. W. 462.

**Death.**—For still stronger reasons, the evidence of a witness, since deceased, given at a former trial is admissible against the accused who then confronted him. *People v. Elliott*, 172 N. Y. 146, 64 N. E. 837, 60 L. R.

**§ 460. ([5] *Right to Confrontation*); Reasons for the Limitations.**—The reason is plain, and has been stated above.<sup>1</sup> The constitutional provision was not intended to introduce a new principle into the law of evidence. It merely declared an old one.<sup>2</sup> The founders of the original constitutions justly deemed any procedure in opposition to this rule as being contrary to law. They were apprehensive of the future, and sought to limit the power of the executive in this particular, for much the same reason that

A. 318 (1902) [judgment *affirmed*, (N. Y. Suppl. 1901) 73 N. Y. Suppl. 279]; *Porch v. State*, (Tex. Cr. App. 1907) 99 S. W. 1122. The rule is not varied where the deceased witness was the victim of the alleged crime. *Porch v. State*, (Tex. Cr. App. 1907) 99 S. W. 1122. In general, it may be affirmed that where a witness has since died or is absent from the state, his evidence on a former trial may be received. *State v. Walton*, (Or. 1909) 99 Pac. 431 [rehearing *denied*, 101 Pac. 389].

**Necessity for using secondary evidence must be established.**—In any case, however, where evidence of this class is received a sufficient predicate must first be laid. *Putnal v. State*, (Fla. 1908) 47 So. 864; *Somers v. State*, (Tex. Cr. App. 1908) 113 S. W. 533; *Arnwine v. State*, (Tex. Cr. App. 1908) 114 S. W. 796, 802 (stenographer's notes). Thus, for example, to read from the stenographer's minutes, without sufficient foundation, the evidence of a witness given in a civil action is error. *State v. Woods*, (Kan. 1905) 81 Pac. 184.

9. *State v. Waldron*, 16 R. I. 191, 192, 14 Atl. 847 (1888). See *infra*, §§ 2739 *et seq.*

10. **Presumptions of law.**—It need not be said that the rules of procedure affecting presumptions of law (*infra*, §§ 1085 *et seq.*) are not modified or affected by the constitutional provisions regarding confrontation. For instance, statutes giving a *prima facie* effect to certain facts, in a specified connection, are not in violation of the right of an accused person to confront the witnesses against him.

Thus, an act making the possession of an internal revenue tax receipt for the sale of ardent spirits *prima facie* evidence of a sale of liquor violates no constitutional privilege to which a defendant is entitled. *Clopton v. Com.*, (Va. 1909) 63 S. E. 1022. The same ruling has been made in cases involving the possession of illegally taken fish or game. *State v. Sheehan*, 28 R. I. 160, 66 Atl. 66 (1907) (short lobsters).

1. *Supra*, § 458.

2. *Campbell v. State*, 11 Ga. 353 (1852); *Lambeth v. State*, 23 Miss. 322 (1852); *Jackson v. State*, 81 Wis. 127, 51 N. W. 89 (1892). "The right of a party accused of a crime, to meet the witnesses against him, face to face, is no new principle. It is coeval with the common law. Its recognition in the Constitution was intended for the twofold purposes of giving it prominence and permanence." *Campbell v. State*, 11 Ga. 353, 374 (1852), per Lampkin, J., "When the bill of rights was adopted by the framers of our Constitution, they were aware of this rule of evidence of the common law. They found it adopted into, and forming a part of, the jurisprudence of the country." *Lambeth v. State*, 23 Miss. 322, 357 (1852). "The right of the accused to meet the witnesses face to face was not granted, but secured, by the constitutional clauses mentioned. It is the right, therefore, as it existed at common law that was thus secured. That right was subject to certain exceptions." *Jackson v. State*, 81 Wis. 127, 131, 51 N. W. 89 (1892).

they forbade unreasonable searches or attached a sacramental value to the "trial by jury." At the time when the drafters of the original state or federal constitutions, from which subsequent documents of a similar nature are copied, began their work these established rules of evidence were in full operation as a recognized and universally accepted part of the law, and no desire to change them was manifested.

*There was, however, a very real mischief, as to which they were properly sensitive and which they earnestly desired to eliminate by law, as being unjust and contrary to the fundamental rights of Englishmen. They felt that in the conflict between the liberties of the people and the prerogative of the crown, the latter had found no instrument of oppression more serviceable than secret tribunals,—like the courts of star chamber or high commission.*

But no grievance or need for change was felt concerning the ordinary and regular course of administering justice by the legally constituted tribunals, although this included statements of persons not before the court, and whom, therefore, the party could not confront.<sup>3</sup>

**§ 461. ([5] *Right to Confrontation*); No New Rule of Evidence.**—The constitutional provision did not undertake to prescribe that the only statements receivable in court should have been originally made by one who, later on, should appear as a witness. To make such a requirement, would be to limit the *subject matter* as to which the confronting witness, when produced, should be permitted to testify. But to this, the constitutional requirement did not purport to apply. The matter was left to the established rules of law as the latter had already been, or should hereafter be, formulated by the courts.<sup>1</sup> It may well be doubted whether much of the reasoning on which the constitutional privilege was based is valid at the present day, and whether any lingering apprehension of danger that the executive power will encroach, through the judicial machinery, upon popular rights is anything more than morbid.

<sup>3</sup>. *Lambeth v. State*, 23 Miss. 322 (1852).

<sup>1</sup>. *State v. McO'Brien*, 24 Mo. 416 (1857); *Summons v. State*, 5 Ohio St. 341 (1856). See also *State v. Moore*, 156 Mo. 204, 56 S. W. 883 (1900). "The purpose of the people was not, we think, to introduce any

new principle into the law of criminal procedure, but to secure those that already existed as part of the law of the land from future change by elevating them into constitutional law." *State v. McO'Brien* 24 Mo. 416, 435 (1857). See also *State v. Moore*, 156 Mo. 204, 56 S. W. 883 (1900).



§ 462. ([5] *Right to Confrontation*); Waiver.—The constitutional protection may be waived by a party,<sup>1</sup> as where he fails to object to evidence offered in contravention of it;<sup>2</sup> or, even more clearly, where a party, who would otherwise be aggrieved expressly consents to its reception.<sup>3</sup>

1. *State v. Olds*, 106 Iowa 110, 76 N. W. 644 (1898); *State v. McNeil*, 33 La. Ann. 1332, 1335 (1881); *State v. Mitchell*, 119 N. C. 784, 25 S. E. 783 (1869). Thus, where, after a trial has begun, accused voluntarily absents himself therefrom, he has no cause of complaint if the cause proceed to verdict in his absence. *Collier v. Com.*, 22 Ky. L. Rep. 1929, 62 S. W. 4 (1901). Should a view be ordered in a criminal case and defendant consent to the view but says that he does not care to be present when it is taken, no right of confrontation is violated by the neglect of the court to force the accused to be present. *State v. Mortensen*, 26 Utah 312, 73 Pac. 562 (1903) [rehearing denied, 73 Pac. 633].

Under a contrary ruling, it has been held that on a trial for murder, it is reversible error to proceed with the examination of a witness in the absence of the prisoner, although the questions propounded and answered in his absence are preliminary questions, and upon the return of the prisoner the same questions are reasked and reanswered in exactly the same way, and no exception is taken on the grounds of such irregularity at the time; for to be present at all stages of the trial is a constitutional right of the prisoner, which he cannot waive, and of which he cannot be deprived. *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676 (1901).

2. *State v. Rogers*, 119 N. C. 793, 26 S. E. 142.

3. *Ruiz v. Terr.*, 10 N. M. 120, 61 Pac. 126 (1900).

Where an accused enters into a written stipulation agreeing that an absent witness would testify to a par-

ticular effect, he cannot claim that his right of confrontation has been violated. *State v. Mortensen*, 26 Utah 312, 73 Pac. 562 (1903) [rehearing denied, 73 Pac. 633] citing,

*Arkansas*.—*Hurley v. State*, 29 Ark. 17 (1874).

*Illinois*.—*Bulliner v. People*, 95 Ill. 394 (1880); *Perteet v. People*, 70 Ill. 171 (1873); *McKinney v. People*, 2 Gilman 540, 43 Am. Dec. 65 (1845).

*Indiana*.—*Shular v. State*, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211 (1885); *Hancock v. State*, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211 (1885).

*Iowa*.—*State v. Polson*, 29 Iowa 133 (1870).

*Kansas*.—*State v. Adams*, 20 Kan. 311 (1878).

*Louisiana*.—*State v. Arbuno*, 105 La. 719, 30 So. 163 (1901).

*Missouri*.—*State v. Wagner*, 78 Mo. 644, 47 Am. Rep. 131 (1883).

*Montana*.—*U. S. v. Sacramento*, 2 Mont. 239, 25 Am. Rep. 742 (1874).

*New Hampshire*.—*State v. Albee*, 61 N. H. 423, 60 Am. Rep. 325 (1881).

*New York*.—*Connors v. People*, 50 N. Y. 240 (1872).

*Wisconsin*.—*Williams v. State*, 61 Wis. 281, 21 N. W. 56 (1884). The result is the same where the accused makes a similar agreement in a less formal way. *Ruiz v. Territory*, (N. M. 1900) 61 Pac. 126. A party may waive a right to confrontation by agreeing that a written statement shall be accepted in place of oral testimony. *Odell v. State*, (Tex. Cr. App. 1902) 70 S. W. 964. See also *People v. Welsh*, 84 N. Y. Suppl. 703, 88 App. Div. 65 (1903) (failure to appear).

## CHAPTER VII.

## PRINCIPLES OF ADMINISTRATION; (B) FURTHERANCE OF JUSTICE.

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### § 463. Principles of Administration; (B) Furtherance of Justice.

*Boni judicis est ampliare justitiam.*<sup>1</sup> It is in furtherance of justice which constitutes the characteristic and essential quality of the ideal judge. Only in proportion as any magistrate manifests, effectuates or embodies justice does he become ideal. In this way alone is the highest obligation of the judiciary to the nation, state or the community fulfilled. The administrative power of the court extends not only to protecting the dignity and due regularity of judicial proceedings and so determining the course of the trial as to protect the substantive legal rights of the parties. It will go further and provide that litigation, as it affects the parties, shall result in the attainment of substantial justice and in as speedy a manner as is consistent with a careful attempt to attain it. This attained, judicial administration may well consider the wider influence of litigation upon society, as a whole.

1. Broom's Legal Maxims, Ch. III, § 1.

There is, in reality, no substantial difference between the "*ampliare jurisdictionem*" and the "*ampliare justitiam*." It is the highest jurisdiction of a judge to cause justice to abound. The true maxim of our law is "to amplify its remedies, and without usurping jurisdiction, to apply its rules to the advancement of substantial justice," per Ld. Abinger, Russell v. Smyth, 9 M. & W. 818 (1842), cited arg. Kelsall v. Marshall, 1 C. B. (N.S.) 255 (1856). See also per Ld. Mansfield 4 Burr. 2239 (1768). "As to the power of the judge to tax costs," remarked Vaughan, J., "if he is willing to do it, and can save expense, it is clear that what the officer of the court may do, the judge may do, and *boni judicis*

*est ampliare jurisdictionem*, i. e., *justitiam*." Collins v. Aron, 4 Bing. N. Cas. 233, 235 (1838). See Clement v. Weaver, 4 Scott N. R. 229 (1841), and cases cited Id., 231, n. (44). Sir R. Hutton, Arg. R. v. Williams, 13 St. Tr. 1430 (1695). And see per Cresswell, J., Dart v. Dart, 32 L. J. P. D. & A. (N. S.) 125 (1863). "The true text is, *boni judicis est ampliare justitiam*, not *jurisdictionem*, as it has been often cited," per Ld. Mansfield, 1 Burr. 304 (1757). See also Chanc. Prec. 323; Broom's Legal Maxims, Ch. III. "The administration of justice may therefore be defined as the maintenance of right within a political community by means of the physical force of the state." Salmond, Jurisp. (2d ed.), 11.

Though seldom without its influence upon the minds of judges, it is probable that the potency of this line of considerations is increasingly effective of results in practical administration.

To secure *substantial justice* to the parties is avowedly the object of the procedure under consideration and the motive or object with which the court exercises its wide administrative powers. In addition to its function of regulating the orderly course of the trial itself, the judge may, in pursuance of these administrative powers, intervene directly to secure the ends of justice. Certain of the more prominent canons under which the presiding judge exercises his powers may be stated. (1) He will insist that the primary evidence of any probative or constituent fact in the possession or control of the proponent shall be produced to the tribunal. (2) He will demand for himself, or permit a party to obtain on request, a *complete* presentation of the case as a whole, or in respect to any particular branch of it. (3) He will protect a party from surprise or other unfair advantage, and witnesses from annoyance. (4) He may insist on bringing out any fact deemed by him essential to a just decision; either by suggesting its existence to counsel or by personally asking questions designed to elicit the truth. (5) In certain jurisdictions, he will comment if necessary on the evidence for the guidance of the jury;<sup>2</sup> and may, in most cases, call additional witnesses to the same end. (6) He will hold the balance of indulgence even between the parties; — according to both any privilege conferred upon either. (7) So far as not restrained by substantive or procedural law, he will require that a party or witness make a full disclosure of all material facts. (8) He will suggest amendments of pleadings or changes in method of presentation calculated to bring the truth into a clearer light.

§ 464. (*Principles of Administration; [B] Furtherance of Justice*); (1) **Primary Evidence Required.**— A fundamental and far-reaching canon of administration is to the effect that primary evidence will be preferred to secondary.<sup>1</sup> As will appear later,<sup>2</sup>

2. This topic is considered elsewhere. *Supra*, §§ 276 *et seq.*

1. The distinction between primary and secondary evidence is one in degree of closeness, in logical relation, to the fact to be proved. The distinction is necessarily in large measure

arbitrary; and, as commonly drawn, indicates a relation to the fact which is the immediate subject of the evidence the *factum probans* rather than to its effect on the truth of the ultimate proposition. In other words, the evidence to establish a probative fact

this canon of administration was, in its inception, treated as a rule of procedure;— which, to a limited extent, it still continues to be. It has seemed convenient to consider, first, the general applications of the *canon*, and, subsequently,<sup>3</sup> the limited application of the *rule*. As commonly phrased, the rule is stated by saying that the best evidence must be produced which the nature of the case admits.<sup>4</sup> The presiding judge will insist that, as between a primary and a secondary grade of proof, a party should produce the primary. Where truth is to be ascertained by the use of reason it is intolerable, in point of principle, that anything short of the most probative and conclusive evidence—the “best” evidence, so-called—should be used in the effort. The dignity of the search demands this concession; the social interests involved require it.

may be primary, while that to prove a constituent one may be secondary.

Speaking generally, it may be said that evidence which a presiding judge is required to admit as a matter of course, without calling on the producer to explain the absence of any other method of proving the fact, is primary. Other evidence is secondary.

2. *Infra*, §§ 490 *et seq.*

3. *Infra*, § 481.

4. *Alabama*.—Patton *v.* Rambo, 20 Ala. 485 (1852).

*Arkansas*.—Taylor *v.* Auditor, 4 Ark. 574 (1842).

*California*.—Norris *v.* Russell, 3 Cal. 249 (1855).

*Colorado*.—Crane *v.* Andrews, 6 Colo. 353 (1882).

*Florida*.—Bellamy *v.* Hawkins, 17 Fla. 750 (1880).

*Illinois*.—Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778 (1886) [*reversing* 19 Ill. App. 241].

*Louisiana*.—Wood's Succession, 30 La. Ann. 1002 (1878).

*Maryland*.—Green *v.* Caulk, 16 Md. 556 (1860).

*Massachusetts*.—Com. *v.* Kinison, 4 Mass. 646 (1808).

*Michigan*.—People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49 (1858).

*Mississippi*.—Storm *v.* Green, 51 Miss. 103 (1875).

*Missouri*.—Bent *v.* Lewis, 88 Mo.

462 (1885) [*reversing* 15 Mo. App. 40, 578].

*Nebraska*.—Bee Pub. Co. *v.* World Pub. Co., 59 Neb. 713, 82 N. W. 28 (1900).

*New Hampshire*.—Greely *v.* Quimby, 22 N. H. 335 (1851).

*New Jersey*.—Hoffman *v.* Rozman, 39 N. J. L. 252 (1877).

*New York*.—Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. 105 (1892) [*reversing* 17 N. Y. Suppl. 223].

*North Carolina*.—Scott *v.* Bryan, 73 N. C. 582 (1875).

*Pennsylvania*.—White's Estate, 11 Phila. 100 (1875).

*South Carolina*.—State *v.* Teague, 9 S. C. 149 (1878).

*Tennessee*.—Sims *v.* Sims, 5 Humphr. 370 (1844).

*Texas*.—Cotton *v.* Campbell, 3 Tex. 493 (1848).

*United States*.—Clifton *v.* U. S., 4 How. 242, 11 L. ed. 957 (1846).

*England*.—Williams *v.* East India Co., 3 East 192, 6 Rev. Rep. 589 (1802).

“The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will admit.” Omychund *v.* Barker, 1 Atk. 21, 49, Willes 538, 26 Eng. Reprint 15, (1744), per Hardwicke, L. Ch.

The success of the attempt is dependent upon it; for, as a stream cannot rise higher than its source, any taint of unreality, or false tendency in the facts upon which the tribunal is to exercise its reasoning faculty must, of necessity, vitiate and tend to render inequitable and unjust the joint product of logic and fact. In the light of reason few propositions seem more self-evident than that a judicial tribunal should require that he who submits evidence to it for the purpose of invoking its aid on his behalf should present the best evidence he has to offer.

**§ 465. ([1] *Primary Evidence Required*); Secondary Evidence Defined.**—In defining secondary evidence the circumstance which has been usually treated as the point of differentiation is as to the appearance on the face of the evidence of a substitution of inferior proof for that which is superior in probative force. Thus, Judge Eastman, in *New Hampshire*,<sup>1</sup> “all evidence which shows upon its face that better remains behind is secondary.” Conversely, it is said that “evidence which carries on its face no indication that better remains behind is not secondary but primary.”<sup>2</sup> The statement seems a favorite one.<sup>3</sup> But it may be doubted whether this element of *obviousness*—carrying character on its *face*—is an essential limitation upon the administrative power of the court to draw distinctions between primary and secondary evidence. The true test is not that between obviously superior evidence and that clearly inferior; but between evidence of a higher and a lower grade, in probative force, whether the fact of the difference is plain on presentation or becomes obvious after a hearing.<sup>4</sup>

**§ 466. ([1] *Primary Evidence Required*); Grading of Primary Evidence.**—As an administrative matter, the enforcement of many gradings into primary and secondary evidence is rendered easy by their obvious character. Unlike differences in probative force between witnesses due to differences in intelligence and opportunities for observation which can only become apparent upon an extended hearing, these distinctions between grades of evidence are clear upon the slightest consideration.

1. *Putnam v. Goodall*, 31 N. H. 419 (1855).

2. 1 Gill. Ev., § 84.

3. *Jelks v. Barrett*, 52 Miss. 315 (1876); *Shoenberger v. Hackman*, 37 Pa. St. 87 (1860); *Capera v. Mignon*, (Tex. Civ. App.) 33 S. W. 882 (1896).

4. “The term secondary evidence is applied to evidence not primary, but which, having some tendency to prove the fact, is received because the best evidence cannot be obtained.” 1 Abbott L. Dict. 448.



*Illustrations.*—While it would not be true that the broad and general administrative requirement — that the most probative evidence which is within the control of the party should be furnished to the tribunal — is limited to any particular instances of its application, certain of the best recognized in practical administration and most powerful in shaping the present form of the law of evidence, may, however, be given in this connection.

1. As between *direct* evidence of any fact and *circumstantial* proof of that fact, the direct evidence is deemed primary. This is the basis of the preference for direct as compared with circumstantial evidence. It is also the foundation, in part, upon which the rules as to *res inter alios actae*<sup>1</sup> have been formulated.

2. As between the judicial evidence of one who knows or has observed a fact, and proof of an extrajudicial statement by the knower or observer, the judicial evidence is primary. This is the administrative principle underlying the exceptions to the rule against hearsay<sup>2</sup> and which ought, in principle, to apply to the entire operation of the hearsay rule.<sup>3</sup>

3. In proving the contents of a constituent document, the production of the original writing for the inspection of the court is deemed primary evidence as compared with proof by copy or any verbal testimony as to its contents. This application of the principle is apparently best regarded as part of the substantive law relating to documents and will be considered in connection with that important medium of proof. As is said elsewhere,<sup>4</sup> the pres-

1. *Infra*, §§ 3150 *et seq.*

2. *Infra*, §§ 2762 *et seq.*

3. The "hearsay rule" sustains an anomalous relation to that requiring the "best" evidence. Like that requiring production of an original constituent instrument, (*infra*, § 482), the rule excluding hearsay is a regulation of substantive law relating to procedure, or, if the phrase be preferred, a rule of procedure. Unlike the procedural rule as to documents, however, the hearsay rule presents the unusual feature that, so far as given full operation, it absolutely and arbitrarily excludes the unsworn statements covered by it. No secondary evidence is permitted, however great the proponent's necessity. On

the other hand, the established *exceptions* to the hearsay rule, pedigree, declarations against interest, and the like, present the administrative feature of furnishing secondary evidence in the absence of the primary. As will be said elsewhere (*infra*, § 2374) the hearsay rule becomes harmonious with the rest of the law of evidence by treating it as a requirement of primary evidence — analogous to that regulating proof of the contents of a constituent document — and, when so regarded, is essentially sane and beneficial; while, as a bar to the introduction of relevant testimony, it has no adequate justification in reason.

4. *Infra*, § 482.

ent scope of the "best evidence rule," viewed as one of procedure, is practically limited to proof of the contents or execution of constituent documents.

4. As between evidence of the physical phenomena covered by actual observation and the inference of an observer as to the existence of a fact which these phenomena appear to him to establish, the phenomena themselves are the primary evidence. This administrative principle is at the basis of the so-called "opinion evidence" rule, excluding the unnecessary use by a witness of the reasoning faculty,<sup>5</sup> and will be considered more fully in that connection.

**§ 467. ([1] *Primary Evidence Required; Grading of Primary Evidence*); Evidence by Perception.**—As has been said,<sup>1</sup> the establishment of a grade of primary evidence is more or less arbitrary. It has been suggested, for example, that the evidence gained by the direct perception of the tribunal is more cogent than any other method of showing the same facts; that, therefore, so long as the person or object in question can be brought before the court, no other inferior evidence should be received.<sup>2</sup> This has been repudiated.<sup>3</sup>

**§ 468. ([1] *Primary Evidence Required; Grading of Primary Evidence*); Written and Oral Evidence.**—It is probable that no distinct administrative principle regards written evidence as primary, and oral evidence as secondary. As a question of probative weight, it is not doubtful that the document is much to be preferred. But it will, in most instances, probably be found that the requirement of written evidence of a given fact is due rather to the substantive law than to that of administration. The substantive law has taken a very marked interest in requiring the use of writing as proof of important transactions. Not only will the positive law, when the parties have adopted writing as the depositary of their intentions and agreements, protect and effectuate the presumed intention of the parties by requiring (1) that the language used shall not be varied, modified or contradicted by extrinsic evidence (which is the "parol evidence rule"); and (2) by requiring that in any dispute between the parties to a written agreement the document itself shall be the evidence of the

5. *Infra*, §§ 1791 *et seq.*

1. *Supra*, § 466.

2. Glossford on Evid.

3. *Q. v. Francis*, L. R. 2, C. C. R. 128 (1874); *Lucas v. Williams*, 66 L. T. R. 706 (1892).

understanding between them (which is the best evidence rule viewed as a rule of procedure). But substantive law goes much further, regardless and independent of the assumed conventions and even of the wishes of the parties. It prescribes that deeds, wills, and other formal constituent documents shall be in writing. Important contracts, such as those relating to the sale of interests in land, for the sale of personal property of substantial value, for the rendition of services extending over a period of a year, and the like, must by substantive law relating to procedure be evidenced by writing or equivalent guarantees for truth.

*It is, of course*, immaterial either to administration or procedure in general whether writing is made primary evidence by the substantive law from its view of public policy expressed in a Statute of Wills, Statute of Frauds, or the like; or whether the requirement is made to carry out the assumed intention, the implicit agreement, of the parties. In either event, where the right exists, the production of the document is primary evidence, and its absence must be satisfactorily justified if secondary evidence is to be received.

*But as between two alternative methods* of proving a fact, neither being forbidden by any act of law, there seems no principle of administration to the effect that the one embodying the use of writing must be regarded as primary. For example, while the original agreement of the parties must by rule of substantive law be produced in proof of any fact asserted, as primary evidence of its contents, in any litigation between the parties on the document, no such requirement is made in an action between a party and a stranger.<sup>1</sup> So while *ownership* of a chattel may be established by exhibition of a document, it may also be shown by oral testimony.<sup>2</sup> The lading of goods may be proved by oral testimony though a bill of lading exist.<sup>3</sup>

**§ 469. ([1] *Primary Evidence Required; Grading of Primary Evidence*); Maps, Plans, etc.**—Whether maps, plans and the like be regarded as documents or as seems more appropriate, be treated as real evidence, they are not a primary grade of evidence in relation to oral testimony as to the existence of the

1. See DOCUMENTARY EVIDENCE.

3. *Giraudel v. Mendiburne*, 3 Mart.

2. *Fay v. Davidson*, 13 Minn. 523 (1868) (steamboat); *McMahon v. Davidson*, 12 Minn. 357 (1867).  
N. S. (La.) 509 (1825).

same facts. Thus, it may be shown by oral evidence that a certain piece of land is not included within the description of a deed, although the plan annexed to the deed of conveyance is not proved or its absence explained.<sup>1</sup>

§ 470. ([1] *Primary Evidence Required*); *Scope of the Canon*.—While the “best evidence rule” viewed as one of procedure, is, so far as valid at all, of very limited application, it has, when taken as a canon of administration, a wide sphere of judicial usefulness. No reasonable doubt exists but that the mind intuitively recognizes certain differences in probative force between alternative ways of proving the same fact. That one, for example, called upon to act in an important matter would more readily credit the statement of a percipient witness, than the report, even at first hand, of what someone has heard the latter say; that such a person should prefer to see important letters rather than be informed, in a general way, as to their substance; that he would be sooner and more completely convinced of the truth of a fact by the statement of one who saw it, than by a detail of other facts which suggest an inference, more or less probable, that it must have occurred. These, and similar propositions, are self-evident. In such cases, the varying probative effect of these classes of evidence is not so much one of degree as of kind. In essence, such distinctions are based upon fundamental qualities inherent in the nature of the human mind, its responsiveness to varying grades of suggestiveness in outside facts. But a further consideration is at once apparent. The intrinsic importance of these differences is, in case of judicial administration, greatly enhanced by the presence in court, as part of the tribunal, of a fortuitous aggregation of persons temporarily clothed with judicial power, selected by chance from the general mass of the community, and whose minds are entirely untrained for the careful sifting of testimony. Judicial administration must sedulously, at every step, consider the peculiar mentality of this conditioning factor in the ascertainment of truth;—its constant liability to be misled, its tendency to yield to the play of emotion or the plausible appeal of passion or prejudice.

*Certain of these more obvious distinctions* judicial administration has seen fit to recognize;—regarding, in each case, the higher grade of evidence as *primary*, and any subordinate, weaker or

1. *Hiestand v. Forsyth*, 12 Rob. (La.) 371 (1845).

substitutionary evidence in proof of the same fact as secondary. The administrative canon requires that the primary proof must be presented or its absence satisfactorily explained. In themselves, they are sage maxims of experience—counsels of prudence. The peculiarity presented by the English law of evidence is that certain of these counsels have by intrinsic value and constant use hardened into rules of procedure under what would seem a mistaken impression that the binding force of precedent attaches to the exercise of administrative prudence.<sup>1</sup>

§ 471. ([1] *Primary Evidence Required*); Not a Question of Probative Force.—The fact that other primary evidence is more probative than the primary evidence offered, is no ground for excluding that actually produced. The "best evidence" rule relates rather to admissibility than to weight.<sup>1</sup> In other words, the rule of administration does not attempt to distinguish, in point of admissibility, between different classes of relevant facts;—provided it regards them as primary.<sup>2</sup> To be rejected under this rule,

1. Much mischief to the scientific symmetry in development and to success in practical administration has been thus caused. The hearsay rule, for example, as a counsel of prudence, as a canon of administration, is admissible. Regarded as a hard and fast rule of procedure it is highly mischievous to the end which judicial administration seeks to reach.

1. *Indiana*.—Hewitt v. State, 121 Ind. 245, 23 N. E. 83 (1889).

*Massachusetts*.—Com. v. Merrell, 99 Mass. 542 (1868).

*New Hampshire*.—Roberts v. Dover, 72 N. H. 147, 55 Atl. 895 (1903).

*New York*.—People v. Gonzales, 35 N. Y. 49 (1866).

*Pennsylvania*.—Canfield v. Johnson, 144 Pa. St. 61, 22 Atl. 974 (1891).

*Vermont*.—Whitney Wagon Works v. Moore, 61 Vt. 230, 17 Atl. 1007 (1888).

2. *Alabama*.—McCreary v. Turk, 29 Ala. 244 (1856).

*Connecticut*.—Barnum v. Barnum, 9 Conn. 242 (1832).

*Illinois*.—Vigus v. O'Bannon, 118 Ill. 334, 8 N. E. 778 (1886).

*Indiana*.—Hewitt v. State, 121 Ind. 245, 23 N. E. 83 (1889).

*Kentucky*.—Grubbs v. Pickett, 1 A. K. Marsh. 253 (1818).

*Maryland*.—Richardson v. Milburn, 17 Md. 67 (1860).

*Massachusetts*.—Chamberlain v. Carter, 19 Pick. 188 (1837) [*distinguishing* Williams v. East India Co., 3 East 192, 6 Rev. Rep. 589].

*Michigan*.—Robinson v. Mulder, 81 Mich. 75, 45 N. W. 505 (1890).

*Missouri*.—Austin v. Boyd, 23 Mo. App. 317 (1886).

*New Hampshire*.—Roberts v. Dover, 72 N. H. 147, 55 Atl. 895 (1903).

*New York*.—People v. Gonzales, 35 N. Y. 49 (1866); Fry v. Bennett, 3 Bosw. (N. Y.) 200 (1858).

*North Carolina*.—Clements v. Hunt, 46 N. C. 400 (1854).

*Pennsylvania*.—Crozer v. New Chester Water Co., 148 Pa. St. 130, 23 Atl. 1123 (1892).

*Texas*.—Holmes v. Coryell, 58 Tex. 680 (1883).

*Vermont*.—Whitney Wagon Works v. Moore, 61 Vt. 230, 17 Atl. 1007 (1888).

whether treated as one of procedure or of administration, the evidence offered must not only be of inferior probative force, but the inferiority must arise from the circumstance that the evidence offered is of a lower *grade* of proof,<sup>3</sup> one so obviously inferior as to suggest that its employment by the proponent could not have been in good faith, or that the interests of public justice would suffer by its use. For example, an admission, by a rule of procedure, is made primary evidence.<sup>4</sup> It follows, so far as this canon is concerned, that such a statement is equally admissible, though often not so probative, as the direct evidence of a percipient witness to the fact stated by the admission. Thus, the book of deposits kept by a bank, though made from slips kept by another clerk is quite as much primary evidence as to the state of a depositor's account, as is the depositor's pass book kept by the bank's officers receiving his money. The evidence, therefore, is equally admissible.<sup>5</sup> One who saw an occurrence from a distance though but little of it, is equally competent, if not quite as credible, as a witness who with excellent powers of observation and a retentive memory, is able to state, with absolute indifference between the litigants, the entire set of happenings in his immediate proximity. The distinction is not between the probative

*West Virginia.*—*State v. Cain*, 9 W. Va. 559 (1876).

*Wisconsin.*—*Althouse v. Jamestown*, 91 Wis. 46, 64 N. W. 423 (1895).

*United States.*—*U. S. v. Reyburn*, 6 Pet. 352, 8 L. ed. 424 (1832).

3. *Alabama.*—*McCaskle v. Amarine*, 12 Ala. 17 (1847).

*Connecticut.*—*Barnum v. Barnum*, 9 Conn. 242 (1832).

*Illinois.*—*Vigus v. O'Bannon*, 118 Ill. 334, 8 N. E. 778 (1886).

*Kentucky.*—*Buckwalter v. Arnett*, 34 S. W. 238, 17 Ky. L. Rep. 1233 (1896).

*Maryland.*—*Richardson v. Milburn*, 17 Md. 67 (1860); *Oelrichs v. Ford*, 21 Md. 489 (1863).

*Michigan.*—*Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668 (1875).

*New Jersey.*—*Patton v. Freeman*, 1 N. J. L. 113 (1791).

*New York.*—*People v. Gonzales*, 35 N. Y. 48 (1866).

*North Carolina.*—*Clements v. Hunt*, 46 N. C. 400 (1854).

*Pennsylvania.*—*Canfield v. Johnson*, 144 Pa. St. 61, 22 Atl. 974 (1891).

*South Carolina.*—*Thomasson v. Kennedy*, 3 Rich. Eq. 440 (1851).

*Tennessee.*—*McCully v. Malcom*, 9 Humphr. 187 (1848).

*Texas.*—*Bledsoe v. Gonzales County*, 31 Tex. 636 (1869).

*Vermont.*—*Whitney Wagon Works v. Moore*, 61 Vt. 230, 17 Atl. 1007 (1888).

*West Virginia.*—*State v. Cain*, 9 W. Va. 559 (1876).

*United States.*—*U. S. v. Gilbert*, 25 Fed. Cas. No. 15,204, 2 Sumn. 19 (1834).

4. *Infra*, §§ 1232 *et seq.*

5. *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145 (1898).

force of facts or witnesses but is between certain primary methods of proving facts and substitutionary or secondary proof for establishing them.

**§ 472. ([1] *Primary Evidence Required*); Extent of Administrative Action.**— That the court is justified, unless a suitable necessity<sup>1</sup> for receiving it is shown, in rejecting the secondary evidence tendered, in refusing a continuance for the purpose of securing the primary, seems clear. That the judge may further properly call the attention of the jury to any unfavorable inferences which arise from the fact of suppressing the truth, is equally unquestioned. Here it would seem that the court must stop. It cannot dismiss the case itself without hearing on the merits and as unprejudiced a consideration of the substantial equities of the party's case as is possible to persons upon whom an imposition has been attempted. Fraud and trickery practiced on the court by one of the parties during the progress of the trial does not justify the dismissal of the action.<sup>2</sup> Administrative favors, a judge may properly reserve for those who have earned them. But justice is not a question of administrative indulgence, given to meritorious suitors. Rather it is a matter of right, conceded by society for its own social purposes. A party should have a hearing *ex debito justitiæ*.

**§ 473. ([1] *Primary Evidence Required*); Necessity for Using Secondary Evidence.**— It may be suggested that an obvious conflict exists between the present principle of administration and that which proposes to itself the protection of the substantive right of a party to prove his case by the most probative evidence in his power.<sup>1</sup> The conflict certainly exists, as frequently happens between opposing canons of administration,— a just balancing of which constitutes juridical success, as the adjusting of opposing duties constitutes sound ethical conduct. It is not difficult to notice the reconciling element which must be the determining factor with the court in deciding upon the admissibility of any particular piece of evidence of a secondary grade. The proponent must show an adequate necessity for proving the fact and a practical inability to prove it in any other way than by secondary evidence. Unless a litigant is able to show, to the

1. *Infra*, § 473.

1. *Supra*, §§ 334 *et seq.*

2. *Fitch v. Martin*, (Neb. 1907)  
113 N. W. 796.

reasonable satisfaction of the judge, that it is necessary for him to use secondary evidence, he will be required to produce the primary. Wherever such a necessity is shown, he will be permitted to use the secondary,<sup>2</sup> if otherwise competent.<sup>3</sup> Hearsay, nevertheless, will not be received as secondary evidence;<sup>4</sup>—the most startling anomaly in the English law of evidence.

This necessity may arise at either of two stages of the proponent's case: (1) that of establishing a *prima facie* case, or, if the proponent is not also the actor,<sup>5</sup> in creating an equilibrium in a civil or a reasonable doubt in a criminal case; or (2) at the stage when it is necessary for the proponent to maintain the situation, either of proof or doubt which he has succeeded in establishing. The necessity arising at the former stage may properly be designated as the necessity for establishing; that arising at the latter stage seems more properly called the necessity for corroboration.

*Scope of Necessity.*—It is essential that the proponent should show that he cannot prove the same ultimate facts by an entirely different class of evidence. It is not, as an invariable rule, insisted that in order to introduce secondary evidence of a particular *factum probans* the proponent should show that this particular *factum probans* is absolutely necessary to proof of a particular

2. *Alabama.*—Adams v. Governor, 1 Ala. 627 (1840).

*California.*—Walsh v. Harris, 10 Cal. 391 (1858).

*Georgia.*—Woodruff v. Woodruff, 22 Ga. 237 (1857).

*Kentucky.*—Louisville Bridge Co. v. Louisville, etc., R. Co., 75 S. W. 285, 25 Ky. L. Rep. 405 (1903).

*Louisiana.*—Montgomery v. Routh, 10 La. Ann. 316 (1836).

*Maryland.*—Cloherly v. Creek, 3 Harr. & J. 428 (1813).

*Massachusetts.*—Binney v. Russell, 109 Mass. 55 (1871).

*Minnesota.*—Wilson v. Minneapolis, etc., R. Co., 31 Minn. 481, 18 N. W. 291 (1884).

*New York.*—Langdon v. New York, 133 N. Y. 628, 31 N. E. 98 (1892) [affirming 59 Hun 434, 13 N. Y. Suppl. 864].

*Pennsylvania.*—McGarr v. Lloyd, 3 Pa. St. 474 (1846).

*Rhode Island.*—Inman v. Potter, 18 R. I. 111, 25 Atl. 912 (1892).

*South Carolina.*—Rigby v. Logan, 45 S. C. 651, 24 S. E. 56 (1895).

*Tennessee.*—Teil v. Roberts, 3 Hayw. 139 (1818).

*United States.*—U. S. v. Reyburn, 6 Pet. 352, 8 L. ed. 424 (1832).

*England.*—Omychund v. Barker, 1 Atk. 21, Willes 538, 26 Eng. Reprint 15 (1744).

3. Prince v. Smith, 4 Mass. 455 (1808); Niles v. Totman, 3 Barb. (N. Y.) 594 (1848).

4. Nichols v. Kingdom Iron Ore Co., 56 N. Y. 618 (1874); Reeves v. State, 7 Tex. App. 276 (1879). See also Domschke v. Metropolitan El. R. Co., 148 N. Y. 337, 42 N. E. 804 (1896) [reversing 74 Hun 442, 26 N. Y. Suppl. 840].

5. *Infra*, § 361.



constituent fact. He may be permitted to prove a fact by secondary evidence, though he could prove the same fact, in another way by primary. If the party desires to establish a probative fact, the *factum probans*, he may do so by the best evidence he can, although he need not use that particular probative fact to prove the *factum probandum* which the *factum probans* tends to establish. So of a witness. A party may be permitted to introduce the secondary testimony of a witness, although he has another witness to the same effect to whose testimony no objection can be taken that it is not primary. In like manner, a deposition could be received as to the contents of papers, though oral testimony to the same effect was procurable.<sup>6</sup>

**§ 474. ([1] *Primary Evidence Required; Necessity for Using Secondary Evidence*); Grounds of Necessity; Witnesses or Documents.**—Reasons for resorting to secondary evidence are numerous.

A witness may be dead, sick, insane, he may be a resident of parts unknown beyond the reach of legal process. In case of a document the primary evidence may have been lost, destroyed or be beyond the reach of process.

*Difficulty of Proof, Subject-Matter.*—Other reasons may justify the court in employing secondary evidence. The necessity for using it may be inherent in the nature of the subject-matter; — as where the facts are ancient.<sup>1</sup> It is naturally assumed, under such circumstances, that the living witnesses of the actual transactions are unavailable. Any evidence, though less probative, such as historical works, fragmentary documents, reputation, rumor, tradition or the like, will be received, *ex necessitate rei*. The necessity for using such evidence closely resembles that which requires the employment of circumstantial evidence instead of direct. Indeed, the secondary proof may fairly be regarded as circumstantial in its nature.<sup>2</sup> The same administrative indulgence will be extended where, for any reason, the direct evidence of witnesses is unavailable. For example, where evidence of actual reception of rents cannot be used to establish the revenues of an estate in a large city, both owners and tenants being either

<sup>6</sup> 6. *Altham v. Anglesea*, 11 Mod. 210 (1709).

2. *Supra*, § 15.

1. *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 633 (1847).

scattered or dead, proof of rental value by means of the inferences of witnesses may be received.<sup>3</sup>

**§ 475. ([1] *Primary Evidence Required; Necessity for Using Secondary Evidence*); Necessity for Establishing.**—The necessity in using secondary evidence for establishing a case, either as actor or nonactor,<sup>1</sup> arises when evidence is needed and in proportion as primary evidence is not available. Thus, for example, whenever in discharge of his burden of evidence at a particular time, a litigant finds it incumbent upon him to prove certain facts of which the primary evidence is a letter, and he cannot for some reason procure the primary evidence of the letter itself, he will usually, should his reason for not producing the letter be satisfactory to the presiding judge, be permitted to show its contents in some secondary way, the recollection of one who has seen it, a press copy of it or the like.<sup>2</sup> So cogent an administrative force is the party's substantive right to prove his case by the best evidence in his power<sup>3</sup> that even where a statute requires a certain kind of evidence to establish a given fact it will not be assumed that proof of good faith and a necessity for using secondary evidence will not justify the judge in receiving substituted evidence of the fact in question.<sup>4</sup>

**§ 476. ([1] *Primary Evidence Required; Necessity for Using Secondary Evidence*); Necessity for Corroboration.**—In connection with the use of secondary evidence for the purpose of corroboration the impelling administrative necessity is not, as where necessity for using secondary evidence arises in connection with the duty of the actor or nonactor to establish his original

3. *Griswold v. Metropolitan El. R. Co.*, 14 Daly (N. Y.) 484 (1888).

1. **Burden of proof and burden of evidence.**—While the distinction between actor and nonactor is mentioned in this connection, it may not be amiss to notice that this necessity for using secondary evidence is one which has no direct relation to the forensic or procedural *burden of proof*, the position of which is the point of differentiation between actor and nonactor. The necessity for producing secondary evidence under consideration concerns itself with and exclusively

relates to the logical *burden of evidence* which, while it does not determine by its position at any given time who is actor and who is nonactor, is naturally affected, in extension at least, by the different objects which actor and nonactor have in mind;—the actor, to prove and maintain a *prima facie* case, the nonactor to prevent him from succeeding in this effort.

2. See DOCUMENTARY EVIDENCE.

3. *Supra*, §§ 334 *et seq.*

4. *Kendall v. Kingston*, 5 Mass. 524 (1809).

case, the fact that primary evidence is not available at all, but rather the circumstance that it is *no longer* available. Corroboration of a case once established may be effected by the use of secondary, deliberative, cumulative or otherwise inferior proof when the primary evidence has become exhausted. The administrative situation here presented is, from the standpoint of the court, which, as usual, is that of society, resembles an attempt to determine a preponderance by a pair of scales, an old and yet almost inevitable simile in this connection. In such an effort, should the heavier weights placed on either side of the scale be found to balance *in equilibrio*, or one scale be found to preponderate with less than the requisite certainty, smaller weights, not in themselves necessary while it seemed probable that the matter could be determined by the more decisive weights, may properly be added to bring about, if possible, the ultimate tip of the scale. It is even conceivable that the process should be continued so long as any of these smaller weights remained available.

*From the viewpoint of the parties*, that of the personal, non-social element in litigation, the administrative situation here presented is more closely analogous to the mediæval *combat a l'outrance*. When the spears of the tilting were shattered without a decisive issue, the combatants might well dismount and attempt a settlement with swords or battle-axes. Should the issue still remain in doubt, victory might be gained, or even the *coup de grace* given, with the dagger. Whether the standpoint of deliberation or that of controversy be adopted, as the physical analogy for the psychological process of creating the mental certainty required for affirmative action, it cannot be regarded but as excellent, indeed, as necessary, administration that when the supply of primary facts and arguments is exhausted the parties be allowed to introduce less conclusive evidence or reasoning. Under this principle, where direct evidence is equally balanced, circumstantial proof may be shown; although it would have been rejected, if offered at an earlier stage.

**§ 477. ([1] *Primary Evidence Required; Necessity for Using Secondary Evidence; Necessity for Corroboration*); Deliberative Facts.**—Deliberative facts<sup>1</sup> may be given a prominence not customarily accorded them. Under such circumstances of equilibrium or indecision primary evidence hitherto rejected

1. *Supra*, § 52.

as cumulative or as having but little probative force may, upon being again tendered, be received. Tests and experiments not usually employed, may be devised or acquiesced in by the presiding judge.

*Facts Inferior in Probative Force.*—It will be noted that this administrative principle requiring that the best evidence should be submitted to the court which is within the power of the party to produce is by no means so extended in application as might be gathered from the earlier authorities whereby the principle was at first announced as a rule of substantive or procedural law.

§ 478. ( [1] *Primary Evidence Required* ); **A Valuable Principle.**—While the administrative principle of requiring the best evidence is at present applied chiefly to what are practically procedural rules, i. e., the established grades of primary and secondary evidence,<sup>1</sup> probably no sufficient reason exists why the normal exercise of the court's administrative function should not properly be so extended as to cover other cases as they arise, not as rulings on points of procedure governed by precedent, but as examples of administrative action, valuable as suggestions, and not revised on appeal except where sound reason has not been exercised by the presiding judge. The discreet exercise of such a power would be available as a potent preventative of suppression, concealment or general bad faith to the tribunal. Certainly, the present system, or lack of it, is highly anomalous. In this connection the scope of the principle is limited, at the present time, to an extent for which no valid reason can probably be assigned. Good faith is sporadically insisted upon, as it were;—much being permitted to a litigant as sanctioned by the ethics of war and by these only.

*The mechanism by which the administrative power of the court may be applied* will be found to vary;—according as the suppressing party is seeking relief as actor; or is, on the contrary, as *reus* or nonactor, trying to prevent the court from taking affirmative action in favor of his opponent.

*As regards the former*, i. e., the actor, the inference of fact against the spoliator may clearly be stated by the judge.<sup>2</sup> This may be adequate protection to all personal interests involved in the litigation. But those interests are not all or even the most important interests affected. There seems some confusion on the subject, involving a doubt as to the proper function of the presid-

1. *Supra*, § 466.

2. *Infra*, §§ 1070 *et seq.*

ing justice. May the judge go further? When made aware that a fraud has been attempted on justice as administered by him, is he warranted in refusing to allow the actor to produce even the best evidence penalizing the offending party by summarily dismissing his case?<sup>3</sup> Reason apparently suggests a negative answer. That justice is entitled to the best available evidence in any and all cases seems clear. As against the party seeking relief, an order for continuance until that evidence is furnished, would seem to enable the judge to enforce this reasonable requirement effectively. But he may properly go further. In the exercise of his administrative function, he may decline to receive the evidence offered; and, in the interest of justice, refuse to allow a decision to be rendered except upon a full presentation of all the facts. But when the demand of justice is satisfied and the most probative evidence available is before the tribunal; when, notwithstanding the inevitable logical inferences against one who has sought to pervert justice by suppressing the proper evidence on which to request judicial action, it still appears, by the requisite preponderance of the evidence, that the offending party has a just claim to relief, upon what theory of judicial administration shall the law decline to listen to his demand for justice? Personally the litigant has shown himself unworthy of favors. But justice is not accorded by society as a favor, but as a duty which the community owes to itself, i. e., to all its members. By the *lex talionis*, it is conceivable that he who has sought to do injustice, should suffer injustice. But the *lex talionis* has been repealed by a higher law, the reciprocal obligation of the citizen to society and of society to the citizen. It seems both *infra dignitatem* and the height of folly for society to teach injustice. It may, more properly, lift the offender to its own higher plane of thought and action.

Where the suppressing party seeks no relief, a more difficult administrative problem is presented. Delay has no constraining power over the conduct of such a party. Continuing the case until the probative evidence be produced will be regarded with indifference, if not satisfaction by the party whose forensic position is that of seeking to prevent the court from acting. More

3. A somewhat analogous case is presented where a party who has refused to produce a document and his antagonist has thereupon proved the

contents by parol, subsequently asks leave to produce the primary evidence. See DOCUMENTARY EVIDENCE.

drastic measures are required. At once, two administrative expedients present themselves; (1) an order to produce, enforced by contempt proceedings; (2) ordering judgment for the opponent. The former is clearly preferable;—the latter, except as a penalty for disobedience to an order to produce, seems objectionable. That a party may be compelled to afford discovery is a well-recognized power of equity jurisprudence. Modern statutory substitutes ratify, simplify and enforce satisfactory substitutes which attain by easier and less expensive methods the same result. That wherever this method of reaching truth through the use of the best evidence fails to apply or proves inadequate, the lack may be supplied by a judicious exercise of the administrative power of the court seems fairly clear. That he who contumaciously refuses to produce evidence under his control may properly be defaulted and judgment ordered against him appears tolerably free from doubt. If, however, the suppressing party should desire to produce the evidence in his control he should be permitted to do so, though previous to the order to produce, he may have refused to afford the adversary the assistance which the evidence in his power would furnish. The inferences from suppression are serious. But if, notwithstanding these, the party not seeking relief can persuade the court that the relief should not be granted, it would seem beneath the dignity of justice to punish a citizen who has sought to prevent justice being done by doing him an injustice. For example, where the party in possession of an original document refuses to produce it upon notice and the party seeking relief incorrectly proves it by the recollection of witnesses, the common ruling that the party in whose possession the document is cannot prove the actual contents seems erroneous. Society does not do justice alone for the sake of the recipient. It does it, still more truly, for its own benefit and advantage.

**§ 479. ([1] *Primary Evidence Required*); How Objection is Taken.**—The party objecting that the evidence offered is not primary, must affirmatively show that the evidence produced by the proponent is secondary, that there is primary evidence in existence and that it is within the power of the proponent to produce it.<sup>1</sup> The objecting party is bound to show not only the

1. *Alabama*.—*Scarborough v. Reynolds*, 12 Ala. (N. S.) 252 (1847).  
*Georgia*.—*May v. Dorsett*, 30 Ga. 116 (1860).

*Indiana*.—*Terre Haute, etc., R. Co. v. Stockwell*, 118 Ind. 98, 20 N. E. 650 (1888).

existence of primary evidence within the control of the proponent of the secondary, but also that this primary evidence is material and relevant to the truth of the proposition in issue;<sup>2</sup> and that the exclusion sought will assist in the just determination of the cause.<sup>3</sup> For the administrative or procedural requirement of the best evidence applies only to probative or constituent facts. It does not cover those that are deliberative<sup>4</sup> or what may be called collaterally relevant facts,<sup>5</sup> i. e., circumstances which are not in the direct line of proof of the constituent facts.

**§ 480. ([1] *Primary Evidence Required*); "Best Evidence" as a Rule of Procedure.**—The insistence upon the primary grade of evidence in proving probative or constituent facts is by no

*Iowa*.—*Arnold v. Arnold*, 20 Iowa 273 (1866).

*Louisiana*.—*Eastin v. Eastin*, 10 La. 194 (1836).

*Maine*.—*Bryer v. Weston*, 16 Me. 261 (1839).

*Maryland*.—*Hadden v. Linville*, 86 Md. 210, 38 Atl. 37, 900 (1897).

*Michigan*.—*Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84 (1879).

*Missouri*.—*Gilbert v. Boyd*, 25 Mo. 27 (1857).

*New Hampshire*.—*Roberts v. Dover*, 72 N. H. 147, 55 Atl. 895 (1903).

*New York*.—*Imperial Bldg. Co. v. John H. Woodbury Dermatological Institute*, 29 Misc. 617, 61 N. Y. Suppl. 129 (1899).

*Pennsylvania*.—*Lee v. Lee*, 9 Pa. St. 169 (1848).

*South Carolina*.—*Ingram v. Sumter Music House*, 51 S. C. 281, 28 S. E. 936 (1897).

*Texas*.—*Missouri, etc., R. Co. v. Milan*, 20 Tex. Civ. App. 688, 50 S. W. 417 (1899).

*Vermont*.—*Curtis v. Ingham*, 2 Vt. 287 (1829).

*United States*.—*U. S. v. Reyburn*, 6 Pet. 352, 8 L. ed. 424 (1832).

*Canada*.—*Taggart v. Ross*, 13 U. C. Q. B. 611 (1856).

2. *Ware v. Morgan*, 67 Ala. 461 (1880); *Lamb v. Moberly*, 3 T. B. Mon. (Ky.) 179 (1826); *Clifton v.*

*Litchfield*, 106 Mass. 34 (1870); *Doe v. Morris*, 12 East 237 (1810).

3. *Alabama*.—*O'Neal v. Brown*, 20 Ala. 510 (1852).

*Arkansas*.—*Greenfield v. Wright*, 16 Ark. 186 (1855).

*Connecticut*.—*Edgerton v. Edgerton*, 8 Conn. 6 (1830).

*Indiana*.—*Lee v. Hills*, 66 Ind. 474 (1879).

*Iowa*.—*Donahue v. McCosh*, 70 Iowa 733, 30 N. W. 14 (1886).

*New Hampshire*.—*Caldwell v. Wentworth*, 16 N. H. 318 (1844).

*New Jersey*.—*Den v. Hamilton*, 12 N. J. L. 109 (1830).

*North Carolina*.—*Dail v. Sugg*, 85 N. C. 104 (1881).

*South Carolina*.—*Simmons Hardware Co. v. Greenwood Bank*, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700 (1893).

*England*.—*Doe v. Morris*, 12 East 237 (1810).

4. *Supra*, § 52.

5. *New Jersey Zinc, etc., Co. v. Lehigh Zinc, etc., Co.*, 59 N. J. L. 189, 35 Atl. 915 (1896); *Gilbert v. Duncan*, 29 N. J. L. 133 (1861); *McFadden v. Kingsbury*, 11 Wend. (N. Y.) 667 (1834); *Carrington v. Allen*, 87 N. C. 354 (1882); *Dail v. Sugg*, 85 N. C. 104 (1881); *Schoenberger v. Hackman*, 37 Pa. St. 87 (1860). See also *Holt v. Weld*, 140 Mass. 578, 5 N. E. 506 (1886).

means a universal procedural rule applicable as a general test to all questions as to the admissibility of evidence. A rule of this nature was much favored during the formative<sup>1</sup> period of the law of evidence. Its effects, however, still linger; and the existence of a so-called "best evidence rule" is frequently raised as an objection to the admissibility of all grades of evidence in cases to which it has no present application.<sup>2</sup>

*But the attempt of English judges*<sup>3</sup> and text-writers,<sup>4</sup> in the eighteenth century to formulate a scientific procedural rule, that

1. "After much study of the law of evidence my opinion is that the greater part of the present law came into definite existence, after being for an unascertainable period the practice of the courts (differing by the way to some extent on different circuits), just about one hundred years ago." Sir James Fitz James Stephen, *Nuncomar & Impey*, i 121n. (1888).

2. More serious than this, such an objection at times prevails with the court. "No rule of law is more frequently cited and more generally misconceived than this. It is certainly true when rightly understood; but it is very limited in its extent and application. It signifies nothing more than that, if the best legal evidence cannot possibly be produced, the next best legal evidence shall be admitted. Evidence may be divided into primary and secondary; and the secondary evidence is as accurately defined by the law as the primary." 3 Christian's Blackstone, p. 368.

3. *Villiers v. Villiers*, 2 Atk. 71 (1740), per Lord Hardwicke. "That all common-law courts ought to proceed upon the general rule, namely, the best evidence that the nature of the case will admit, I perfectly agree." *Grant v. Gould*, 2 H. Bl. 104 (1792), per Lord Loughborough. "The judges and sages of the law have laid down that there is but one general rule of evidence, the best that the nature of the case will allow." *Omychund v. Barker*, Willes Rep. 550 (1744), per Willes, J. "The rule of evidence is

that the best evidence that the circumstances of the case will allow must be given. There is no rule of evidence to be laid down in this court but a reasonable one, such as the nature of the thing to be proved will admit of." *Llewellyn v. Mackworth*, 2 Atk. 40 (1740), per Lord Hardwicke. "The best proof that the nature of the thing will afford is only required." *Ford v. Hopkins*, 1 Salk. 283 (1699), per Holt, C. J.; *Thayer's Cases on Evidence*, 732.

4. "The one general rule, that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed." 3 Black Comm. 368. "It seems in regard to evidence to be an uncontested rule that the party who is to prove any fact, must do it by the highest evidence the nature of the thing is capable of." *Bacon's Abridgment*. "The first, therefore, and most signal rule in relation to evidence is this, that a man must have the utmost evidence the nature of the fact is capable of. The true meaning of the rule of law that requires the greatest evidence that the nature of the thing is capable of is this, that no such evidence shall be brought which *ex natura rei* supposes still a greater evidence behind in the parties own possession and power." *Gilb. Evid.* (2d ed.), 4, 15-17.



the best evidence of which a case was capable was in all instances to be required, and, if produced, received as sufficient, necessarily failed and was abandoned;<sup>5</sup>—for reasons which, in part, appear hereafter.<sup>6</sup>

§ 481. ( [1] *Primary Evidence Required* ); “ *Best Evidence Rule* ” at the Present Time.—It is not difficult to understand why the “ best evidence rule ” as a *rule* of evidence, failed to attain the vogue which its advocates hoped and apparently anticipated. As qualified by the words “ within his power ” a requirement that the proponent of evidence produce the most probative proof, is really a precept of caution, a canon of administration. Regarded as a rule of procedure, it is unworkable. As each case arises, what shall be deemed the most probative evidence in proponent’s power must be decreed upon the special facts, effect must be accorded to certain considerations which is denied to others, the wealth of the parties, their opportunities for securing information, the seriousness of the matter in controversy, all should be examined. No procedural rule could adjust such details. Only a precept of administration could be effective under these circumstances. On attempting to apply the precept as a *rule* of evidence, it has accordingly, and of necessity, broken down. “ Regarded as a general rule, the trouble with it is that it is not true to the facts, and does not hold out in its application.”<sup>1</sup>

*Viewed as a rule of indulgence* or permission, the “ best evidence rule ” is not of general application. Certain relevant facts are not received in evidence though they may be not only the most probative but the only evidence on the point. Exclusionary procedural rules may at any time intervene with an effect over which the “ best evidence rule ” exercises no control. As Professor Christian says:<sup>2</sup> “ In general the want of better evidence can never justify the admission of hearsay, interested witnesses, copies of copies, etc.”

*No general procedural rule* obtains in the English law of evidence to the effect that a party is required to exercise good judgment in the selection of witnesses, that he should choose and maintain the strongest position of law or fact open to him, or that he must in all cases correctly ascertain and properly present to

5. *Queen v. Francis*, L. R. 2 C. C. R. 128 (1874); *Lucas v. Williams*, 66 L. T. Rep. 706.

6. *Infra*, § 481.

1. Thayer, *Prelim. Treat.* 497.

2. 3 *Christian’s Blackstone*, p. 368.

the court the most probative and forceful evidence at his disposal. Folly, ignorance, superficial "smartness," poor judgment and the like carry in litigation much the same consequences that they do elsewhere in human affairs. A party has, in many instances, the right to present illogical and inconclusive facts. Even as a matter of judicial administration, any requirement that a proponent should produce the superior grade of evidence is aimed not so much at bad judgment as at bad faith. To this extent, at least, Gilbert's qualification upon the rule seems to be sound;—although, as will be observed, his consideration attaches rather to the canon of administration than to any procedural rule.

*It is by no means invariably required*, as a rule of procedure, that a party should not suppress testimony of a higher probative force than that which he presents;—that he should conceal nothing of help to the tribunal in its search for truth. Except in the limited cases, shortly to be mentioned,<sup>3</sup> he may do as he pleases about keeping back from the tribunal, not only the best evidence he has but the best possible evidence, if he is content to pay the penalty established for doing so. The judge does not, as he well might under his administrative powers, block his way in so doing. The "rules of the game" of litigation in general permit concealment, both in civil and criminal cases, if the litigant prefers to pay the price for doing so. In many cases the only penalty is a logical one;—the *presumptio contra spoliatorem*, as it is occasionally called.<sup>4</sup> An inference arises, as a matter of logical necessity, that he who thus refuses to produce the decisive evidence undertakes to defraud justice because the more conclusive testimony, if produced, would operate less favorably upon his contention than does the less probative proof on which he prefers to rely.<sup>5</sup> Should this in-

3. *Infra*, § 482.

4. *Infra*, §§ 1070 *et seq.*

*Omnia præsumuntur contra spoliatorem*—as is the common adage, Broom's Legal Maxims (7th ed.), p. 717.

5. *Mordecai v. Beal*, 8 Port. (Ala.) 529 (1839); *Fitzgerald v. Adams*, 9 Ga. 471 (1851); *U. S. v. Reyburn*, 6 Pet. (U. S.) 352, 8 L. ed. 424 (1832); *Tayloe v. Riggs*, 1 Pet. (U. S.) 591, 7 L. ed. 275 (1828). "The object of the rule of law which requires the production of the best evidence of

which the facts sought to be established is susceptible, is the prevention of fraud; for, if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises, that better evidence is withheld for fraudulent purposes which its production would expose and defeat." *Bagley v. McMickle*, 9 Cal. 430, 446 (1858), per Field, J.

Statutory provision has been made to the same effect. *Hudson v. Spence*, 49 Ga. 479 (1873); *Anglo-American*

ference be so violent as to render the evidence actually produced devoid of probative force to such an extent that a jury could not rationally act in accordance with it, the judge may exclude the evidence or order a verdict against the proponent, under his general power to enforce the use of reason.<sup>6</sup> Should the inferences arising from suppression abate probative force without destroying it, the party guilty of concealment may proceed to prove his case with the inferior evidence and take his chance of winning, notwithstanding the logical handicap that he has imposed upon himself.<sup>7</sup>

*Nor is it even inevitable* that concealment of truth should, in the eye of the law, carry with it any penalty whatever. In cases of suppression where there is no active participation by the party but merely a nonfeasance permitted by law, as where the possessor of an important document declines to produce it on notice from his adversary,<sup>8</sup> or a person accused of crime declines to answer pertinent questions on the ground that so doing might incriminate him. In such cases, while, logically, an unfavorable deduction may be difficult to prevent, the law itself prescribes none and even directs that the minds of the tribunal shall not draw such an inference.

**§ 482. ([1] *Primary Evidence Required; "Best Evidence Rule" at the Present Time*); Present Scope of Rule.**—As a rule of procedure the requirement of the best evidence never was enforced to its full extent as stated by its formulators; nor, for the reasons just given, could it have been thus applied with any advantage to the cause of justice. As a rule definitely regulating the admissibility of a class or species of evidence, the present scope of the mandatory portion<sup>1</sup> of the "best evidence rule" is limited to proof of the *contents* of constituent documents in actions between the parties thereto. Here, as in many other connections, not only of procedure but of substantive law, a rule adopted for reasons whose validity has vanished under changed conditions, is retained from motives of practical convenience or effectiveness in

Packing, etc., Co. v. Cannon, 31 Fed. 313 (1887).

6. *Supra*, §§ 385 et seq.

7. From the standpoint of the social as distinguished from the personal interests involved in litigation, the peculiarity lies in permitting either

party to conceal the truth and seek to obtain a victory which he frankly confesses by his conduct could not be gained on a full disclosure.

8. See DOCUMENTARY EVIDENCE.

1. *Supra*, § 464.

the attainment of justice. Historically, the procedural rule that if a litigant desires to prove the contents of a document he must produce the document itself, is part of and a necessary incident in a form of trial, analogous to the trial by witnesses,<sup>2</sup> trial by jury,<sup>3</sup> trial by record,<sup>4</sup> and the like;—which may properly be termed “trial by document.” On such a form of trial the only question was as to whether a given genuine document, usually of the constituent order, in fact existed. If it did, the legal results were established. “If a man *said* he was bound, he was bound.”<sup>5</sup> “The use of documents, in pleading and proof, long antedates the use of ordinary witnesses to the jury. The vast majority of documents used in trials in early times were no doubt of the solemn, constitutive and dispositive kind, instruments under seal, records, certificates of high officials, public registers and the like. Such documents, if the authenticity of them were not denied, ‘imported verity,’ as the phrase was, fixed liability and determined ‘rights.’”<sup>6</sup> Naturally, on a trial by document it was essential that the document should be present in court. “Of course, therefore, whoever would use a document of this character must produce it, just as the court had to have the jury in court, in trial (or proof) by jury, and the record, in trial (or proof) by record.”<sup>7</sup> At a later stage of legal growth, the requirement of the presence of the actual document in court revealed its continued effect in the rules of pleading relating to *profert* and *oyer*<sup>8</sup> in case of such constituent instruments in pursuance of which a pleader relying upon the existence of such a document must produce it or account satisfactorily for its absence. In a still later stage of judicial development, where the formal document is relied on in evidence rather than in pleading, the requirement of production to the jury is still one of *procedure*;—but its application to a case comes through the law of evidence, rather than through that of pleading. This modern survival at present is best rested upon the conventional agreements of the parties to a formal instrument. The best evidence rule as a present rule of procedure provides that in proving the contents of a document, especially of the constituent nature,

2. See DOCUMENTARY EVIDENCE.  
See also Thayer, Prelim. Treat., 205,  
504; *supra*, § 269b.

3. *Supra*, §§ 269 *et seq.*

4. *Supra*, § 152.

5. Holmes, Com. Law, 262.

6. Thayer, Prelim. Treat., p. 504.

7. Thayer, Prelim. Treat., p. 504.

8. Stephen, Pleading (Tyler's ed.),  
3 and note 86.

the writing itself is the primary evidence.<sup>9</sup> It must, therefore, be produced or satisfactory reasons assigned why it is not done. This is the modern survival of the best evidence rule as a rule of procedure. It is, indeed, sadly shrunk as a pretension to control the entire field of evidence which its founders appear to have claimed for it; for this is the rule which was glorified by Burke in the closing days of the eighteenth century:<sup>10</sup> "At length Lord Hardwicke, in one of the cases the most solemnly argued that has been in man's memory, with the aid of the greatest learning at the bar, and with the aid of all the learning on the bench, both bench and bar being then supplied with men of the first form, declared from the bench, and in concurrence with the rest of the judges and with the most learned of the long robe, and able counsel on the side of the old restrictive principles making no reclamation that the judges and sages of the law have laid it down that there is but ONE general rule of evidence — the best that the nature of the case will admit. This, then, the master rule that governs all the subordinate rules, does, in reality, subject itself and its own virtue and authority to the nature of the case, and leaves no rule at all of an independent abstract and substantive quality."

§ 483. ( [1] *Primary Evidence Required; "Best Evidence Rule" at the Present Time*); A Sole Survival.— He who is to prove the contents of a writing must produce the writing itself or account satisfactorily to the court for his failure to do so;— as a condition precedent to permission to use any less probative form of proof.

*It is probable that the survival* of this solitary application of the best evidence rule as a *rule*, is due to a controlling influence entirely extrinsic to itself;— the existence of a substantive conventional right in each party to a constituent document of insisting not only that its ascertained purport should not be varied by outside evidence (which is the nucleus of the "parol evidence rule")<sup>1</sup>, but also that in ascertaining this purport the actual document should be the sole evidence of its contents;— which is the present form of the "best evidence" rule viewed as one of procedure rather than as a principal of administration. This subject,

9. See DOCUMENTARY EVIDENCE. (Little & Brown's edition), XI, 77

10. Burke, Lords' Journal, Trial (1794).

Warren Hastings, Works of Burke 1. See PAROL EVIDENCE.

however, seems most conveniently considered in connection with proof by documents;—<sup>2</sup> the same proposition being also stated in this connection, i. e., in respect to the “best evidence rule” viewed as a canon of administration.<sup>3</sup>

§ 484. ( [1] *Primary Evidence Required; “Best Evidence Rule” at the Present Time* ); A Vanishing Rule.— While, therefore, the broad principle of the “best evidence rule,” in the sense that primary evidence will be required wherever attainable, is operative and gaining force and extension, the line of operation of the “best evidence rule” as a rule of procedure, has dwindled to very narrow proportions. Even the situation announced by Gilbert<sup>1</sup> as the sure guaranty of the operation of the rule — that the evidence offered should be *substitutionary*, i. e., presuppose the concealment by the proponent of more probative evidence — no longer suffices to extend the rule to additional cases beyond the single instance of proving the contents of a document. Even as thus restricted, the rule, as one of procedure, is by no means vital or firmly established. A procedural rule which is enforced only until a judge is satisfied, in the exercise of administrative power, that a reasonable excuse has been given for not complying with it, is, in reality, covered by the administrative principle, if any, by which its operation is conditioned.<sup>2</sup> In this connection, the controlling consideration is the administrative principle of the best evidence to which reference has above been made.<sup>3</sup> As the sole survival of the procedural rule is this moribund requirement that in proving the contents of a written instrument between the parties to it, the original must be produced or its absence accounted for, the requirement itself may well be regarded from the standpoint of the modern law of evidence, as is elsewhere suggested,<sup>4</sup> as but an instance of the general administrative canon that primary evidence is to be preferred to secondary. This principle, in practical operation, is itself conditioned by the paramount adminis-

2. See DOCUMENTARY EVIDENCE.

3. *Supra*, §§ 464 *et seq.*

1. Gilbert, *Evid.* (2d ed.), 4, 15–17.

2. For this reason, it can scarcely with propriety be said that there is any *rule* of procedure which excludes opinion, *res inter alios* or circumstantial evidence in favor of direct. The hearsay rule is one strictly of

procedure and hence its anomalous nature. The rule excluding evidence of character stands in the same anomalous position as does the rule against hearsay; though, of course, for reasons peculiar to itself. *Infra*, §§ 3265 *et seq.*

3. *Supra*, § 464.

4. *Supra*, § 464.

trative canon that a party has a right to prove the substance of his contention by the most probative evidence in his power.

§ 485. ([1] *Primary Evidence Required; "Best Evidence Rule" at the Present Time*); A Wider Scope.—Professor James Bradley Thayer thus states the position of those who claimed for the "best evidence rule" as one of procedure, a wider scope than that of a regulation as to proving the contents of constituent documents above<sup>1</sup> assigned to it:<sup>2</sup> "Let us therefore look at the best evidence rule, in its character as a specific rule forbidding substitutionary evidence, i. e., such as shows on its face that there is something direct and better behind it. In this sense it is a phrase which has been thought to group under one name at least three other specific rules, namely (1) If you would introduce before a jury the statements of a witness, you must produce the witness in person; (2) If you would introduce to a jury the contents of a writing, you must produce the writing itself; (3) If you would prove to a jury the execution of an attested document, you must produce the attesting witnesses." But, as Professor Thayer points out, if the rule against hearsay, that requiring production of the original constituent document and the presence of the attesting witness to prove the execution of an attested document be regarded as procedural rules furnishing present instances of a general "best evidence" rule, the peculiarity is presented that each of these three separate rules has had a different origin and has developed entirely apart from any more general rule. It would, therefore, seem that while such rules might, in some just sense, be considered as having grown up in accordance with a general principle, or canon of administration, they can scarcely, in the nature of things, present as separate rules instances of any more general rule of procedure.

§ 486. ([1] *Primary Evidence Required; "Best Evidence Rule" at the Present Time*); Hearsay.—The rule against hearsay, in its inception at least, constituted a prohibition attaching to a witness rather than to the derivative character of what he said. Under the early procedure a person who could not state something to the jury which he had seen or heard simply did not come within the class of persons designated as witnesses. Two branches of the law of evidence come from this single root—the rule against

1. *Supra*, § 482.

2. Thayer, *Prelim. Treat.* 497.

hearsay<sup>1</sup> and that excluding "opinion" evidence.<sup>2</sup> Neither he who could state only what some one had told him nor the person who could say merely what he inferred were *witnesses*, as the term was then understood. The witness was required to swear that he would testify to what he had seen and heard *quod vidi et audivi, de visu suo et auditu*.<sup>3</sup> The witness must be *voyant et oyant*, by the Norman phrase of the year books.<sup>4</sup> He could not infer, he could not report another's observations. Hearsay and inference were alike excluded. The short reason for this was that it was for the ancient *jury*,<sup>5</sup> acting still partly upon their own information, to do what reasoning was deemed necessary and to use hearsay, reputation, rumor, tradition or whatever else might seem good in their eyes, as the basis of their verdict. Inference and hearsay were denied to the witness because these things were within the exclusive province of the jury. The results of his perception alone the witness could properly bring to that body as originally constituted. All the rest they themselves were to furnish;—such as general knowledge,<sup>6</sup> hearsay, their own private knowledge, *including hearsay and inferences from it*, and the reasoning and conclusions involved in comparing and digesting all that they knew or had heard from others.<sup>7</sup> This entirely intelligible, though now obsolete, relation between witnesses and jury throws light on the expression "Hearsay is not evidence," which appears so to have puzzled Mr. Justice Stephen.<sup>8</sup>

*The anomalous nature of the hearsay rule* is shown in its wide divergence from principle, as compared with its fellow offshoot from this common root of the ancient restriction of the early witness to facts of perception, thereby equally excluding "opinion" and "hearsay." The opinion rule has developed along rational and fairly scientific lines. It establishes the sense perception of the original observer as a primary grade of evidence. Where the original phenomena cannot, with satisfactory clearness, be placed before the jury or co-ordinated by them into a reasonable inference, the effect of these phenomena upon the mind of the witness may

1. *Infra*, §§ 2698 *et seq.*

2. *Infra*, §§ 1791 *et seq.*

3. *Liber Albus*, 1 Mun. Gild. Lon. 62 (1220). See also Y. B. 20 H. VI. 20, 16. See also *Bushell's Case*, Vaughan, 135 (1670) ("what hath fallen under his senses").

4. Connected with this thought of the witness's restricted function was

that all statements to the jury must be made in public. With this procedural requirement the declarant, in case of hearsay, would not comply.

5. *Supra*, § 270i.

6. *Infra*, §§ 691 *et seq.*

7. Thayer, *Prelim. Treat.* 500.

8. *Law of Evid.*, Pref. (3d ed.), May's Amer. ed., p. 23.



be introduced, under suitable conditions of necessity and relevancy, as secondary evidence.<sup>9</sup> This is sensible and fairly scientific. The hearsay rule, on the contrary, has been made to develop into one which, except in certain enumerated instances, presents the peculiar and from a scientific point of view, the *startling*, feature of an absolute procedural rule of exclusion. "Neither the original speaker's death, alone, nor the highly probative character of the circumstances under which he spoke, alone, are enough; and not the two together except in special cases. This sort of circumstantial evidence is separated from all others in the English law of evidence, is classified as hearsay, and as such is condemned."<sup>10</sup> This is absolutely unscientific. The fact that in certain so-called exceptions, as pedigree, matters of public and general interest and the like, the hearsay rule comes within the operation of the true administrative principle by deeming the declarant's statement primary evidence, and yet receiving, under suitable conditions of necessity and relevancy a report of it as secondary evidence, merely accentuates the anomalous character of the rule. It is interesting to notice, however, that the anomaly, like the unanimity of the jury,<sup>11</sup> and other striking peculiarities of English procedural law, was not an *intentional* or reasoned result; but merely an incidental consequence of doing something else — perhaps quite intelligent in itself — which involved results which no one foresaw or has cared to remedy, so long as conditions were endurable. While a jury could and did proceed on hearsay, a witness might with reason be forbidden to produce it to them. When the jury could proceed only upon evidence, hearsay, however necessary or relevant, became unusable, and has so remained.

§ 487. ([1] *Primary Evidence Required; "Best Evidence Rule" at the Present Time*); Attesting Witnesses.—For reasons similar to those affecting proof of the contents of documents,<sup>1</sup> it may fairly be assumed that the rule of procedure which requires that where the execution of an instrument is attested by the signature of a subscribing witness in any proceedings based on the instrument, its execution must be proved by the evidence of such subscribing witness, is not so much an example of the best

9. *Infra*, §§ 1802 *et seq.*

10. Thayer, Prelim. Treat. Evid., 501.

11. *Supra*, § 270g.

1. See DOCUMENTARY EVIDENCE.

See also an interesting article on the present necessity of calling subscribing witnesses to prove attested instruments in 35 L. R. A. 321.

evidence rule as an independent regulation of substantive law, ratifying the assumed convention of the parties. However this rule of procedure should be regarded at the present day, it is, historically considered, a survival of a once numerous class of oases in which figures the preappointed evidence of which Bentham speaks, the transaction-witnesses of the Teutonic tribes. These witnesses joined the business then in hand upon the express understanding and implied agreement that in case of any difference between the parties as to it, they were to be called upon to state the truth as to the matter. Here, as in cases of other witnesses, the testimony of the person as to individual knowledge was the thing sought.<sup>2</sup> Each witness who sees or hears a fact must himself state it.

§ 488. Principles of Administration; (B) Furtherance of Justice; (2) Completeness demanded.—Fairness may mean *completeness*. The preservation of good faith by the parties frequently assumes the form of a requirement by the court that the *complete* meaning of an oral statement or the entire purport of a document should be placed before the jury. Such a requirement by no means implies that all that is said at a given time must be stated; or that the document as a whole necessarily becomes competent in its entirety.<sup>1</sup> The canon of administration is directed against the use of mutilated, imperfect and, therefore, misleading evidence in either oral or written form. In practice, this requirement takes one of two phases, as the matter is viewed from the standpoint of the proponent of the evidence or from that of his opponent.

§ 489. ([2] *Completeness Demanded*); Oral Statements; Proponent.<sup>1</sup>—From the standpoint of the proponent of the evidence, the party taking the initiative, this canon of administration is simple. Whatever he shall offer to the tribunal must be presented with sufficient fulness to place it in a true light. Speaking generally, the proponent of evidence is entitled to de-

2. Brunner, Schw. 54. See also *supra*, § 269c.

1. While the general principles of administration dealing with the matter of completeness are the same whether the statements are oral or in writing, the ease with which a document can be introduced in evidence as a whole and referred to, at any subsequent

stage, by either party has introduced certain differences in practice in case of written statements. *Infra*, §§ 503 *et seq.*

1. A litigant in his aspect of offering evidence of any kind is called the *proponent*; in his capacity of resisting the admissibility of such evidence he will be spoken of as the *opponent*.

termine how much he shall present and for what purpose he shall offer it. This is essential to the strategic handling of a cause.<sup>2</sup> The court does not affect to order a litigant to offer evidence which he does not desire to present or to compel him to tender it for a different or additional purpose. The judge, indeed, may well bring out facts, *suâ sponte*, as is elsewhere seen.<sup>3</sup> But the party is in control of his own litigation so far as his handling of it is concerned. He is *litis magister*. He may offer such evidence and only such evidence as he sees fit and for such purposes alone as he wishes. The function of the court is, therefore, confined in this respect, to insisting that the proponent shall guide and not mislead. He is left free to choose his evidence and limit the purpose of it. But he must not arbitrarily select isolated portions of an entire statement which produce, when divorced from their context and qualifications, a false impression, unduly favorable to himself. He must, if he produces anything on a given subject, present so much of it as will represent it fairly and as it is. It is the clear right of the tribunal to have for its consideration an entire oral utterance where any part of such statement has been offered in evidence. This fundamental prerequisite to the ability to adjudicate justly is not in dispute.

*The administrative problem* is rather as to what portion of the entire utterance is it fair that the proponent, i. e., the party offering the evidence, should be required to produce in the first instance; and how much may properly be left to be supplied by the other side, if they desire to do so. The proper solution is, as the phrase goes, largely a matter of discretion. It may well vary with the combination of circumstances presented in any individual instance; or with the respective amounts of knowledge in possession of the particular parties, which the court cannot fail to regard,<sup>4</sup> requiring of the proponent, having the initiative, only such evidence as is fairly within his power to produce.<sup>5</sup> Apart from the administrative matter, the question of how far to demand completeness in an oral utterance is one of relevancy. So much of the entire series of individual statements must be pro-

2. It is necessary, for the operation of the canon of completeness, that the proponent of the evidence should have intended the statement which it is sought to complete. Winchell

*v. Latham*, 6 Cow. (N. Y.) 682, 684 (1827).

3. *Infra*, §§ 535 *et seq.*

4. *Infra*, § 978.

5. *Supra*, § 334.

duced as is fair in view of the purpose for which it is offered, and the knowledge of the party with regard to it.

*In general, the distinction* in the scope of the verbal utterance required in the first instance will be in accordance with whether the offering litigant relies on the *fact* or on the *effect* of the statement.

*Independent Relevancy.*—Where the mere making of the statement is independently relevant,<sup>6</sup> the party offering it need go no further, as a matter of principle, than to introduce the precise statement on which he relies, with substantial fullness and accuracy, together with such connecting facts as establish its bearing upon the issue. The balance of a conversation, speech or other oral utterance may be entirely irrelevant to show that a given statement was *not* made, and if it is claimed that other statements made at the same time tend to show that the language used did not convey the meaning asserted, no hardship is imposed in leaving to the other side the opportunity of showing that such is the case. The proponent should not be called upon to obscure the dramatic effect of his point by involving it in a mass of conflicting details. This is more properly the work of rebuttal and the proponent is fairly entitled to ask, if he is stating the declaration fairly and fully, that he be permitted to build up his own case as strongly and connectedly as possible before exposing it to a rebuttal.

*Statement as Proof of Facts Asserted.*—The situation is materially altered where the proponent relies upon the probative *effect* of a verbal utterance. He is depending on the result of the entire utterance. It is, therefore, obviously unfair that the party intending such an object should content himself with offering a portion of the utterance which is not a correct resumé of the whole statement upon the relevant point. The court will seek to prevent the cause from resting before the jury in this misleading condition. It will, in substance, be required by the judge that the proponent should show all statements or parts of statements which are reasonably necessary to produce the same logical meaning as was originally created; i. e., without omission of any essential modification or qualification. But the court will not go so far as unnecessarily to curtail the proponent's right to submit a clean-cut, effective case from his own point of view. All which is called for is substantial accu-

6. *Infra*, §§ 2574 et seq.

racy and fullness of all the statements as the proponent understands they were made. He is not to be compelled to confuse his case by the introduction of details of doubtful or controversial nature. He is not to be obliged to submit to interpolations of adverse constructions either directly from his opponent or indirectly through the court. This method of qualifying or modifying the force of oral statements, is appropriate only at the stage of rebuttal or that of argument. At this earlier stage, the proponent is *litis magister* and the court will exercise its power to call for completeness only to the extent of providing that it shall not be misled through the omission of confessedly material qualifications. Any additional parts of the oral statement which is deemed relevant to the inquiry must be supplied by the other party.

**§ 490. ([2] *Completeness Demanded; Oral Statements; Proponent*); Admissions and Confessions.**—In the majority of instances, the question as to completeness arises with regard to admissions or confessions, including statements made by a third person in the presence of the party. The special reason for the truth of this fact is, that a party whose statements are relied upon as admissions frequently seeks, under the guise of completing his statement to introduce in evidence his self-serving and otherwise incompetent declarations.

Admissions and confessions are anomalous;—occupying an intermediate position between utterances independently relevant<sup>1</sup> and those relied on as proof of the facts asserted. Drawing its evidentiary force from procedure rather than from logic,<sup>2</sup> the mere fact that the statement was made is the sole condition of admissibility. In this sense, the utterance is one independently relevant. The statement is, however, deemed competent evidence of the facts asserted.<sup>3</sup> Such utterances, will, therefore, be most conveniently treated in connection with probative statements. As is to be elsewhere<sup>4</sup> pointed out, this anomaly is itself due to the antecedent anomaly of the “hearsay rule,” which serves to conceal the fact that in all cases, equally with that of an admission or confession,<sup>5</sup> it is the fact that the statement is made by the person in question

1. *Infra*, §§ 2574 *et seq.*

2. *Infra*, § 1721.

3. *Infra*, §§ 1232 *et seq.*

4. *Infra*, § 2580.

5. For the distinction between admissions and confessions, see *infra*, §§ 1472 *et seq.*

under the circumstances attending the occurrence, which in reality constitutes the ground for believing it. What actually has occurred is this: In promulgating the hearsay rule the law has caused certain requirements of procedure—the administration of an oath and an opportunity for cross-examination—to supplant the fundamental logical rule of evidence that “all relevant facts are competent.” In connection with admissions and confessions procedure repairs the breach which itself has made in the symmetry of the logical basis of the law of evidence, by providing that in case of a party the basic rule of all reasoning that the fact that a given statement was made under a particular set of circumstances furnishes a ground for believing it to be true.

**§ 491. ([2] *Completeness Demanded; Oral Statements; Proponent; Admissions and Confessions*); Oral.**—Oral admissions should be proved in their entirety,<sup>1</sup> the complete declaration made at one time being taken as a whole.<sup>2</sup> This includes all conversations upon a relevant topic in which a party participates,<sup>3</sup> or which takes place in his presence<sup>4</sup> under conditions conferring relevancy upon his conduct with regard to it.<sup>5</sup> Thus, if a party admits that he has owed certain money, or been under a given obligation, but, at the same time, alleges that he has paid the money or discharged the debt,<sup>6</sup> or that it is different than was claimed,<sup>7</sup> both branches of the declaration, the self-serving as well as the self-incriminating,<sup>8</sup> should be introduced in evidence to-

1. *Wilson v. Calvert*, 8 Ala. 757 (1845); *Brown v. Upton*, 12 Ga. 505, 507 (1853); *Quick v. Johnson*, 6 Mart. (N. S.) (La.) 532 (1828); *Johnson v. Powers*, 40 Vt. 611 (1868). *Infra*, § 1296.

2. *Johnson v. Powers*, 40 Vt. 611 (1868).

3. *Barnum v. Barnum*, 9 Conn. 242, 247 (1832).

4. *Gillam v. Sigman*, 29 Cal. 637, 641 (1866).

5. *Infra*, § 1418.

6. *Smith v. Jones*, 15 Johns. (N. Y.) 229 (1818) (purchase of land); *Methodist Ep. Church v. Jaques*, 2 Johns. Ch. (N. Y.) 543 (1817).

An acknowledgment of indebtedness relied upon to remove the bar of the statute of limitations is useless for the purpose if accompanied by a claim

of payment. The creditor cannot separate the two and must accept the suggestion of payment, if he relies on the more favorable part of the declaration. *Oliver v. Gray*, 1 Har. & G. (Md.) 204, 219 (1827). But see *Barber v. Anderson*, 1 Bail. (S. C.) 358, 360 (1830).

7. *Hopkins v. Smith*, 11 Johns. (N. Y.) 161 (1814) (liability as surety only); *Jacobs v. Farrall*, 2 Hawks (N. C.) 570, 571 (1823) (offsetting account); *Arthur v. Wells*, 1 Mill. Const. (S. C.) 314 (1818) (did not mean to kill).

8. *Arkansas*.—*Adkins v. Hershy*, 14 Ark. 442 (1854).

*Maryland*.—*Oliver v. Gray*, 1 H. & G. 204, 219 (1827).

*New York*.—*Gough v. St. John*, 16 Wend. 646, 652 (1837).

gether. This is obviously fair,<sup>9</sup> for the declaration, as a whole, claims an absence of liability.<sup>10</sup> It is equally clear that a party offering an admission is not concluded by the self-serving portion of the declaration; but may control it by other evidence.<sup>11</sup>

For some consideration of the canon of completeness, as applied to admissions in written form, see *infra*, § 1296.

**§ 492. ([2] Completeness Demanded; Oral Statements; Proponent); Confessions.**—A confession must be proved as a whole. In case of such a statement, the whole declaration must, as the phrase is, “be taken together,”<sup>1</sup> as well for as against the accused,<sup>2</sup> it being obviously impossible to ascertain what the accused has admitted without knowing what qualifications, if any, he has placed upon the *prima facie* meaning of the inculpatory phrases. Should the confession have been reduced to writing the practice

*North Carolina.*—Barnes v. Kelly, 2 Hayw. 45 (1797).

*Pennsylvania.*—Shaller v. Brand, 6 Binn. 435, 438 (1814).

*South Carolina.*—Smith v. Hunt, 1 McC. 449 (1821).

*England.*—Randle v. Blackburn, 5 Taunt. 245 (1813).

“Prima facie an inculpatory admission must be viewed in connection with matter in exculpation which comes out in the same conversation.” Gough v. St. John, 16 Wend. (N. Y.) 646, 652 (1837).

9. Randle v. Blackburn, 5 Taunt. 245 (1813).

10. Carver v. Tracy, 3 Johns. (N. Y.) 427 (1808).

11. Newman v. Bradley, 1 Dall. (U. S.) 240 (1788).

1. *Alabama.*—Webb v. State, 100 Ala. 47, 51, 14 So. 865 (1893).

*Arkansas.*—Williams v. State, 69 Ark. 599, 65 S. W. 103 (1901).

*California.*—People v. Keith, 50 Cal. 137 (1875).

*Georgia.*—Myers v. State, 97 Ga. 76, 25 S. E. 252 (1895).

*Illinois.*—Comfort v. People, 54 Ill. 404, 406 (1870).

*Iowa.*—State v. Novak, 109 Iowa 717, 79 N. W. 465 (1899).

*Kentucky.*—Berry v. Com., 10 Bush 15 (1873).

*Massachusetts.*—Com. v. Russell, 160 Mass. 8, 10, 35 N. E. 84 (1893); Com. v. Trefethen, 157 Mass. 180, 197, 31 N. E. 961 (1892).

*Mississippi.*—Coon v. State, 13 Smedes & M. 248 (1849).

*Missouri.*—State v. Carlisle, 57 Mo. 102 (1874).

*North Carolina.*—State v. Worthington, 64 N. C. 594, 595 (1870).

*Tennessee.*—Tipton v. State, Peck. 308, 314 (1824).

*Texas.*—Conner v. State, 34 Tex. 659, 661 (1871).

*Vermont.*—State v. Mahon, 32 Vt. 241 (1859).

*Virginia.*—Brown's Case, 9 Leigh 633 (1838).

*Wisconsin.*—Griswold v. State, 24 Wis. 144 (1869).

*England.*—King v. Paine, 5 Mod. 163 (1696).

The entire confession may require for its narration more than one witness, as where it is given partly in one language and partly in another. People v. Ah Wee, 48 Cal. 236 (1874) (Chinese and English). See also People v. Keith, 50 Cal. 137 (1875).

2. Eiland v. State, 52 Ala. 322 (1875); R. v. Steptoe, 4 C. & P. 397 (1830); People v. Gelabert, 39 Cal. 663 (1870); King v. Paine, 5 Mod. 163 (1696).

applicable to other documents may well be extended to it, and the written confession introduced, as a whole, without being read, each party being at liberty to use such portions as may be deemed material.<sup>3</sup> This practice is especially commendable for the protection of the interests of third persons whom the statement may tend to incriminate. As the confession, in the absence of conspiracy or other agency, is competent against no one but the declarant, there is danger lest third persons mentioned in the statement may be prejudiced by it, if the entire document were read.

*The English practice* reads the entire written confession protecting the rights of third persons by directing that the name of any such person mentioned in it be not read;<sup>4</sup> or with a caution to the jury to disregard the irrelevant name if it is read in their hearing.<sup>5</sup>

*The American practice* follows the second branch of the English rule. It allows the confession to be read as a whole, cautioning the jury that it is not evidence as against third persons mentioned in it.<sup>6</sup>

*In either civil*<sup>7</sup> or criminal<sup>8</sup> cases it is within the province of

3. *Webb v. State*, 100 Ala. 47, 52, 14 So. 865 (1893).

4. "The practice has been, in reading confessions, to omit the names of other accused parties, and, where they are used, to say 'another person,' 'a third person,' etc., where more than one other prisoner was named; and some judges have even directed witnesses, who came to prove verbal declarations to omit the names of those persons in like manner." *R. v. Clewes*, 4 C. & P. 221, 224 (1830), *note*.

5. *R. v. Hearne*, 4 C. & P. 215 (1830); *R. v. Fletcher*, 4 C. & P. 250 (1829). See also *R. v. Walkley*, 6 C. & P. 175, (1833).

6. *Louisiana*.—*State v. Sims*, 106 La. 453, 31 So. 71 (1901).

*Massachusetts*.—*Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560 (1896).

*North Carolina*.—*State v. Collins*, 121 N. C. 667, 28 S. E. 520 (1897).

*South Carolina*.—*State v. Dodson*, 16 S. C. 453, 460 (1881).

*Vermont*.—*State v. Fournier*, 68 Vt. 262, 35 Atl. 178 (1896).

*United States*.—*U. S. v. Ball*, 163 U. S. 662, 16 Suppl. 1192 (1896).

As the actual prejudice to a co-defendant of permitting an incriminating mention of his name to be made in presence of a jury may greatly exceed the theoretic, it is but fair to require that the confessing party should give the guaranty of good faith implied in actually accusing himself. A statement which really amounts to throwing the blame on the declarant's associates, should not be received. *State v. Mitchell*, 49 S. C. 410, 27 S. E. 424 (1897); *State v. Green*, 48 S. C. 136, 26 S. E. 234 (1896).

7. *Johnson v. Powers*, 40 pt. 611 (1868).

8. *Alabama*.—*Burns v. State*, 49 Ala. 370, 374 (1873).

*Arkansas*.—*Frazier v. State*, 42 Ark. 70 (1883).

*California*.—*People v. Navis*, 3 Cal. 106 (1853).

*Georgia*.—*Long v. State*, 22 Ga. 40, 42 (1857).



the jury to credit any *portion* of the entire declaration, or set of declarations before them, discarding the rest. The utterances are presented as a whole; they need not be believed as a whole.

No general rule of requirement has been formulated for the guidance of the court as to whether, in case of an oral admission or confession, it is the duty of the proponent, in the first instance, to put in the entire statement; or whether the party having the initiative may introduce such portion, not obviously garbled or otherwise misleading as he may see fit, and then leave the declarant to correct and supplement, in turn, as he may deem judicious. The question seems purely one of judicial administration. It might be reasonable, however, to expect that the prosecution in offering a confession should give, at once and in full detail, the statements on which the government relies,<sup>9</sup> with a particularity and fullness which would not be demanded of a proponent of an admission in a civil suit between individuals. It is, however, universally conceded, as appears *passim*, that justice demands that before the tribunal is called upon to act it should have a completed statement before it; that, consequently, such portion of an entire admission,<sup>10</sup> confession, or other inculpatory utterance as the proponent is not required to produce may be supplied by his adversary.

**§ 493. ([2] *Completeness Demanded; Oral Statements; Proponent*); Independent Relevancy.**—Where, as in case of admissions, contradictory declarations<sup>1</sup> or statements independently relevant<sup>2</sup> for some other reason,<sup>3</sup> the object is merely to show that a given statement was made, it will, in general, be sufficient for the proponent of the evidence to prove the statement itself in its fullness,<sup>4</sup> leaving any modification of its effect to his opponent.<sup>5</sup>

*England.*—*R. v. Higgins*, 3 C. & P. 603 (1829).

9. *R. v. Jones*, 2 C. & P. 629 (1827).

10. *Hartman Steel Co. v. Hoag*, 104 Iowa 269, 73 N. W. 611, (1897) (conversation).

1. *Infra*, § 1779.

2. *Infra*, §§ 2574 *et seq.*; *Drake v. State*, 110 Ala. 9, 20 So. 450, (1895) (threats).

3. **Admissions** and confessions, though, in a sense, independently rele-

vant (*infra*, §§ 2574 *et seq.*), are considered as constituting evidence of the facts asserted. *Infra*, §§ 2698 *et seq.*

4. *Sylvester v. State*, (Fla. 1903) 35 So. 142; *State v. Lawhorn*, 88 N. C. 634, 637 (1883); *Davis v. Smith*, 75 N. C. 115 (1876).

5. *Hudson v. State*, 137 Ala. 60, 34 So. 854 (1902); *Halifax Banking Co. v. Smith*, 29 N. Brunsw. 462, 465, 18 Can. Suppl. 710 (1890) (admissions).

Where the proponent uses a statement as independently relevant his antagonist is not at liberty to use the balance of the entire conversation in its probative capacity, i. e., as evidence of what is asserted. A witness may be asked, for example, as to a particular statement in a conversation to *identify* a third person; the other side is not permitted to put in evidence the balance of the conversation as proof of what it asserts.<sup>6</sup> His right is limited to introducing such portions of the conversation, and such additional facts, as fairly supplement, condition and explain the identifying statement.<sup>7</sup>

**§ 494. ([2] *Completeness Demanded; Oral Statements; Proponent; Independent Relevancy*); *Res Gestæ* an Exception.**—

There is, however, one important qualification of this rule. Where the independently relevant statements constitute or assist to constitute the *res gestæ*<sup>1</sup> of a transaction, the entire matter must be stated by the proponent in the first instance. The reason is plain; — that the statements cannot be divorced from their context. Thus, in case of the declarations forming an oral contract,<sup>2</sup> the statements accomplish the legal result involved in the inquiry. What is being sought is the *legal effect* of all that is said; all the declarations of the parties, all that was written by them,<sup>3</sup> at the time and on the subject must be therefore proved by the proponent.

*The practice is the same* where it is neither the *fact* of a statement, nor its legal effect, but its logical and probative meaning which is involved in the inquiry.

**§ 495. ([2] *Completeness Demanded; Oral Statements*); *Opponent*.**—From the standpoint of the party who does not offer the evidence in the first instance, the canon of completeness operates to permit a reasonable amount of *supplementing* on his part of the evidence after his opponent has presented it to the court with the required degree of fairness and fullness. It is this power

6. *Com. v. Keyes*, 11 Gray (Mass.) 323 (1858).

7. The giving in evidence by one party of part of a conversation entitles the other party to introduce so much of the rest of it only as relates to the same subject. *Com. v. Keyes*, 11 Gray 323, 325 (1858), per Merrick, J.

1. *Supra*, § 47.

2. *Flood v. Mitchell*, 68 N. Y. 507, 511 (1877).

3. For a consideration of the extent to which completeness is demanded in the *proof of contents* of constituent or other documents, see *supra*. §§ 341 *et seq.*

on the part of his opponent which imposes the careful discretion as to substance and purpose which the proponent should exercise in opening up a given topic. When once he has opened the door, it is open for his antagonist as well. It cannot well be shut in his face. What may fairly be termed supplemental, in this connection, lies largely within the administrative function of the court — matter of discretion, as it is frequently called — whatever may be the *right* of the party to introduce evidence on the same subject on his own initiative. The reasons on which the opposing party may demand the right to complete the statements introduced by the other side in general, are of two kinds.

*The party may claim, in the first place* that, on the whole, the oral statements on the occasion referred to or the declarations of a particular document on a given subject have not been fully and correctly stated. In other words, he may contend that while certain portions may seem to support the point which they are said to sustain, that still, on the whole, they fail to do so. He cannot introduce, under the guise of completing his adversary's evidence, statements of the same persons on other occasions, or irrelevant parts of a document. He may, however, show, if he can, that other statements made on the same occasion, or other parts of a document, so limit, modify, explain or qualify, the statement, already in evidence as, in reality, to deprive it of the effect alleged by the proponent.

*In the second place*, the opposing party may claim and exercise the right to insist, not only that the extracts offered by his antagonist do not, when the proper contemporaneous qualifications are made, support the latter's contention, but that, when taken as a whole, they actually sustain his own inconsistent claim. In other words, he need not content himself with taking the position that the statements do not sustain the theory of the case which they are said by the proponent to support; he may go a step further and assert that the theory itself is wrong; and that the entire set of relevant oral statements or the document as a whole, sustains a different one. He may take this advanced position for one of two alternative purposes. He may deem the plausible suggestion of a counter-theory, the most complete method of destroying the original hypothesis; but may have no further interest in the establishment of the counter-theory itself; or, in the second place, the

counter-theory which he may use to explain the completed set of statements may be an integral part of his affirmative case.

*When the point is reached that the additional oral statements or the further declarations of a document are to be used by an opponent as part of his own case, the right to complete for the purpose of supplementing logically ceases. The evidence is competent, indeed; but as to it the opposing party has the initiative, i. e., the burden of evidence.<sup>1</sup> He is, in turn, the proponent,<sup>2</sup> up to this point, within the limits prescribed by reason, the court may permit, by virtue of its administrative power, as expressed through the canon under consideration, that the statements offered should be made full and complete.*

**§ 496. ([2] *Completeness Demanded; Oral Statements; Opponent*); Probative Effect.**—All that is said concerning any given topic at any one time should be received, if any portion of it is admitted.<sup>1</sup>

*But one point remains in dispute. Is opponent confined to such statements in the conversation, or other oral utterance, as are relevant to the portions already introduced in evidence, by modifying, qualifying or otherwise affecting the portion already in evidence, or is he, on the other hand, entitled, as of right, to have the entire set of declarations made at that same time received in evidence*

1. *Infra*, §§ 967 *et seq.*

2. What may be the stage at which this initiative may be exercised; whether it may be taken up on cross-examination of his adversary's witness (*supra*, § 378) or only by making him his own witness, is dependent upon the practice of the particular jurisdiction.

1. *Connecticut*.—*Bristol v. Warner*, 19 Conn. 7, 19 (1848); *Barnum v. Barnum*, 9 Conn. 242 (1832).

*Florida*.—*Fields v. State*, (Fla. 1903) 35 So. 185; *Thalheim v. State*, 38 Fla. 169, 20 So. 938 (1896).

*Georgia*.—*Cox v. State*, 64 Ga. 374, 382, 411, 414 (1879).

*Illinois*.—*Jami-son v. People*, 145 Ill. 357, 378, 34 N. E. 486 (1893).

*Iowa*.—*Hess v. Wilcox*, 58 Iowa 380, 382, 10 N. W. 847 (1882).

*Louisiana*.—*Bean v. Evans*, 9 La. Ann. 163 (1854).

*Maryland*.—*Turner v. Jenkins*, 1 Har. & G. 161, 163 (1827).

*Massachusetts*.—*Cusick v. Whitcomb*, 173 Mass. 330, 53 N. E. 815 (1899); *Com. v. Armstrong*, 158 Mass. 78, 32 N. E. 1032 (1893).

*Missouri*.—*Burghart v. Brown*, 51 Mo. 600 (1873).

*New Hampshire*.—*Barker v. Barker*, 16 N. H. 333, 338 (1844).

*New Jersey*.—*Somerville & E. R. Co. v. Doughty*, 22 N. J. L. 495, 500 (1850).

*New York*.—*Fleischman v. Topplitz*, 134 N. Y. 349, 355, 31 N. E. 1089 (1892).

*Wisconsin*.—*Paulson v. State*, 118 Wis. 89, 94 N. W. 771 (1903).

whether relevant or irrelevant to the same matter on which the portion already received was admitted? As intimated elsewhere,<sup>2</sup> the right of supplementing is fully satisfied when such additional statements made on the same occasion as explain, control or modify utterances already received regarding the matter in hand, or at a different time on the same subject<sup>3</sup> have been introduced in evidence. The tribunal is entitled to receive the whole of what was said at the same time on the same subject.<sup>4</sup> But what was said at the same time on a different subject, as to which the judge will determine,<sup>5</sup> cannot be added by way of supplementation, unless, indeed, the matter is still pending.<sup>6</sup> This is the limit of the opponent's right, so far as relates to utterances which are not ad-

2. *Supra*, § 495.

3. *Alabama*.—Lee v. Hamilton, 3 Ala. 529, 533 (1842).

*Connecticut*.—Robinson v. Ferry, 11 Conn. 460, 462 (1836); Stewart v. Sherman, 5 Conn. 244, 245 (1824).

*Iowa*.—State v. Vance, 17 Iowa 138, 140 (1864).

*Louisiana*.—State v. Jones, 47 La. Ann. 1524, 18 So. 515 (1895).

*Massachusetts*.—Adam v. Eames, 107 Mass. 275 (1871) ("another interview").

*United States*.—Blight v. Ashley, 1 Pet. C. C. 15, 20 (1808) (another day).

*England*.—Sturge v. Buchanan, 10 A. & E. 598 (1839). "The law never intends that a party may make evidence for himself from his own declaration, but merely that the meaning of a conversation shall not be perverted by proof of a part of it only."

4. *Alabama*.—Wefel v. Stillman, 44 So. 203 (1907).

*Colorado*.—Bailey v. Carlton, 95 Pac. 542 (1908).

*Connecticut*.—Stewart v. Sherman, 5 Conn. 244, 245 (1824).

*Illinois*.—Chicago City Ry. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28 (1904) [judgment affirmed, 109 Ill. App. 637 (1903)].

*Iowa*.—State v. Rutledge, 135 Iowa 581, 113 N. W. 461 (1907).

*Nebraska*.—Pettis v. Green River Asphalt Co., 99 N. W. 235 (1904).

*Texas*.—Underwood v. State, (Cr. App. 1909) 117 S. W. 809.

*Wisconsin*.—Earley v. Winn, 129 Wis. 291, 109 N. W. 633 (1906); Smith v. Milwaukee Electric Ry. & Light Co., 127 Wis. 253, 106 N. W. 829 (1906).

*United States*.—Stanley v. Beckham, 153 Fed. 152, 82 C. C. A. 304 (1907). The rule is the same in criminal cases. Lowry v. State, (Tex. Cr. App. 1908) 110 S. W. 911. It is to be understood that in all cases the additional evidence is relevant to that which was originally offered. All that two parties say at a single interview on whatever subject is not admissible because what is said on some one or more subjects is testified to. Thomas v. Young, 81 Conn. 702, 71 Atl. 1100 (1909). It is not, however, objectionable that the rebutting evidence contains self-serving declarations. Olson v. Brundage, 139 Ill. App. 559 (1908). *Infra*, § 2734.

5. Robinson v. Ferry, 11 Conn. 460, 463 (1836).

6. "The question is merely this, whether a particular conversation is part of a preceding conversation because a negotiation begun was still pursued." Stewart v. Sherman, 5 Conn. 244, 245 (1824).

missible on any other principle than that of completeness;<sup>7</sup>—though earlier decisions extended a broader indulgence.<sup>8</sup> The form in which the rule is stated—that when a party sees fit to introduce his opponent's statements, the entire conversation thereupon becomes admissible, is misleading.<sup>9</sup>

**§ 497. ([2] *Completeness Demanded; Oral Statements; Opponent*); Right of Initiative.**—It will be observed also that the part added, by way of supplementation, is not independent evidence, but is a component part of the otherwise imperfect and fragmentary statement which it completes and is governed as to its purpose and effect in evidence by those of the main fact to which it is, in a way, ancillary. But the opponent has other rights than that of supplementing. He has also the right of *initiative* in offering evidence. Utterances irrelevant to any issue connected

7. *Illinois*.—*Young v. Bennett*, 5 Ill. 43, 47 (1842).

*Massachusetts*.—*Com. v. Keyes*, 11 Gray 323 (1858).

*Michigan*.—*Atherton v. Defreeze*, 129 Mich. 364, 88 N. W. 886 (1902).

*New York*.—*Platner v. Platner*, 78 N. Y. 90, 103 (1879).

*Rhode Island*.—*Sherman v. Stafford Mfg. Co.*, 23 R. I. 529, 51 Atl. 26 (1902).

*Tennessee*.—*Colquit v. State*, 107 Tenn. 381, 64 S. W. 713 (1901). "At least so far as it may materially tend to impeach, rebut, explain or qualify the portion introduced by his adversary," the whole is admissible. *Diehl v. State*, 157 Ind. 549, 62 N. E. 51, (1901). "There is an important limitation to the rule, in giving evidence of conversations or of oral statements and declarations. The proof in such case is to be confined to what was said upon or concerning those matters which are made subjects of inquiry or investigation. Every remark or observation made upon those topics is to be received as competent evidence, because they may essentially modify the character and purport of the whole conversation, and vitally affect what might otherwise appear

to be explicitly asserted or denied." *Com. v. Keyes*, 11 Gray (Mass.) 323, 325 (1858). A witness, who has been cross-examined as to what plaintiff said in a particular conversation, cannot, on that ground, be re-examined as to other assertions, made by the plaintiff in the same conversation, but not connected with the assertions to which the cross-examination related, although the assertions, as to which it is proposed to re-examine, be connected with the subject-matter of the present suit. *Prince v. Samo*, 7 A. & E. 627 (1838), per Denman, C. J.

8. *Clark v. Smith*, 10 Conn. 1, 5 (1833); *Kelsey v. Bush*, 2 Hill (N. Y.) 440 (1842); *The Queen's Case*, 2 Br. & B. 297 (1820).

9. *Com. v. Vosburg*, 112 Mass. 419 (1873); *Rice v. Withers*, 9 Wend. (N. Y.) 138, 141 (1832).

As a jury must, almost of necessity, consider any evidence before them for any purpose indicated by the reasoning faculty (*supra*, § 59), a corresponding tendency has developed on the part of the court to permit what it cannot prevent. *Bristol v. Warner*, 19 Conn. 7, 19 (1848).

with the case,<sup>1</sup> as conversations upon another subject,<sup>2</sup> do not become competent merely because made at the same time as a statement which the opposing party has introduced. But it is not so clear that the court may not properly permit the opponent of a party who has given part of a specific utterance in support of a given proposition to put in evidence other parts of the same utterance so far as relevant on any issue in the case. This may be permitted for one of two purposes additional to the mere supplementing of the parts already in evidence. (a) He may put in other parts to sustain an independent theory of his own as to the effect of entire declaration, or (b) he may use such additional matter to establish a disconnected fact as to which he himself has the initiative. Having a right to introduce this evidence at some stage of the trial, whether it shall be done at one point or another, is a question of the order of evidence, and entirely within the administrative function of the judge — a matter of discretion.<sup>3</sup> In

1. *Hathaway v. Tinkham*, 148 Mass. 85, 87, 19 N. E. 18 (1888). "In an action of replevin, a witness for plaintiff testified to a conversation with defendant in which the latter made statements tending to rebut his claim of title to the property in controversy. On cross-examination the witness testified that defendant also said that he was so blind he could not see, and that, if he should lose the suit, he would go to the poor-house. *Held*, that the last-mentioned testimony was inadmissible, though relating to the same conversation, since it had no connection with the issue involved." *Atherton v. Defreeze*, 129 Mich. 364, 88 N. W. 886 (1902). "Where a party on the trial of a cause avails himself of an admission of his adversary to sustain his action or defence, the opposite party is entitled to prove such other parts of the conversation had on his part as tend to explain, modify or even destroy the admission made by him; but it is not at liberty to call for such parts of the conversation had by him, as relate to assertions made operating in his favor upon the general merits of the case, but hav-

ing no connection with the admission made." *Garey v. Nicholson*, 24 Wend. (N. Y.) 350, 351 (1840).

Irrelevant statements have been admitted in the exercise of the court's discretion. See *Carlson v. Holm*, (Neb. 1901) 95 N. W. 1125.

2. *Atherton v. Defreeze*, 129 Mich. 364, 88 N. W. 886 (1902); *Garey v. Nicholson*, 24 Wend. (N. Y.) 350, 352 (1840). "But there is an important limitation to the rule [that all parts of an entire conversation should be considered together], in giving evidence of conversations or of oral statements and declarations. The proof in such case is to be confined to what was said upon or concerning those matters which are made subjects of inquiry or investigation. Every remark or observation made upon those topics is to be "received as competent evidence, because they may essentially modify the character and purport of the whole conversation, and vitally affect what might otherwise appear to be explicitly asserted or denied." *Com. v. Keyes*, 11 Gray (Mass.) 323, 325 (1858).

3. See WITNESSES.

jurisdictions where a party is at liberty to develop his own case upon cross-examination,<sup>4</sup> it will occur with especial frequency that all parts of an entire conversation, or other oral utterance, which can be relevant for any purpose will be received at the instance of the opponent. But under any practice in this particular a judge may well find that the balance of convenience and fair play would lie in receiving the entire set of declarations at one time, following the analogy of a document, leaving each party to point out and rely upon what they may deem relevant on any issue in the case, rather than accept extracts at different times for different purposes. Such a course has frequently been followed.

*The trial judge may well require* that upon the stage at which supplementing is appropriate, every party be limited to the proof of such further statements as relate to, or in some way qualify the declaration originally put in evidence.

**§ 498. ([2] *Completeness Demanded; Oral Statements; Opponent*); Former Evidence.**—The requirement regarding former evidence,<sup>1</sup> to the effect that the reporting witness should be able to state, in extension, the entire oral utterance,<sup>2</sup> is exceptional. The general practice is to receive the statements of a witness as to so much of the relevant parts of the conversation<sup>3</sup> or other utterance,<sup>4</sup> as he heard; — failure to hear the entire conversation being a consideration properly affecting the weight.<sup>5</sup>

**§ 499. ([2] *Completeness Demanded; Oral Statements; Opponent*); Independent Relevancy.**—This consideration would

**4. See WITNESSES.**

**1.** *Infra.* § 1675.

**2. If part of the former testimony** of a witness is admitted the whole is competent. *Aulger v. Smith*, 34 Ill. 534 (1864). Such additional evidence may, however, be properly limited to statements which may fairly be said to *qualify* the evidence already received. *Siberry v. State*, 149 Ind. 684, 39 N. E. 937 (1895); *Re Chamberlain*, 140 N. Y. 390, 393, 35 N. E. 602 (1893).

**3.** *State v. Elliott*, 15 Iowa 72, 74 (1863); *State v. Daniels*, 49 La. Ann. 954, 22 So. 415 (1897).

**4.** *California.*—*People v. Daniels*, 105 Cal. 262, 38 Pac. 720 (1894).

*Georgia.*—*Woolfolk v. State*, 85 Ga. 69, 99, 11 S. E. 814 (1890).

*Louisiana.*—*State v. Spillers*, 105 La. 163, 29 So. 480 (1900).

*North Carolina.*—*State v. Robertson*, 121 N. C. 551, 28 S. E. 59 (1897).

*South Carolina.*—*State v. Gossett*, 9 Rich. L. 428, 436 (1856). "That which is heard may be given in evidence, but that which is not heard cannot, of necessity." *State v. Covington*, 2 Bail. (S. C.) 569, 570 (1832); *Shifflet's Case*, 14 Gratt. (Va.) 652, (1858) (confession).

**5.** *Mays v. Deaver*, 1 Iowa 216, 222 (1855).



be, for obvious reasons, of less importance in dealing with statements independently relevant,<sup>1</sup> than where the statement shown is relied upon as proof of the facts asserted in it. In either case, however, the weight may be reduced below the point of relevancy.<sup>2</sup> It is no ground for excluding a statement that the declarant made other disconnected statements at another time which are in conflict with it.<sup>3</sup>

*Rules relating to incorporation by reference* apply equally to oral statements as to documents. Where an oral declaration is made with such reference to a document, by whomever made,<sup>4</sup> or a verbal statement,<sup>5</sup> by whomever uttered, as to be unintelligible, or otherwise incomplete without it, the document or statement will be received or required, according to its obvious necessity to the case of the proponent. If the part admitted is reasonably intelligible in the first instance, without the document or statement to which reference is made, the opponent will be allowed to supply it at a stage where he has the initiative.

**§ 500. ([2] *Completeness Demanded*); Documents; Proponent; Independent Relevancy.**—In case of a document used, not to the end of proving a proposition but of establishing the existence of the document, or some statement contained in it, all that need be proved is the existence of such a document or state-

1. *People v. Dice*, 120 Cal. 189, 52 Pac. 477 (1898) (threats); *State v. Moelchen*, 53 Iowa 310, 314, 5 N. W. 186 (1880) (foreign language; one word — “knife” — recognized); *Shifflet’s Case*, 14 Gratt. (Va.) 652, 657 (1858) (confession).

2. *William v. State*, 39 Ala. 532 (1865) (confession interrupted before completion; excluded); *People v. Gelabert*, 39 Cal. 663 (1870) (confession partly in Spanish which the witness did not understand; excluded); *State v. Gilcrease*, 26 La. Ann. 622 (1874).

3. *Com. v. Chance*, 174 Mass. 245, 54 N. E. 551 (1899); *State v. Cowan*, 7 Ired. (N. C.) 239, 242 (1847); *State v. Gossett*, 9 Rich. L. (S. C.) 437 (1856); *Jones v. State*, 13 Tex. 168, 177 (1854).

4. *Alabama*.—*Amos v. State*, 123 Ala. 50, 26 So. 524 (1898) (postal card; by third person).

*Illinois*.—*Morris v. Jamieson*, 205 Ill. 87, 68 N. E. 742 (1903).

*Iowa*.—*Brayley v. Ross*, 33 Iowa 505, 508 (1871); *Collins v. Bane*, 34 Iowa 385, 389 (1872).

*Massachusetts*.—*Buffum v. York Mfg. Co.*, 175 Mass. 471, 56 N. E. 599 (1900); *Trischet v. Ins. Co.*, 14 Gray 457 (1860).

*Oregon*.—*Sturgis v. Baker*, 39 Or. 541, 65 Pac. 810 (1901).

*South Carolina*.—*McGrath v. Isaacs*, 1 Nott. & McC. (S. C.) 563, 573 (1819).

*United States*.—*Mutual Benefit L. Ins. Co. v. Higginbotham*, 95 U. S. 380, 390 (1877). See also *Ingoldsby v. Juan*, 12 Cal. 564, 577 (1859).

5. *Judd v. Brentwood*, 46 N. H. 430 (1866); *Barker v. Barker*, 16 N. H. 333, 339 (1844); *Insurance Co. v. Newton*, 22 Wall. (U. S.) 32, 35 (1874).

ment. Proof is accordingly complete when this is done;<sup>1</sup> and the extension of the evidence is limited in consequence. Where the document is intended and offered for the purpose of showing merely the fact of its existence and not for that of establishing the truth of what it asserts, even the proponent is not at liberty to read or use before the jury statements of alleged fact not germane to the document in its independently relevant capacity.

*Pleadings at Law.*— Thus, a pleading may be offered as proof of its existence, as formative of the issue, or otherwise. This may be deemed to be its aspect of independent relevancy,<sup>2</sup> as where, in case a deposition were tendered in evidence the pleadings of the cause in which it was taken are required to establish the identity of the parties, the nature of the issue and the like.<sup>3</sup>

**§ 501. ( [2] *Completeness Demanded; Documents; Proponent; Independent Relevancy* ); Judgment.**— Thus, in case of a judgment, all that need at times be proved is that, in point of fact, such a judgment was rendered. Evidence of preliminary, subsequent or subordinate matters need be produced only so far as is necessary to show that the judgment was rendered and specialize as to what it covers.<sup>1</sup> But however circumscribed the purpose for which the evidence is offered all of the record needed for this limited purpose must be produced.<sup>2</sup> Naturally, the minimum of requirement as to what parts of a judgment should be produced

1. *Milne v. Leisler*, 7 H. & N. 786, 803 (1862) (notice to quit).

2. *Infra*, §§ 2574 *et seq.*

An answer may be received in evidence without the other pleadings. *Edwards v. Mattingly*, (Ky. 1899) 53 S. W. 1032.

3. *Gordon v. Gordon*, 1 Swanst. 165, 170 (1818); *Corbett v. Corbett*, 1 Ves. & B. 335, 336 (1813); *Palmer v. Aylesbury*, 15 Ves. Jr. 176 (1808); *Bayley v. Wylie*, 6 Esp. 85 (1807).

1. *Little Rock C. Co. v. Hodge*, 112 Ga. 521, 37 S. E. 743 (1900); *Gibson v. Robinson*, 90 Ga. 756, 763, 16 S. E. 969 (1892); *McGuire v. Kouns*, 7 T. B. Monr. 386 (1828); *Lee Adm'x v. Lee*, 21 Mo. 531, 534 (1855); *Rainey v. Hines*, 121 N. C. 318, 28 S. E. 410 (1897).

2. On an issue of nul tiel record, extracts are not sufficient. *Hallum v.*

*Dickinson*, 47 Ark. 120, 124, 14 S. W. 477 (1886). And, in general, the proof of contents of a judgment, when disputed, is, where inspection is not convenient, by the use of full transcripts rather than by the consideration of extracts, though certified, or even by the sworn testimony contained in a deposition. *Mandeville v. Stockett*, 28 Miss. 398, 408 (1854); *Carrick v. Armstrong*, 2 Coldw. (Tenn.) 265 (1865). But see also *White v. Clay*, 7 Leigh (Va.) 68, 78 (1836). Recitals in prior proceedings will not be accepted as a substitute for copies. *Wilson v. Conine*, 2 Johns. (N. Y.) 280 (1807). See also *Winans v. Dunham*, 5 Wend. (N. Y.) 47 (1830); *McNeely v. Pearson*, (Tenn. 1897) 42 S. W. 165 (probate of will); *White v. Clay*, 7 Leigh (Va.) 68, 78 (1836).

is reached where the only object to be shown is that such a judgment exists,<sup>3</sup> i. e., where the judgment is independently relevant.<sup>4</sup> In the average case, where the final action of a court is to be established as a fact, the limits of the proposition whose truth has been passed upon must be made to appear with satisfactory certainty. Thus, where a decree in chancery is offered in evidence, the tender should be accompanied by the bill and answer,<sup>5</sup> which may serve to particularize and render specific the meaning of the decree. Similarly, in an action at law, the judgment and the declaration and answer or other defensive pleading are mutually necessary, each to the other, in determining what is the precise force and effect of the judgment. The pleadings alone, without the judgment book,<sup>6</sup> would be insufficient for the purpose of formulating the precise point covered by it. The civil judgment<sup>7</sup> and criminal conviction,<sup>8</sup> or acquittal<sup>9</sup> stand, in this respect, in the same position.

*Range of Proof Limited.*—Where the only fact to be shown is the existence of the judgment—in its independently relevant capacity—the extension of the proof by record will, as a rule,

3. "It is a general rule, that records, when used in evidence, must be produced entire. But this rule is laid down with some exceptions and limitations. The reason assigned for it is, that the part of the record which is lacking, may give the rest a different meaning. Where a record is used as evidence to prove the facts therein contained, the rule well applies. But where it is only used as it is here, to shew the fact that there was such judgment, then, so much of the record as is relevant, is frequently permitted to be used." *McGuire v. Kouns*, 7 T. B. Monr. (Ky.) 386 (1828).

4. *Infra*, §§ 2574 *et seq.*

5. *Leake v. Westmeath*, 2 M. & Rob. 394 (1841).

Should the decree alone be procurable, on account of the destruction of the other proceedings, it has been deemed sufficient. *Wilson v. Spring*, 38 Ark. 181, 186 (1881).

6. *Nims v. Johnson*, 7 Cal. 110 (1857). Each part of a record should not be certified. But the fact does

not furnish ground for exclusion. *Goldstone v. Davidson*, 18 Cal. 41 (1861). The clerk's general certificate as a copy will be deemed a certificate of every part of the record purporting to be under his certificate and it will be assumed that the entire record has been certified. *Coffee v. Neely*, 2 Heisk. (Tenn.) 304, 307 (1871).

7. *Campbell v. Ayres*, 6 Iowa 339, 344 (1858); *Lewis v. Bullard*, 3 Humph. (Tenn.) 207 (1842). But see *Lowry v. McDurmott*, 5 Yerg. (Tenn.) 225 (1833).

Where execution is relied on, the judgment should also be submitted. *Richards v. Pearl*, D. Chip. (Vt.) 113 (1797).

8. *Doggett v. Sims*, 79 Ga. 253, 257, 4 S. E. 909 (1877); *McCully v. Malcom*, 9 Humph. (Tenn.) 187, 192 (1848). See also *Ocean S. S. Co. v. Wilder*, 107 Ga. 220, 33 S. E. 179 (1899).

9. *Winemiller v. Thrash*, 125 Ind. 353, 25 N. E. 350 (1890).

be found to be much restricted, with especial readiness on the part of the court where the part produced recites or indicates the proper taking of constituent steps.<sup>10</sup> But a copy of the "docket entries" is not sufficient.<sup>11</sup> Where the sole object of the evidence is to show the appointment of a receiver, it will only be necessary to prove the mere entry making the appointment.<sup>12</sup> The fact to be shown being that a judgment was rendered, all that need be produced is a record of the entry, provided the court had jurisdiction.<sup>13</sup> On this principle, where a decree is used simply for purposes of corroboration no need exists to introduce evidence of the prior steps in the proceedings.<sup>14</sup> Where an indictment is brought for an *escape*, the original sentence of imprisonment and its execution may be proved by a transcript of the judgment without attempting to show the entire proceedings.<sup>15</sup> In general, where the sole object of the evidence is to show the existence of the judgment, all that will be needed is to offer the judgment entry or judgment roll rather than the entire record.<sup>16</sup> A common instance of the situation is presented where a purchaser relies

10. *Phillips v. Webster*, 85 Ill. 146 (1877); *McGuire v. Kouns*, 7 T. B. Mon. (Ky.) 386, 18 Am. Dec. 187 (1828); *Lee v. Lee*, 21 Mo. 531, 64 Am. Dec. 247 (1855).

11. *Ingham v. Crary*, 1 Penr. & W. (Pa.) 389 (1830).

12. *Ocean Steamship Co. v. Wilder*, 107 Ga. 220, 33 S. E. 179 (1899).

13. *Alabama*.—*Adams v. Olive*, 62 Ala. 418 (1878).

*Florida*.—*Watson v. Jones*, 41 Fla. 241, 25 So. 678 (1899).

*Georgia*.—*Stringfellow v. Stringfellow*, 112 Ga. 494, 37 S. E. 767 (1900). See also *Bush v. Lindsay*, 24 Ga. 245, 71 Am. Dec. 117 (1858).

*Illinois*.—*Phillips v. Webster*, 85 Ill. 146 (1877). See also *Turner v. Hause*, 199 Ill. 464, 65 N. E. 445 (1902).

*Louisiana*.—*Baudin v. Roliff*, 1 Mart. (N. S.) 165, 14 Am. Dec. 181 (1823).

*Missouri*.—*Jones v. Talbot*, 9 Mo. 121 (1845).

*New York*.—*Gardere v. Columbian Ins. Co.*, 7 Johns. 514 (1811).

*North Carolina*.—*Rainey v. Hines*, 121 N. C. 318, 28 S. E. 410 (1897).

*Virginia*.—*Wynn v. Harman*, 5 Gratt. 157 (1848).

*England*.—*Jones v. Randall*, 1 Cowp. 17, Lofft, 383, 428 (1774).

14. *Droop v. Ridenour*, 11 App. Cas. (D. C.) 224 (1898) (decree of divorce).

15. *Sanford v. State*, 11 Ark. 328, (1850); *Hudgens v. Com.*, 2 Duv. (Ky.) 239 (1865).

16. *Arkansas*.—*Wilson v. Spring*, 38 Ark. 181 (1881).

*Kansas*.—*Haynes v. Cowen*, 15 Kan. 637 (1875).

*Kentucky*.—*Francis v. Hazlerig*, 1 A. K. Marsh. 93 (1817); *Chinn v. Caldwell*, 4 Bibb. 543 (1817).

*Massachusetts*.—*Rathbone v. Rathbone*, 10 Pick. 1 (1830).

*Virginia*.—*Wynn v. Harman*, 5 Gratt. 157 (1848).

*West Virginia*.—*Guinn v. Bowers*, 44 W. Va. 507, 29 S. E. 1027 (1898); *Waggoner v. Wolf*, 28 W. Va. 820, 1 S. E. 25 (1886). See also *Masters v. Varner*, 5 Gratt. (Va.) 168, 50 Am. Dec. 114 (1848).

on a sale under an execution as his muniment of title to property,<sup>17</sup> though the whole record has been required to determine, as is said, the question of the jurisdiction of the court out of which the execution issues.<sup>18</sup> For, should it appear that the judgment is that of an inferior court, or under a limited jurisdiction, sufficient of the entire record must be shown to make it affirmatively appear that the court was acting, in the case in question, within its jurisdiction.<sup>19</sup>

**§ 502. ([2] *Completeness Demanded; Documents; Proponent; Independent Relevancy*); Notice to Quit, etc.**—So, also, to illustrate, one who offers a notice to quit is not at liberty to use, in any way likely to be regarded as evidence of their truth, the self-serving statements of the writer as to why he is giving the notice.<sup>1</sup> In view of the limited purpose for which the writing is offered, such statements are irrelevant.<sup>2</sup>

17. *Indiana*.—Woolen v. Rockefeller, 81 Ind. 208 (1881).

*Kentucky*.—McGuire v. Kouns, 7 T. B. Mon. 386, 18 Am. Dec. 187 (1828).

*Mississippi*.—Cockeral v. Wynn, 12 Sm. & M. 117 (1849).

*Missouri*.—Lee v. Lee, 21 Mo. 531, 64 Am. Dec. 247 (1855).

*Tennessee*.—Lowry v. McDurmott, 5 Yerg. 225 (1833).

*Texas*.—Maverick v. Salinas, 15 Tex. 57 (1855).

18. Harper v. Rowe, 53 Cal. 233 (1878); McGehee v. Wilkins, 31 Fla. 83, 12 So. 228 (1893); Ashmead v. Wilson, 22 Fla. 255 (1886); Kenyon v. Baker, 16 Mich. 373, 97 Am. Dec. 158 (1868). Recitals, including those concerning jurisdiction, may as they appear on the face of the judgment be accorded by the presiding judge considerable weight in determining whether he shall require the proponent to produce in the first instance more than the judgment itself. *Simmons v. Threshour*, 118 Cal. 100, 50 Pac. 312 (1897); *Dogan v. Brown*, 44 Miss. 235 (1870); *Monk v. Horne*, 38 Miss. 100, 75 Am. Dec. 94 (1859); *Blackburn v. Jackson*, 26 Mo. 308 (1858). See also *Downer v. Shaw*, 22 N. H. 277 (1851); *Buford v. Hick-*

*man*, 4 Fed. Cas. No. 2,114a, Hempst. 232 (1834).

19. *Florida*.—Donald v. McKinnon, 17 Fla. 746 (1880).

*Indiana*.—Brown v. Eaton, 98 Ind. 591 (1884).

*Kentucky*.—Adams v. Tiernan, 5 Dana 394 (1837).

*New York*.—Simons v. De Bare, 4 Bosw. 547 (1859).

*Wisconsin*.—Wells v. American Express Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695 (1882).

1. "As the Lord Chief Baron [Pollock, C. B.] reminds me, there is a forcible instance in the case of letters written by attornies before action brought, which often contain matter almost defamatory; but though they might be admissible as against the parties to whom they were written, they would not be admissible as evidence of all the facts stated in them. Therefore it is plain, that a document may be admissible and yet not proof of all the facts stated in it." *Milne v. Leisler*, 7 H. & N. 786, 803 (1862), per Wilde. B.

2. *Milne v. Leisler*, 7 H. & N. 786, 803 (1862).

§ 503. (**[2] Completeness Demanded; Documents; Proponent**); **General Practice.**— Documents, viewed in their probative capacity, i. e., as evidence of facts which their statements assert, invite from their very nature, to an administrative practice fair to both parties and also to the court, while avoiding unnecessary loss of time. The practice is to require the proponent to produce, in evidence, the entire document and then, the document being in evidence as having been offered by the proponent, to permit each party to read, at any appropriate stage, such portions of the document as may be deemed material. The administrative practice, indeed, is perhaps especially applicable to cases in which a voluminous mass of written statements is presented. Where, indeed, an extensive document, as, e. g., a book claimed to be libelous, is involved, or the written or printed report of an extended oral statement, such as a speech said to have been calculated to excite to crime,<sup>1</sup> is under consideration, the court may from motives of practical convenience adopt the expedient of allowing the party putting in the document to be assumed to have put it all in evidence but to read only such portions as the party deems material to his case. The other side, in turn, are allowed, at an appropriate stage, to read and point out such other portion as impresses them as important from their point of view. The same practice may properly be applied to any other document,<sup>2</sup>

1. It has, however, been held that it is improper to offer *en masse* a large number of exhibits. *Dowie v. Priddle*, 116 Ill. App. 184 (1904). Thus, on hearing before the Parnell Commission, when the speeches of certain leaders of the Irish Land League were under investigation as calculated to incite to criminal outrages, President Hannen ruled as follows: "The only regular course is this (and whatever it leads to, it must be followed): You, Sir Henry, [Sir Henry James, Attorney General] will call attention to what you consider the material parts of the speech, and Sir C. Russell [Counsel for Hon. Charles

S. Parnell] can on cross-examination refer to other portions which he may consider, and, if necessary, the cross-examination can be postponed until he has had an opportunity of seeing the full speeches." Parnell Commission's Proceedings, *Times' Rep.* I, pp. 28, 104 (1888).

2. *Crawford v. Roney*, 126 Ga. 763, 55 S. E. 499 (1906). In an action for a libel contained in a newspaper, the defendant has a right to have read, as part of the plaintiff's case, another part of the same newspaper referred to in the libel complained of. *Thornton v. Stephen*, 2 Md. & Rob. 46 note (1837).

as the *verbatim* report of former evidence,<sup>3</sup> letters,<sup>4</sup> and other documents not of record.<sup>5</sup>

*General Considerations.*—In general the proponent of a document produced in evidence cannot, it is said be *required* to read the entire instrument on its presentation.<sup>6</sup> There is, however, as in case of depositions, authority to the contrary effect, that the proponent may be compelled to read the entire document before proceeding with other evidence.<sup>7</sup>

3. *Waller v. State*, 102 Ga. 684, 28 S. E. 284 (1897) (prosecution need read only direct examination); *Waller v. State*, 102 Ga. 684, 28 S. E. 284 (1897). *Infra*, § 1700.

4. *Georgia*.—*Lester v. Ins. Co.*, 55 Ga. 475 (1875).

*Illinois*.—*Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772 (1898).

*Massachusetts*.—*Robinson v. Cutter*, 163 Mass. 377, 40 N. E. 112 (1895).

*New York*.—*Grattan v. Life Ins. Co.*, 92 N. Y. 274, 284 (1883); *Tilton v. Beecher*, N. Y., Abbott's Rep. II, 270 (1875).

*United States*.—*Wright v. Bragg*, 96 Fed. 729, 37 C. C. A. 574 (1899).

Letters written at another time are not rendered competent by way of supplementing a statement merely because they relate, in a general way, to the same subject-matter. Thus, where a defendant had produced, upon notice, certain specified letters written by defendant to his partner and a letter book kept by him, containing copies of the above letters, it was held that defendant had no right to read, in his own behalf, other letters upon the same subject, copied in the same book, but not referred to in those read by the plaintiff. In connection with this ruling the court say: "Defendant now says, 'as you prove the letters by my book, I have a right to read in evidence the whole of that book; or at least the whole correspondence on the subject, as it is found in the same book. You produce a document

of my writing, and must read the whole.' But how can this be called a document?" *Sturge v. Buchanan*, 10 A. & E. 598 (1839).

5. *Todd v. Crail*, (Ind. 1906) 77 N. E. 402; *Trustees v. Hogg*, 2 Hawks (N. C.) 370, 374 (1823) (petition).

6. *Lester v. Ins. Co.* 55 Ga. 475, 479 (1875) (letter); *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772 (1898); *Wright v. Bragg*, 96 Fed. 729, 37 C. C. A. 574 (1899); *Euton's Trial*, 23 How. St. Tr. 1030 (1794).

7. *Milne v. Leisler*, 7 H. & N. 786, 795 (1862). If one party reads a portion of a written document in evidence in his behalf, the other party is entitled to the reading of the remaining portions thereof, before the intervention of other testimony. *Spanagel v. Dellinger*, 38 Cal. 279, 283 (1869) (former pleadings).

The question is one entirely of administration and the attempt to elevate this small matter of practice into a rule of evidence results chiefly in confusion and impediment to the orderly course of judicial proceedings. Against the obvious fairness of placing the entire matter immediately before the triers,—preventing at once any possible misconception from an unfair selection of extracts,—must be placed the practical danger that time may be wasted in reading what nobody cares to put in as part of his case. The danger from garbled extracts is apt to be overestimated, as the inevitable reaction in the minds of the jury outweighs, in most instances, any temporary advantage to

For obvious reasons the same opportunity of inspection and consequent optional use is not afforded in case of oral statements. An increased stringency of requirement as to completeness in the first instance is therefore made in oral as compared with written declarations.

**§ 504. ([2] Completeness Demanded; Documents; Proponent); Depositions.**—The party who has taken a deposition or given his own,<sup>1</sup> need, in the first instance, read only the direct examination,<sup>2</sup> or such portion of it as he deems material,<sup>3</sup> subject to immediate correction by the judge, in case of obvious unfairness,<sup>4</sup> or for other cause. This he may do of his own accord<sup>5</sup> or at the instance of opposing counsel, and subject also

be gained, while few courts or counsel would fail to yield at once to a demand for the correction of a palpable misrepresentation.

1. *Thomas v. Miller*, 151 Pa. 482, 486, 25 Atl. 127 (1892).

2. The practice, which seems a convenient one, has not been adopted in England. *Temperley v. Scott*, 5 C. & P. 341 (1832). Nor is it accepted in a majority of American jurisdictions.

*California*.—*Orland v. Finnell*, 65 Pac. 976 (1901).

*Georgia*.—*McArdle v. Bullock*, 45 Ga. 89, 92 (1872).

*Kansas*.—*Grant v. Pendery*, 15 Kan. 236, 243 (1875).

*Missouri*.—*Hill v. Sturgeon*, 28 Mo. 323, 329 (1859).

*Nebraska*.—*Converse v. Meyer*, 14 Neb. 190, 15 N. W. 340 (1883).

See also *Alexander v. Grand Lodge*, 119 Iowa 519, 93 N. W. 508 (1902).

It is, however, necessary to read only such portions as are relevant or material. *Walkley v. Clark*, 107 Iowa 451, 78 N. W. 70 (1899); *Kilbourne v. Jennings*, 40 Iowa 473, 474 (1875). The requirement of completeness in this respect has been carried so far as to make it necessary that the party introducing the deposition should read the whole, though the only purpose is one of independent relevancy, e. g., to show inconsistent statements. *Hamilton v. People*, 29 Mich. 195, 198

(1874); *Lightfoot v. People*, 16 Mich. 507, 511, 516 (1868). *Infra*, § 1779. The stringency of the rule is somewhat relaxed where the party who took the deposition declines to use it and his opponent sees fit to do so. Under these circumstances, it is, as a rule, sufficient if he read all that pertains to any given subject.

*Iowa*.—*Citizens' Bank v. Rhutasel*, 67 Iowa, 316, 319, 25 N. W. 261 (1885).

*Minnesota*.—*Watson v. St. P. C. R. Co.*, 76 Minn. 358, 79 N. W. 308 (1899).

*Nebraska*.—*Hamilton B. S. Co. v. Milliken*, 62 Neb. 116, 86 N. W. 913 (1901).

*North Dakota*.—*First Nat'l Bank v. Minneapolis & N. E. Co.*, 11 N. D. 280, 91 N. W. 436 (1902).

*Pennsylvania*.—*Calhoun v. Hays*, 8 W. & S. 127, 130 (1844).

Even this indulgence is not universally accorded. *Hill v. Sturgeon*, 28 Mo. 323, 329.

3. *Bunzel v. Maas*, 116 Ala. 68, 22 So. 563 (1897).

The entire direct examination must, it is said, be read in the original instance. *Southwark Ins. Co. v. Knight*, 6 Whart. (Pa.) 327, 330 (1841).

4. The whole of any particular answer must be read. *Perkins v. Adams*, 5 Mete. (Mass.) 44, 48 (1842).

5. *Watson v. R. Co.*, 76 Minn. 358, 79 N. W. 308 (1899).



to subsequent supplementing by the opposing side as shall appear to them to be in their interest.<sup>6</sup> The subsequent answers, read by way of supplementation, are the evidence of the taker of the deposition, though not read by him.<sup>7</sup>

**§ 505. ([2] *Completeness Demanded; Documents; Proponent*); Admissions.**—Where an admission is in writing it is particularly appropriate, as in case of oral admissions, that the self-serving portion go to the jury at the same time as the portion more favorable to the proponent, providing the two are needed to give the effect of the statement as a whole. This is the practice not only where the statements are made at or about the same time, *c. g.*, were parts of a single transaction; but where, as in case of an account,<sup>1</sup> the entries, both of charge and discharge are made

6. This is optional with them. *Williams v. Kelsey*, 6 Ga. 365, 375 (1849); *Byers v. Orensstein*, 42 Minn. 386, 44 N. W. 129 (1890). But should the cross-examining party decline to take advantage of the option, the proponent of the evidence may still himself introduce the cross-examination. *Williams v. Kelsey*, 6 Ga. 365, 375 (1849).

7. *Reed v. Ins. Co.*, 117 Ga. 116, 43 S. E. 433 (1903).

1. *Georgia*.—*Bridges v. State*, 110 Ga. 246, 34 S. E. 1037 (1900) (entire book introduced).

*Illinois*.—*Boudinot v. Winter*, 190 Ill. 394, 60 N. E. 553 (1901).

*Iowa*.—*Veiths v. Hagge*, 8 Iowa 163, 189 (1859) (items in entire book).

*Louisiana*.—*Wakeman v. Marquand*, 5 Mart. La. (N. S.) 265, 272 (1826).

*Maryland*.—*King v. Maddux*, 7 H. & J. 467 (1824) (all items between same parties in same book).

*New York*.—*Dewey v. Hotchkiss*, 30 N. Y. 497, 502 (1864); *Pendleton v. Weed*, 17 N. Y. 72, 76 (1858) ("the whole relating to same matter").

*North Carolina*.—*Turner v. Child*, 1 Dev. 133 (1826).

*Pennsylvania*.—*Thommon v. Kalbach*, 12 S. & R. 238 (1824).

*Vermont*.—*State v. Powers*, 72 Vt. 168, 47 Atl. 830 (1900); *Mattocks v. Lyman*, 18 Vt. 98, 103 (1846).

*Virginia*.—*Jones v. Jones*, 4 Hen. & M. 447 (1909). See also *Robertson v. Archer*, 5 Rand. (Va.) 319, 324 (1827).

*West Virginia*.—*Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544 (1901).

*United States*.—*Bell v. Davidson*, 3 Wash. C. C. 328, 333 (1818); *Morris v. Hurst*, 1 Wash. C. C. 433 (1806).

*England*.—*Rowland v. Blaksley*, 1 Q. B. 403 (1842). But see, excluding entries in other parts of the book, *Catt v. Howard*, 3 Stark. 6 (1820); *Kilbee v. Sneyd*, 2 Molloy Chan. 186, 193 (1828); *O'Brien v. O'Brien*, 27 N. Br. 145, 156, Can. Sup., in *Cassels' Dig.* 1893, p. 297 (1888); *Palmer v. Gilbert*, 1 All. N. Br. 505 (1849).

After a defendant has availed himself of the plaintiff's books of account, to establish certain credits in his favor, it is competent for the plaintiff to read from the same books charges and entries which show that those credits have been exhausted by counter charges of debit, made at about the same time and afterwards. The defendant cannot use the books to establish credits in

at different times. If the proponent claims the advantage of the concessions, he must take it *cum onere*, subject to the offsetting claims which the declarant makes, in this particular matter, in his own favor.<sup>2</sup>

**§ 506. ([2] *Completeness Demanded; Documents; Proponent*); Public Records.**—Public record as a rule is afforded to instruments constituent of legal results. The interdependence of parts being especially marked in instruments of this nature, a full copy of the original record, which itself, is usually irremovable, alone demonstrates whether a particular conclusion is justified by the instrument; or whether, on the contrary, some minor and perhaps disconnected clause may modify and indeed control the alleged meaning and effect. Such a full copy being as readily obtained as a partial one, the court is justified in so discharging its administrative function as to require that it be done. The litigant offering any part of a public record puts in evidence a copy of the whole of that record<sup>1</sup> and, thereupon, reads or otherwise states the portion on which he actually relies.<sup>2</sup> While reasonable

his favor, and *uno flatu* deny to the plaintiff the full benefit of the charges therein against him. He must take the whole or none; and having elected to put the books in evidence, for his own benefit, he cannot afterward be permitted to deprive the plaintiff of the benefit of any charges therein in his favor. In such a case it is wholly unimportant whether the whole or any portion of the entries are in the handwriting of the plaintiff. *Dewey v. Hotchkiss*, 30 N. Y. 497, 502 (1864). When books are produced on notice, and entries are read in evidence by the party calling for them, the party producing them may read other entries necessarily connected with the former entries, if made prior to the commencement of the suit. *Withers v. Gillespy*, 7 S. & R. (Pa.) 10, 14 (1821).

**Entries made after suit** lack the element of good faith essential to relevancy and are excluded. *Withers v. Gillespy*, 7 S. & R. (Pa.) 10, 15 (1821). An entirely different book cannot be placed in evidence by virtue of the principle. *Doolittle v.*

*Stone*, 136 N. Y. 613, 616, 32 N. E. 639 (1892).

The rule is the same in equity as at law. If one side of an account produced by the adversary is used, both must be taken. The account must be adopted altogether, or rejected *in toto*. *Kilbee v. Sneyd*, 2 Moll. 186, 193 (1828).

2. *Infra*, § 2734.

1. *Smith v. Rich*, 37 Mich. 549 (1877); *State v. Clark*, 41 N. J. L. 486 (1879); *Wood v. Knapp*, 100 N. Y. 109, 2 N. E. 632 (1885). See also *Garrison v. Hyman*, 29 La. Ann. 28 (1877).

**So far as the copy is proved** by the certificate of the custodian of the record, as is the common statutory practice, it would be difficult to offer an extract, or the substance or effect of the record;—as the authority of the custodian is, as a rule, limited to the certification of copies, i. e., entire copies. The fact does not affect copies established by the evidence of an examining witness.

2. *Davis v. Mason*, 4 Pick. (Mass.) 156 (1826).

exactness in the copy will be required, no objection can be raised to a copy that blanks have been left in it where the original document cannot be deciphered.<sup>3</sup> The canon of completeness does not require that where a record is contained in a book, that the whole volume should be offered; copies sufficiently extensive to cover the entire relevant fact or transaction satisfies the rule.<sup>4</sup>

*Extracts will not be received*, e. g., from letters addressed to public officials.<sup>5</sup> A leaf out of a public record will not be accepted in evidence, while the whole of a book from which it has been torn can be presented.<sup>6</sup> Should the entire volume, thus mutilated, be offered, the question is one of administration. Standing alone, without additional circumstances generating a feeling of suspicion, the loss of the leaves, though unexplained, would probably not be cause for rejecting the book.<sup>7</sup>

*Such a course is not only in the interest of fair play but calculated to assist in the attainment of justice.*<sup>8</sup> The party who proposes to prove a fact by the introduction of a public record, must produce a copy of the entire record. The record being accessible to the public in its entirety, no reason, as a rule, exists why the tribunal should submit to the risk of being misled by garbled extracts, selected by the respective parties in their own (assumed) interest.<sup>9</sup> Selection of extracts easily gives rise to an

3. *Wiley v. Portsmouth*, 35 N. H. 303 (1857).

4. *Woods v. Banks*, 14 N. H. 101 (1843); *Wallace v. Douglas*, 114 N. C. 450, 19 S. E. 668 (1849). The copy must fairly represent the entire transaction or set of transactions relevant to the inquiry. Thus while every account between the parties need not be produced, a copy of an account will not be received if that part is imperfect or misleading—as by stating debits and omitting credits. *U. S. v. Gaussen*, 19 Wall. (U. S.) 198, 22 L. ed. 41 (1873).

5. *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598 (1847).

6. *U. S. v. Cummings*, 25 Fed. Cas. No. 14,900 (1855).

7. *People v. Hancock County*, 21 Ill. App. 271 (1886).

8. *Vance v. Reardon*, 2 N. & McC. (S. C.) 299 (1820).

9. "At common law, the copy of a paper writing could not be given in evidence when the original was in existence and in the power of the party; but the act of the legislature of 1721 (P. L. 117, 1 Brev. 315) authorizes attested copies of all records certified by the clerks of the Courts, to be given in evidence. When an act of the legislature is in abrogation of the Common Law, it is to be strictly construed, and even without the aid of this rule it appears to me obvious that the legislature never intended by the term *copies*, to make *extracts* evidence; the terms themselves are of different import, and besides the mischiefs of confounding them appear to me too manifest to need exposure." *Vance v. Reardon*, 2 N. & McC. (S. C.) 299, 303 (1820).

inference of suppression.<sup>10</sup> Abstracts of<sup>11</sup> or extracts from<sup>12</sup> a record cannot be introduced in evidence, even in the statements of a deposition.<sup>13</sup>

*This principle of administration correlates* readily with the usual statutory regulation that an official in charge of a public record may certify the accuracy of a *verbatim* copy of the records in his charge but not as to their substance or effect. Sworn or examined copies are, however, still competent.<sup>14</sup> What shall be deemed to constitute the entire record, within the meaning of this rule of practice depends largely upon the nature and form of the record itself;—due scope being given to the assumption (“presumption”) of regularity in postulating former propriety of procedure in preliminary steps from the existence of a definite result to which these prior steps were necessary.<sup>15</sup>

*Deeds, Wills, etc.*—Records, as those of deeds, wills, and the like which are customarily copied *in extenso* are proved by *verbatim* copies, duly certified by an official or proved, under oath, by an examining witness.

*Other records consist*, in most jurisdictions, of a series of single entries frequently consisting of one or more lines, each relating to a single subject. Proof is necessarily restricted to the single entry, however syncopated or fragmentary.<sup>16</sup> This is equally

10. When the party offering a record in evidence, alleges it to be incomplete, and offers a transcript of the part omitted, the court may receive both as proof of the whole record. “As he apprised the opposite party of the defect, it was proper to give him the means of curing it.” *Dismukes v. Musgrove*, 8 Mart. (N. S.) (La.) 375, 381 (1829).

11. *Mercier v. Harnan*, 39 La. Ann. 94, 1 So. 410 (1887) (marriage contract); *Atkins v. Lewis*, 14 Gratt. (Va.) 30, 34 (1857) (land patent).

12. Such extracts have been received, under special circumstances. *Robinson v. Gillman*, 3 Vt. 163, 164 (1831) (land warrant).

13. *Hamilton v. Shoaff*, 99 Ind. 63, 65 (1884) (deed).

14. See DOCUMENTARY EVIDENCE.

“Proof of a copy, or of the contents

so full and complete as to be substantially a copy.” is the standard of requirement. *Eaton v. Hall*, 5 Mete. (Mass.) 287, 290 (1842).

15. *Infra*, §§ 1193 *et seq*; *McNeely v. Pearson*, (Tenn. 1897) 42 S. W. 165 (will); *Newman v. T. C. S. & I. Co.*, 80 Fed. 228, 25 C. C. A. 382 (1897) (probate of will).

16. “An extract is evidence, if it appears on its face to contain all that relates to the subject in controversy. It cannot be deemed necessary for a party to go to the expense of copying large plots and maps containing irrelevant matter.” *Farr v. Swan*, 2 Pa. St. 245, 256 (1845).

The complete entry must be proved.—Thus, where a clerk’s certificate of a marriage failed to contain the minister’s name, it was rejected. *State v. Colby*, 51 Vt. 291, 295 (1878).

true whether the record is one connected with the executive, legislative or judicial branches of the government.

**§ 507. ([2] *Completeness Demanded; Documents; Proponent; Public Records*); Executive.**— The executive department of government affords numerous instances of records to which the requirement of completeness is constantly being applied;— whether these public documents are those made *in extenso*, or consist of what may be called “single entry” records. Of this latter class are parish registers of births, marriages and deaths,<sup>1</sup> and municipal official records covering the same data,<sup>2</sup> plats of lots,<sup>3</sup> tax lists.<sup>4</sup>

*Other public executive documents*, such as official bonds<sup>5</sup> which are not usually extended upon a permanent record, but kept on file, are subject, in their proof, to the same rule. A complete copy will reproduce the marginal comments, entries<sup>6</sup> or references, if any, made by official authority. Where a record is inconveniently voluminous, it may be summarized;<sup>7</sup> but mere length does not apparently suspend the operation of the rule.<sup>8</sup>

**§ 508. ([2] *Completeness Demanded; Documents; Proponent; Public Records*); Legislative.**— Where proof is required of a statute, only such portions need be introduced in evidence as are material,<sup>1</sup> and relate to the proposition in issue,<sup>2</sup> whether the proof is by deposition<sup>3</sup> or otherwise, and whether the statute be domestic<sup>4</sup> or foreign.<sup>5</sup>

1. *American Life Ins. Co. v. Rosengale*, 77 Pa. 507, 515 (1875).

2. *State v. Potter*, 52 Vt. 33, 38 (1879); *State v. Colby*, 51 Vt. 291, 295 (1878); *Blair v. Sayre*, 29 W. Va. 604, 606, 2 S. E. 97 (1887).

3. *Farr v. Swan*, 2 Pa. St. 245, 255 (1845).

4. *Job v. Tebbetts*, 10 Ill. 376, 380 (1848); *State v. Howard*, 91 Me. 396, 40 Atl. 65 (1898) (liquor tax payers).

5. *State v. Hawkins*, 81 Ind. 486, 487 (1882).

6. *Rice v. Cunningham*, 29 Cal. 492, 497 (1866) (official grants; “not taken”); *Cary v. Cary*, 189 Pa. 65, 42 Atl. 19 (1899) (satisfaction of a mortgage).

7. *Infra*, § 2709.

8. *Nelthrop v. Johnson*, Clayt. 142 (1650).

1. *Swift v. Fitzhugh*, 9 Port. (Ala.) 39, 54 (1839).

2. *Chamberlain v. Maitland*, 5 B. Monr. (Ky.) 448 (1845) (law as to holidays); *Adle v. Sherwood*, 3 Whart. (Pa.) 481, 483 (1838).

The title of a statute is not sufficient to establish its effect. *State v. Welsh*, 3 Hawks (N. C.) 404, 407 (1824) (incorporation).

3. *Biesenthall v. Williams*, 1 Duv. (Ky.) 329 (1864); *Chamberlain v. Maitland*, 5 B. Monr. (Ky.) 448 (1845) (foreign notary).

4. *Grant's Succession*, 14 La. Ann. 795 (1859).

5. *Chamberlain v. Maitland*, 5 B. Monr. (Ky.) 448 (1845); *Grant v. Coal Co.*, 80 Pa. 208, 216 (1876).

§ 509. ([2] *Completeness Demanded; Documents; Proponent; Public Records*); Judicial.—In no connection is the application of the principle of completeness at once so difficult and so important as in regard to judicial records. The requirement is strongly insisted upon by the presiding judge, in the interest of public justice.<sup>1</sup> The opponent may object to the reception of any judicial document on the ground that it is not complete. Such an objection, however, will receive no consideration where the proponent would have completed his tender had the opponent permitted him to do so.<sup>2</sup> The question of what shall be deemed a complete record for proof of a given fact is, in any case, a question of administration. No precise rule, other than the necessity for the use of reason, can, in the nature of the case, be formulated.<sup>3</sup> Some consideration as to what other judges have done may, perhaps, assist to suggest what is reasonable administration in a similar case.

*Irrelevancy, if Separable, Rejected.*—Where an entire record cannot, by any possibility, ever become material on an issue, but a line of clear demarkation may be traced between relevant and irrelevant parts of the record, the proponent may rest content upon offering the former portions of the writing. For example, where the only object in using a record is to show an admission.<sup>4</sup>

1. *Florida*.—Walls v. Endel, 20 Fla. 86 (1883).

*Illinois*.—Vail v. Iglehart, 69 Ill. 332 (1873).

*Kentucky*.—McGuire v. Kouns, 7 T. B. Mon. 386, 18 Am. Dec. 187 (1828).

*Louisiana*.—Dismukes v. Musgrove, 8 Mart. (N. S.) 375 (1829).

*Maine*.—Jay v. East Livermore, 56 Me. 107 (1868).

*Maryland*.—Orendorff v. Mumma, 3 Harr. & J. 70 (1910).

*Michigan*.—Platt v. Stewart, 10 Mich. 260 (1862).

*Missouri*.—Philipson v. Bates, 2 Mo. 116, 22 Am. Dec. 444 (1829).

*Pennsylvania*.—Ingham v. Crary, 1 Penr. & W. 389 (1830).

*South Carolina*.—Wilson v. Harper, 5 S. C. 294 (1874).

*Tennessee*.—Phipps v. Caldwell, 1 Heisk. 349 (1870).

*Virginia*.—White v. Clay, 7 Leigh 68 (1836).

2. Dismukes v. Musgrove, 8 Mart. (N. S.) (La.) 375 (1828).

3. *Kansas*.—Haynes v. Cowen, 15 Kan. 637 (1875).

*Kentucky*.—McGuire v. Kouns, 7 T. B. Mon. 386, 18 Am. Dec. 187 (1828).

*Maine*.—Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598 (1847).

*New Hampshire*.—Newbury Bank v. Eastman, 44 N. H. 431 (1862).

*New York*.—Packard v. Hill, 7 Cow. 434 (1827).

*Vermont*.—Robinson v. Gillman, 3 Vt. 163 (1831).

4. Gay v. Rogers, 109 Ala. 624, 20 So. 37 (1895); Clayton v. Clayton, 4 Colo. 410 (1878); Henderson v. Cargill, 31 Miss. 367 (1856); Gregory v. Pike, 94 Me. 27; 46 Atl. 793 (1900). So of an admission in the pleadings

*Part Complete in Itself Sufficient.*—It has been ruled that a party may be permitted to produce only that portion of a document which establishes the fact on which he relies;<sup>5</sup>—*provided* the proof is complete in itself, and may, for that reason, be separated readily from the remainder of the record.<sup>6</sup> To prove, for example, naturalization it is not necessary to prove the existence of preliminary facts essential to the validity of the decree.<sup>7</sup>

*It is assumed* that the other side is at liberty to produce any other portion of the record which he deems material to his side of the controversy.<sup>8</sup>

**§ 510. ([2] *Completeness Demanded; Documents; Proponent; Public Records*); Pleadings at Law.**—In connection with the pleadings themselves, whether in equity or at law, substantially the same canons of administration are adopted;—the existence of rules of substantive law or procedure very properly furnishing, as in other connections, factors of no slight importance in determining the exercise of the discretion, even where they are not controlling in their operation. Pleadings may be offered for either of two purposes. In the first place, as is shown elsewhere, the statement may be independently relevant, i. e., by reason of its own existence regardless of the truth of the facts asserted. Or, on the other hand, the pleading may, as where it contains an admission, be used as constituting evidence of something asserted by it, i. e., in what may be called its probative or assertive capacity.

**§ 511. ([2] *Completeness Demanded; Documents; Proponent; Public Records*); Pleadings in Chancery.**—In dealing with pleadings in chancery causes the bill, as a whole, should be

of another case. *German-American Ins. Co. v. Paul*, 2 Indian Terr. 625, 53 S. W. 442 (1899).

5. *Illinois*.—*Walker v. Doane*, 108 Ill. 236 (1883).

*Indiana*.—*Anderson v. Ackerman*, 83 Ind. 481 (1883). Compare *Brown v. Eaton*, 98 Ind. 591 (1884).

*Texas*.—*Maverick v. Salinas*, 15 Tex. 57 (1855).

*West Virginia*.—*McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415 (1894). See also *Dickinson v. Chesapeake*, etc., R. Co., 7 W. Va. 390 (1874).

*United States*.—*O'Hara v. Mobile*, etc., R. Co., 76 Fed. 718, 22 C. C. A. 512 (1896).

6. *Haynes v. Cowen*, 15 Kan. 637 (1875).

7. *The Acorn*, 1 Fed. Cas. No. 29, 2 Abb. 434 (1870). See also *Ritchie v. Putnam*, 13 Wend. (N. Y.) 524 (1835); *Stark v. Chesapeake Ins. Co.*, 7 Cranch (U. S.) 420, 3 L. ed. 391 (1813).

8. *Walker v. Doane*, 108 Ill. 236 (1883).

produced by the opponent; and so much of it read by him, subject to supervision by the court and correction by his antagonist, as fairly covers, to a reasonable extent,<sup>1</sup> the particular aspect or portion of the bill which he deems relevant to the truth of a proposition in issue.<sup>2</sup> In equity causes where the answer is treated as a *pleading*, e. g., when used in the cause in which it was filed, the same rule as to completeness is applied.

An answer in *chancery* stands in a somewhat different position from the bill, in this, that it is not only, like the bill, a *pleading*, but is, in a special sense, the personal statement competent as an *admission*. It follows that, in its aspect of a *pleading*, i. e., as assisting to formulate the *issues*, the same rules as are applicable to the bill, regulate also the completeness of the answer. The proponent is entitled to read in proof of any fact in his case so much of the answer as he deems to be fairly necessary to enable him to prove it in this way;—subject to supplementing by the opposing interest. Such is also the rule when an answer in equity is used in an action at law as an admission.<sup>3</sup> The same course has been adopted as to documents produced as part of the answer:<sup>4</sup> the plaintiff may use such portions of the defendant's answer in

1. To introduce in evidence part of a writing, such as a bill in equity, and withhold from the jury the balance of the instrument, it is at least necessary to point out definitely the part offered, that is, the pages, paragraphs, sentences or words. When this is not done, the whole or none should go to the jury. *Jones v. Grantham*, 80 Ga. 472, 477, 5 S. E. 764 (1888).

2. *Jones v. Grantham*, 80 Ga. 472, 476, 5 S. E. 764 (1888).

3. *Benedict v. Nichols*, 1 Root (Conn.) 434 (1792); *Lawrence v. Ins. Co.*, 11 Johns. (N. Y.) 241, 260 (1814); *Hoffman v. Smith*, 1 Caines (N. Y.) 157 (1803); *Brown v. Thornton*, 1 Myl. & C. 243, 246 (1836); *Butterworth v. Bailey*, 15 Ves. Jr. 358, 362 (1808); *Ormond v. Hutchinson*, 13 Ves. Jr. 47, 53 (1806). See also *Roberts v. Tennell*, 3 T. B. Mon. (Ky.) 247 (1826); *Duncan v. Gibbs*, 1 Yerg. (Tenn.) 256 (1829).

4. "The uniform opinion of the judges of the courts of common law is, that when a bill of discovery has been filed, to which an answer has been put in, and documents are produced at the trial, as part of the answer, in which character alone the plaintiff in equity is entitled to use them, the whole answer must be read; but, on the other hand, when a court of equity has interfered, and has ordered the documents to be produced and read, the court of law, sitting at *Nisi Prius*, pays such respect to the order of the court of equity, that it allows the documents to be read alone, without inquiring into the grounds of the order. That is the rule established by law, and it is consistent with what is the situation of the parties." *Brown v. Thornton*, 1 Myl. & Cr. 243, 248 (1836).



the cause as he may deem favorable to himself,<sup>5</sup> preserving only essential grammatical construction,<sup>6</sup> and so incorporating matters to which reference is made, or which are necessary in explanation,<sup>7</sup> as will render the extracts used complete,<sup>8</sup> so far as relates to the particular subject-matter of which it treats,<sup>9</sup> while the defendant is not at liberty to offer his own assertions, as contained in his answer, in his own favor.<sup>10</sup>

*Where the answer in an equity cause is used in its probative capacity*, as setting forth a party's admissions, e. g., when the answer is used in a cause other than that in which it was given, the rule varies as between England and America. In English chancery practice an answer to a bill in equity is treated in an equitable cause as it would be in an action at law, viz., the pro-

5. *Blount v. Burrow*, 1 Ves. Jr. 546 (1792); *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62, 90 (1816).

6. *Boardman v. Jackson*, 2 Ball & B. 382 (1813); *Miller v. Gow*, 1 Y. & C. Ch. 56, 59, V. C. Bruce (1841); *Rude v. Whitechurch*, 3 Sim. 562 (1830); *Ridgeway v. Darwin*, 7 Ves. Jr. 404 (1802) (same sentence).

**Formal connection without real linking in meaning**—as where “and” or “but” are used between ideas not in logical relation, is not within the rule. *Davis v. Spurling*, 1 Russ. & M. 64, 68 (1829). The test of necessity for reading is where there is: “Such a connection between the passages as to render it necessary to read the latter with the former.” *Connop v. Hayward*, 1 Y. & C. 33, 34 (1841).

7. *Nurse v. Bunn*, 5 Sim. 225 (1832).

8. *Robinson v. Scotney*, 19 Ves. Jr. 582 (1816). Where a passage read by a plaintiff from an answer refers to another passage, that other passage is to be read only for the purpose of explaining or qualifying the thing in respect of which the reference is made, and not for the purpose of introducing new facts, which do not explain or qualify that thing, though such new facts be connected, in grammatical construction, with that which must be read. *Bartlett v.*

*Gillard*, 3 Russ. 149, 157 (1826).

“When a document is produced from the custody of the clerk in court, under a bill for relief, the plaintiff is, I apprehend, entitled to use it, without reading that part of the answer which precedes the admission of the possession of the document. I cannot conceive this rule to be likely in any case to produce practical inconvenience, because the court may look at the whole answer, if not as evidence, yet as that which may regulate its discretion with respect to the further investigation of particular facts.” *Miller v. Gow*, 1 Y. & C. Ch. 56, 59 (1841).

9. *Thompson v. Lambe*, 7 Ves. Jr. 587 (1802); *Ormond v. Hutchinson*, 13 Ves. 47, 53 (1806). Where the answer to a bill for discovery only is used as evidence, the whole must be read. Where relief is prayed, and the answer replied to, the plaintiff, reading admissions, must proceed to the completion of the immediate subject, to which the defendant is answering; according to the course of evidence at law; but this does not apply to a distinct matter. *Ormond v. Hutchinson*, 13 Ves. 47, 53 (1806).

10. *Awdley v. Awdley*, 2 Vern. 192 (1690).

ponent must read the whole answer,<sup>11</sup> and should also read any document incorporated in it,<sup>12</sup> by reference or otherwise.

*American Anomaly.*—In America the anomalous doctrine, first, apparently, formulated in New York, prevails. The defendant's answer of affirmative matter, made under oath,<sup>13</sup> responsive to the charges and allegations of the bill,<sup>14</sup> has a *prima facie* effect as *evidence*, requiring the plaintiff to produce two witnesses in disproof.<sup>15</sup>

*This view overrules the earlier*<sup>16</sup> and sounder<sup>17</sup> doctrine, to the

11. *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62, 90 (1816); *Jacobs v. Farrall*, 2 Hawks (N. C.) 570 (1823); *Ormond v. Hutchinson*, 13 Ves. 47, 53 (1806). At law a party producing a letter, or other document in evidence cannot use it partially, but makes the entire evidence. *Boardman v. Jackson*, 2 Ball & B. 382 (1813).

12. When the answer of a party in another cause is resorted to as evidence, the whole of it is admissible, both at law and in equity. *Boardman v. Jackson*, 2 Ball & B. 382 (1813).

13. An unsworn answer is no evidence at all for the defendant. *Bartlett v. Gale*, 4 Paige (N. Y.) 503, 508 (1834). An unsworn answer while refused the effect of requiring the evidence of two witnesses to refute it, has been conceded the effect of ordinary evidence. *Heard v. Russell*, 59 Ga. 25, 51 (1877).

14. An unresponsive answer is not evidence against the complainant. *Bartlett v. Gale*, 4 Paige (N. Y.) 503, 508 (1834). *Methodist Episcopal Church v. Wood*, 5 Ohio 283 (1831); *McCoy v. Rhodes*, 11 How. (U. S.) 131, 140 (1850).

As such a denial imposed upon the plaintiff under the rules of equity practice the necessity of producing two witnesses in order to substantiate the allegation so denied, the erroneous notion arose that an answer which could thus nullify as it were, the plaintiff's oath must be *evidence*, in itself for the defendant. *Lampton v. Lampton's Ex'rs*, 6 T. B. Mon. (Ky.)

616, 620 (1828). From the negative in sense, to the affirmative veiled in negative form proved an easy transition. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 81 (1826); *Paynes v. Coles*, 1 Munf. (Va.) 373, 393, 395 (1810); *Maupin v. Whiting*, 1 Call (Va.) 195 (1798); *Russell v. Clark's Ex'rs*, 7 Cr. 69, 92 (1812). From the affirmative in substance to the affirmative in form was the next step; until the rule, as announced in New York, was to the effect that "It is an undeniable rule in chancery that the answer to a bill for discovery, being under oath, must be taken as true, unless disproved by two witnesses." *Clason v. Morris*, 10 Johns. (N. Y.) 524, 542 (1812).

15. *Georgia.*—*Armstrong v. Lewis*, 61 Ga. 680, 688 (1878).

*New York.*—*Bartlett v. Gale*, 4 Paige (N. Y.) 503 (1834).

*Ohio.*—*Methodist Ep. Ch. v. Wood*, 5 Ohio 283, 285 (1831).

*Tennessee.*—*Beech v. Haynes*, 1 Tenn. Ch. 569 (1874).

*Virginia.*—*Clinch River M. Co. v. Harrison*, 91 Va. 122, 129, 21 S. E. 660 (1895). See also *Branch Bank v. Black*, 2 McCord (S. C.) 344, 350 (1827); *Fant v. Miller*, 17 Gratt. (Va.) 187, 206, 211 (1867).

16. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 82 (1826); *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62, 90 (1816).

17. An answer in chancery (though, in form, responsive to a question put in the bill) is not evidence, where it

effect that only a direct denial of matter charged by the plaintiff places the burden of evidence as to it upon him. This is the rule in England,<sup>18</sup> in the Federal courts,<sup>19</sup> and in a minority of state jurisdictions.<sup>20</sup>

*Either at law or in equity*, to show what is admitted, it will be necessary to know what is charged. Accordingly, so much of the bill must also be read as renders intelligible the portion of the answer which is submitted. The proponent is then, logically, at liberty to produce the precise statement upon which he relies, being careful only to violate no grammatical construction, or fair continuity of expression.

**§ 512. ([2] *Completeness Demanded; Documents; Proponent; Public Records*); Statutory Interrogatories.**—In regulating the use to be made by litigants of the answers obtained in response to interrogatories addressed to an adversary filed by virtue of a statutory provision, the courts apply, as a rule, in any particular jurisdiction, the same requirements as to completeness which obtain in that individual jurisdiction to analogous statements for which these interrogatories are a substitute.

Where these statutory interrogatories take the place of the discovery previously obtained by means of a bill in equity, it is the duty of the proponent to put in evidence the entire set of answers, so far as relates to the same subject-matter.<sup>1</sup> The rule is the same as when the answer in chancery is used as evidence in an action at law rather than when used as a pleading in equity.

*In general, however, the analogy followed has been that of depositions.* It has, accordingly been held that the proponent may

asserts a right, affirmatively, in opposition to the plaintiff's demand; but the defendant is as much bound to establish such assertions by independent testimony, as the plaintiff is to sustain his bill. *Paynes v. Coles*, 1 Munf. (Va.) 373, 395 (1810).

18. *Attwood v. Small*, 6 Cl. & F. 232, 297 (1838).

19. *Clements v. Moore*, 6 Wall. (U. S.) 299, 315 (1867).

20. *Lampton v. Lampton's Ex'rs*, 6 T. B. Mon. (Ky.) 616, 620 (1828); *New England Bank v. Lewis*, 8 Pick. (Mass.) 113, 120 (1829). The answer

of a defendant in equity stating facts which are not inquired of in the bill, is not evidence of such facts. *New England Bank v. Lewis*, 8 Pick. (Mass.) 113, 120 (1829).

1. *Southern R. Co. v. Hubbard*, 116 Ala. 387, 22 So. 541 (1897).

In Louisiana, following the analogies of the civil law, each answer is to be deemed complete in itself and may be relied upon by the proponent as a whole. *McLear v. Hunsicker*, 29 La. Ann. 540 (1877). The latter, however, is not at liberty to separate a statement from its qualifying parts.

offer such portions of his adversary's statements in sworn answers as he deems material and helpful to himself<sup>2</sup> not being obviously unfair and misleading, and subject at all times to the power of the court to order that other portions of the adversary's statement, necessary to fairness<sup>3</sup> or essential to a complete understanding<sup>4</sup> should also be read. The rights of the proponent are subject also to the further qualification that, while he is at liberty to decide on what topic, if any, he will interrogate his opponent, he will be required, having selected his subject and asked his questions, to introduce in evidence *all* that his opponent has to answer as to it.<sup>5</sup> The matter is one frequently regulated by a "rule of court."

**§ 513. ([2] *Completeness Demanded; Documents; Proponent; Public Records*); Judgments.**— It is not, in the absence of exceptional circumstances, as where the inquiry is as to the nature of a claim which has been placed in a judgment,<sup>1</sup> or the effort is made for the enforcement of the judgment itself,<sup>2</sup> the practice to require that the whole record, in all its extension, to whatsoever matter relating, should be produced. The record of a litigated cause is, in the average instance, partly constituted by the original papers; and the balance is extended in book form, upon a judgment roll. It will rarely be found that the entire record is needed for purposes of proof in any single connection.<sup>3</sup> The successive steps of the litigation, the institution of proceedings by the service of process, the relative positions of the parties as defined by their pleadings, the various motions preliminary or preparatory to trial, the course of hearing as to law and fact, the adjudication, all culminating in the rendition of a judgment;— these, and the steps, if any, taken subsequent or supplementary to the judgment, appear with greater or less fullness, upon the record. While these proceedings are, in a sense, interdependent,

Auge v. Variol, 31 La. Ann. 865, 869 (1879).

2. Van Horn v. Smith, 59 Iowa 142, 148, 12 N. W. 789 (1882); Lyon v. Marriott, 5 Brit. Col. 157 (1896); Wunderlich v. Ins. Co., 104 Wis. 382, 80 N. W. 467 (1899).

3. Hammatt v. Emerson, 27 Me. 308, 335 (1847).

4. Allend v. R. Co., 21 Wash. 324, 58 Pac. 244 (1899).

5. Demelman v. Burton, 176 Mass. 363, 57 N. E. 665 (1900).

1. Jones v. Hopkins, 32 Iowa 503, 504 (1871).

2. Willis v. Louderback, 5 Lea (Tenn.) 561 (1880).

3. It has, however, been held that "a record is an entire thing, and if admissible for any purpose, all its parts are received." Miles v. Wingate, 6 Ind. 458 (1855) (bill of exceptions).

it has very reasonably been required that the record in its entirety be produced by its proponent,<sup>4</sup> only so far as the same is fairly relevant to the proposition on which it is offered. What is demanded, is the whole record relating to the particular proposition;<sup>5</sup>—all that which establishes by judicial hearing the existence of the fact which it is sought to prove.<sup>6</sup>

*Extracts are not deemed* sufficient.<sup>7</sup> The course generally adopted facilitates a correct interpretation<sup>8</sup> without unduly im-

4. "It is a general rule, that record, when used in evidence, must be produced entire." *McGuire v. Kouns*, 7 T. B. Mon. (Ky.) 386 (1828).

5. *Illinois*.—*People v. Pike*, 197 Ill. 449, 64 N. E. 393 (1902) (county court records); *McMillan v. Lovejoy*, 115 Ill. 498, 4 N. E. 772 (1886).

*Indiana*.—*Brown v. Eaton*, 98 Ind. 591, 595 (1884); *Anderson v. Ackerman*, 88 Ind. 481, 490 (1883).

*Iowa*.—*Latterett v. Cook*, 1 Iowa 1, 5 (1855).

*Kentucky*.—*Grebbin v. Davis*, 2 A. K. Marsh. 17 (1819).

*Massachusetts*.—*Eaton v. Hall*, 5 Metc. 287, 290 (1842) (order of reference).

*Michigan*.—*Drosdowski v. Chosen Friends*, 114 Mich. 178, 72 N. W. 169 (1897).

*Mississippi*.—*Shirley v. Fearne*, 33 Miss. 653, 667 (1857).

*Missouri*.—*Philipson v. Bates*, 2 Mo. 116 [95] (1829).

*New York*.—*Packard v. Hill*, 7 Cow. 434, 443, on app. 2 Wend. 411, 5 Cow. 375, 384 (1827); *Griffith v. Ketchum*, 12 Johns. 379, 380 (1815) (sheriff's return).

*Pennsylvania*.—*Hampton v. Speck-enagle*, 9 S. & R. 212, 221 (1823).

*Tennessee*.—*Garner v. State*, 5 Lea 213, 217 (1880).

*Virginia*.—*White v. Clay*, 7 Leigh 68, 78 (1836).

The probate of a will follows the same course. *Vail v. Rinehart*, 105 Ind. 6, 12, 4 N. E. 218 (1885); *Loy v. Kennedy*, 1 W. & S. (Pa.) 396 (1841); *Smith v. Neilson*, 13 Lea

(Tenn.) 461, 467 (1884); *Ex parte Todd*, 3 Leigh (Va.) 819 (1831). The requirements necessary for completeness are, however, frequently regulated by statute. *Hankinson v. R. Co.*, 41 S. C. 1, 17, 19 S. E. 206 (1893).

6. *Alabama*.—*Farley v. Whitehead*, 63 Ala. 295 (1879).

*Arkansas*.—*Denton v. Roddy*, 34 Ark. 642 (1879).

*California*.—*Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118 (1894).

*Georgia*.—*Kerchner v. Frazier*, 106 Ga. 437, 32 S. E. 351 (1898).

*Indiana*.—*Brown v. Eaton*, 98 Ind. 591 (1884). Compare *Anderson v. Ackerman*, 88 Ind. 481 (1883).

*Kentucky*.—*Macauley v. Elrod*, 27 S. W. 867, 16 Ky. L. Rep. 291 (1894).

*Louisiana*.—*Mayo v. Brittan*, 34 La. Ann. 984 (1882). See also *Conway v. Erwin*, 1 La. Ann. 391 (1846).

*North Carolina*.—*Rainey v. Hines*, 121 N. C. 318, 28 S. E. 410 (1897).

*Tennessee*.—*Willis v. Louderback*, 5 Lea 561 (1880). See also *American Emigrant Co. v. Fuller*, 83 Iowa 599, 50 N. W. 48 (1891); *Calkins v. Packer*, 21 Barb. (N. Y.) 275 (1855); *Warren v. Fredericks*, 76 Tex. 647, 13 S. W. 643 (1890); *Elwell v. Prescott*, 38 Wis. 274 (1875).

7. *Bellamy v. Hawkins*, 17 Fla. 750, 756 (1880) (probate of will).

8. "The reason assigned for it is, that the part of the record which is lacking may give the rest a different meaning." *McGuire v. Kouns*, 7 T. B. Mon. (Ky.) 386 (1828).

pending the course of the trial. But part of a record may be received to show that a suit is pending,<sup>9</sup> that a divorce<sup>10</sup> has been granted; or other isolated fact exists. The time when a suit began may be shown by a simple endorsement on certain of the pleadings.<sup>11</sup>

**§ 514. ([2] *Completeness Demanded; Documents; Proponent; Public Records*); Verdicts.**—The general rule is that a record of a verdict standing alone, i. e., without the judgment, is not admissible, because, otherwise, *non constat* but that the verdict may no longer be in force. It may have been set aside or for some other reason no judgment have issued on it.<sup>1</sup> Clearly, however, the production of a verdict is independently relevant to the effect that there was a suit which progressed so far as to reach a verdict.<sup>2</sup>

**§ 515. ([2] *Completeness Demanded; Documents; Proponent; Public Records*); Executions.**—In its probative capacity as establishing the facts adjudicated, an execution is not complete without the judgment on which it was issued;<sup>1</sup> and, usually, other portions of the record. Should a third person sue the officer in trespass for conversion of the goods levied on under his execution, the officer should produce not only the writ but the judgment.<sup>2</sup>

9. *Adams v. Olive*, 62 Ala. 418 (1878); *Peck v. Land*, 2 Ga. 1, 46 Am. Dec. 368 (1847); *White v. Clay*, 7 Leigh (Va.) 68 (1836). See also *White v. Clay*, 7 Leigh (Va.) 68 (1836).

10. *Alexander v. Grand Lodge A. O. U. W.*, 119 Iowa 519, 93 N. W. 508 (1903).

11. *Opperman v. McGown*, (Tex. Civ. App. 1899) 50 S. W. 1078.

1. *Mitchell v. Mitchell*, 40 Ga. 11 (1869); *Donaldson v. Jude*, 2 Bibb (Ky.) 57 (1810); *Pitton v. Walter*, 1 Str. 162 (1623). See also *Kip v. Brigham*, 7 Johns. (N. Y.) 168 (1810).

2. *Waldo v. Long*, 7 Johns. (N. Y.) 173 (1810); *Kip v. Brigham*, 7 Johns. (N. Y.) 168 (1810); *Fisher v. Kitchenman*, 7 Mod. 451, Willes 367 (1796); *Pitton v. Walter*, 1 Str. 162 (1623). See also *McLeod v. Crosby*, 128 Mich. 641, 87 N. W. 883 (1901); *Garland v. Scoones*, 2 Esp. 618 (1796).

1. *California*.—*Vassault v. Austin*, 32 Cal. 597 (1867).

*Delaware*.—*State v. Records*, 5 Harr. 146 (1844).

*Missouri*.—*Ramsey v. Waters*, 1 Mo. 406 (1823).

*New York*.—*Townshend v. Wesson*, 4 Deur 342 (1855).

*Pennsylvania*.—*Gaskell v. Morris*, 7 Watts & S. 32 (1844).

*South Carolina*.—*McCall v. Boatwright*, 2 Hill 438 (1834).

*United States*.—*Campbell v. Strong*, 4 Fed. Cas. No. 2,367a, Hempst. 265 (1835).

*England*.—*Britton v. Cole*, 1 Salk. 408 (1822). See also *Carlton v. King*, 1 Stew. & P. (Ala.) 472, 23 Am. Dec. 295 (1832); *Deloach v. Myrick*, 6 Ga. 410 (1849).

2. *Martin v. Podger*, 2 W. Bl. 701, 5 Burr. 2631 (1768); *Lake v. Billers*, 1 Ld. Raym. 733 (1698). See also *Deloach v. Myrick*, 6 Ga. 410 (1849).

If the execution is independently relevant, e. g., where an officer in possession of goods under an execution proceeds against a third person acting without claim or right,<sup>3</sup> or where the owner of the goods sues the officer for seizing them under his writ,<sup>4</sup> mere production of the execution is sufficient.

**§ 516. ([2] *Completeness Demanded; Documents; Proponent; Public Records*); Wills and Probate Papers.**—It is essential that the copy of a will be full and complete. The administrative demand will be urgent in proportion to the importance and complexity of the interests involved, and the probability that an adequate construction can be given to a particular provision only in view of the existence of a number of other clauses in the instrument. In several states of the American Union it is required, in order that a copy of a will should be admissible, that it be accompanied by a record of its probate.<sup>1</sup> Elsewhere, a certificate of the register of probate or other suitable official that the accompanying will has been duly proved will be accorded a *prima facie* effect.<sup>2</sup> Completeness is conditioned, however, in all cases, by the object of the offer. The court cannot judge whether evidence is sufficiently full for a given purpose until informed what that purpose is. Thus, where the only object is to prove the issuance of letters testamentary—nothing turning on the contents of the will itself—a certificate is sufficient if it give a copy of the letters without annexing a copy of the will.<sup>3</sup>

*Administration.*—Appointment as administrator of the estate of a decedent should be proved, in the ordinary case, by production of the original papers, or record books, or else by a copy of them, sworn or certified. It has been established (by statute)

3. *Spoor v. Holland*, 8 Wend. (N. Y.) 445, 24 Am. Dec. 37 (1832); *Blackley v. Sheldon*, 7 Johns. (N. Y.) 32 (1810); *Barker v. Miller*, 6 Johns. (N. Y.) 195 (1810).

4. *DeLoach v. Myrick*, 6 Ga. 410 (1849); *Hunter v. McElhany*, 2 Brev. S. C. 103 (1806); *Britton v. Cole*, Salk. 408 (1795).

1. *Florida*.—*Coffee v. Groover*, 20 Fla. 64 (1883).

*Kentucky*.—*Kentucky Land, etc., Co. v. Crabtree*, 113 Ky. 922, 70 S. W. 31, 24 Ky. L. Rep. 743 (1902).

*Mississippi*.—*Fotherree v. Lawrence*, 30 Miss. 416 (1855).

*New Jersey*.—*Allaire v. Allaire*, 37 N. J. L. 312 (1875).

*New York*.—*Hill v. Crockford*, 24 N. Y. 128 (1861).

*North Carolina*.—*Sutton v. Westcott*, 48 N. C. 283 (1856).

2. *Logan v. Watt*, 5 Serg. & R. (Pa.) 212 (1819). See also *Thursby v. Myers*, 57 Ga. 155 (1876).

3. *Beach v. Pears*, 1 N. J. L. 288 (1795).

that production of the letter of administration will be deemed sufficient.<sup>4</sup>

*Guardianship* may, in like manner, be established by production of the letter of guardianship.<sup>5</sup>

**§ 517. ([2] *Completeness Demanded; Documents; Proponent*); Private Records.**—The records of a corporation in any suit in which they are relevant and competent may be proved by a certificate from the proper officer, an examined and sworn copy,<sup>1</sup> by production of the books properly authenticated,<sup>2</sup> or in any other legal manner, as an admission.<sup>3</sup> While the proponent puts in evidence everything which appears upon the record relating to the transaction which he is seeking to prove,<sup>4</sup> and it is all, constructively at least, in evidence as proof submitted by him,<sup>5</sup>—he may content himself, in the first instance, with reading such portion of the whole as he sees fit,<sup>6</sup> leaving his opponent to read such other portions as may seem to him advisable.

**§ 518. ([2] *Completeness Demanded; Documents*); Opponent; Independent Relevancy.**—When proof of the independent

4. *Hankinson v. Charlotte, etc., R. Co.*, 41 S. C. 1, 19 S. E. 206 (1893).

5. *Prescott v. Cass*, 9 N. H. 93 (1837).

1. "Proprietors' records" of common lands, etc., are treated in the same manner. *Pike v. Dyke*, 2 Greenl. (Me.) 213 (1823); *Woods v. Banks*, 14 N. H. 101, 109 (1843).

2. *Banks v. Darden*, 18 Ga. 318, 341 (1855).

3. *Sinking Fund Com'rs v. Bank, 1 Metc. (Ky.)* 174, 185 (1858) (recital of corporation's doings contained in a mortgage).

4. When books are admitted in evidence, they are testimony before the jury as to all entries appertaining to the same transaction; still, the party offering them may select and read to the jury such portions as answer the purpose for which they were introduced by him, leaving it to the opposite party to submit any other parts that he may see fit. *Banks v. Darden*, 18 Ga. 318, 341 (1855). A copy of the record of the votes of the proprietors of common and undivided

lands in this state, duly certified by the clerk of said corporation, is admissible as evidence thereof. Where the proof may be a copy, an examined copy, duly made and sworn to by any competent witness, is always admissible. A copy of so much of the record as relates to the subject-matter of the suit, is allowable. *Whitehouse v. Bickford*, 29 N. H. 471, 481 (1854). "Records are usually in parts, and there should be a copy of all the matter made up and attested as a record at any particular time, so that the jury may have the whole evidence, and the courts be enabled to give the right construction to what was done. But where what relates to the matter in question is a distinct and independent record, a copy of that is sufficient." *Woods v. Banks*, 14 N. H. 101, 109 (1843) (proprietors' records).

5. *Vischer v. R. Co.*, 34 Ga. 536, 539 (1866) ("already before the jury").

6. *Fouche v. Bank*, 110 Ga. 827, 36 S. E. 256 (1900); *Banks v. Darden*, 18 Ga. 318, 341 (1855).



relevancy of a document has been made, the opponent is at liberty to read so much of the remainder of its statements as pertains to the same subject and tends to qualify, limit or explain the portion already read.<sup>1</sup>

**§ 519. ([2] Completeness Demanded; Documents; Opponent; Independent Relevancy); Pleadings.**—At an appropriate stage, the opposing party is at liberty to read to the jury any portion of the remainder of the bill produced and not read by the proponent which may reasonably be expected to have either a logical bearing on the part read<sup>1</sup> or upon some proposition at issue in the case.<sup>2</sup>

When the proponent offers part of an *answer* the opponent is limited to further statements, made in the same instrument which fairly qualify, to the average appreciation, the effect of the part used by the proponent.<sup>3</sup>

**§ 520. ([2] Completeness Demanded; Documents; Opponent); Public Records.**—The same is true of public documents. The copy of a public document being in evidence the opportunity is afforded to the opposing side, either on cross-examination, re-examination or some other appropriate stage of the proceedings,<sup>1</sup> to point out other of its parts which he deems favorable to his contention.

*Judgments.*—The foregoing rules of administration relating to completeness in proof of judgments apply merely to the duty, in the first instance, of the proponent. The right of his adversary to introduce any further parts of the record which he may feel are necessary to supplement or explain the parts already offered,<sup>2</sup> is not affected by them.

**§ 520a. ([2] Completeness Demanded; Documents; Opponent); Private Writings.**—The opponent's right of supplementation to complete a document already placed in evidence by

1. *Whitman v. Morey*, 63 N. H. 448, 454, 2 Atl. 899 (1885) (deposition).

1. *Davies v. Flewellen*, 29 Ga. 49 (1859).

2. *Sciple v. Northcutt*, 62 Ga. 42, 45 (1878) (amendment to bill).

3. As part of his own case or in rebuttal (*Munroe v. Phillips*, 64 Ga. 32, 40 [1879]), the adverse interest may produce evidence of other statements of the declarant on the same

subject which tend to qualify or even to contradict the extracts upon which reliance is placed. Such a procedure has nothing to do with the administrative principle under consideration.

1. Fairness may require that comment should not be withheld until the final argument.

2. *Rule v. State*, (Miss. 1898) 22 So. 872.

the proponent applies not only to public documents<sup>1</sup> but to private writings as well. The general administrative rule is that he against whom a document of any grade of probative force has been given in evidence may prove, in some proper way, and at an appropriate stage, the balance of the writing.<sup>2</sup>

*In criminal matters of serious consequence* such as prosecutions for seditious libel,<sup>3</sup> or the delivery of incendiary speeches,<sup>4</sup> a somewhat unusually wide range of quotation from the significant writings is properly permitted;—even to the extent of receiving an independent speech delivered on another occasion, or another article on a similar topic.<sup>5</sup>

1. *Supra*, § 520.

2. *Georgia*.—*Stone v. Town of Talalah Falls*, 131 Ga. 452, 62 S. E. 592 (1908) (ordinance book).

*Montana*.—*McConnell v. Combination Min. & Mill. Co.*, 76 Pac. 194 (1904).

*New Hampshire*.—*Page v. Hazelton*, 74 N. H. 252, 66 Atl. 1049 (1907) (entries in a book of account).

*Texas*.—*Corpus v. State*, (Cr. App. 1907) 102 S. W. 1152.

*Wyoming*.—*Bosler v. Coble*, 84 Pac. 895 (1906) (letters).

An obvious limitation upon the application of this practice is to be observed. The rule that, where one party introduces in evidence a part of a writing, his adversary can introduce the whole means the whole of the writing relating to the same subject-matter and necessary to explain it, and does not include parts containing immaterial or irrelevant matter. *T. A. Robertson & Co. v. Russell*, (Tex. Civ. App. 1908) 111 S. W. 205.

Where part of a correspondence has been introduced in evidence, the court will usually receive any relevant additional portion of the same. *Hoggson & Pettis Mfg. Co. v. Sears*, 77 Conn. 587, 60 Atl. 133 (1905); *Gosnell v. Webster*, (Neb. 1904) 97 N. W. 1060; *Buedingen Mfg. Co. v. Royal Trust Co.*, 181 N. Y. 563, 74 N. E. 1115 (1905) [judgment affirmed, 85

N. Y. Suppl. 621, 90 App. Div. 267 (1904)]; *Buedingen Mfg. Co. v. Royal Trust Co.*, 85 N. Y. Suppl. 621, 90 App. Div. 267 (1904).

Letters subsequent in point of time to parts of a correspondence admitted in evidence are not, as a rule, supplementary to such prior portions. *Collins v. Todd*, 17 Mo. 537, 540 (1853). Under certain circumstances, they may be explanatory, and so admissible. *Burlington C. R. & N. R. Co. v. Sherwood*, 62 Iowa 309, 314, 17 N. W. 564 (1883); *Roe v. Day*, 7 C. & P. 705 (1836) (meaning of phrase "entrap" used in earlier letter by same writer). See also *Bradley v. Gardner*, 10 Cal. 371 (1858).

3. *R. v. Lambert*, 2 Camp. 398, 400 (1810). Thus, paragraphs "of the same paper upon the same topic with the libel, or fairly connected with it, although locally disjoined from it," have been held entitled to be read by defendant, "to show the intention and mind of the defendant with respect to this specific paragraph." *R. v. Lambert*, 2 Camp. 398, 400 (1810).

4. *Pinney's Trial*, 3 State Tr. n. s. 11, 464 (1832).

5. *R. v. O'Connell*, 5 State Tr. n. s. 1, 289 (1843). Another article, without value as explaining the utterances drawn in question, is, however, incompetent. *Darby v. Ouseley*, 1 H. & N. 1, 7, 11 (1856); *R. v. Martin*, 6 State Tr. n. s. 925, 998 (1848).

**§ 521. ( [2] *Completeness Demanded; Documents*); Incorporation by Reference.**— The administrative requirement of completeness calls for introduction in evidence of documents referred to in the writings already before the court. The greater the relative importance of the document in the case, the more its precise shades of meaning are significant, the more strenuously will the judge insist that all writings incorporated in it by reference should be produced for inspection.<sup>1</sup> On an action for libel<sup>2</sup> or in one involving an order for sale with accompanying guaranty,<sup>3</sup> the writings embodied by reference in the important documents must be read at the same time. But incorporation in documents of less critical meaning does not of necessity involve reading the writings referred to at the same time.<sup>4</sup> Thus, for example, a written contract may refer to a schedule<sup>5</sup> and still it be entirely proper to omit reading the latter;—allowing the adversary to produce and read items if he desires to do so.<sup>6</sup> In accordance with this principle, a reference in the letters which form part of a correspondence admitted in evidence to prior letters in the series, or the mention in it of other papers<sup>7</sup> necessary to be incorporated with the body of the letter in order to make it intelligible, or the sense complete, requires the production of the papers to which reference has been made.

**§ 522. ( [2] *Completeness Demanded; Documents*); Entire Transaction May Be Shown.**— A somewhat different application of the same administrative principle of completeness is presented when a document is so connected with a certain transaction as to be unintelligible or even misleading in the absence of evidence as to the transaction itself. Under these circumstances, the presiding judge is justified in requiring that the matter be presented as a whole. If, for example, the examination of a bankrupt and the inspection of his books are in reality “all one transaction,” evidence as to both should be submitted at the same time.<sup>1</sup> If two

1. *East Coast Lumber Co. v. Ellis-Young Co.*, (Fla. 1908) 45 So. 826 (deed); *Stone v. Sanborn*, 104 Mass. 319, 324 (1870) (contract).

2. *Thornton v. Stephen*, 2 Mo. & Rob. 45 (1837).

3. *Cordray v. Mordecai*, 2 Rich. Law, (S. C.) 518, 525 (1846) (ship).

4. *Elmore v. Overton*, 104 Ind. 548, 555, 4 N. E. 197 (1885).

5. *Barber v. International Co.*, 73 Conn. 587, 48 Atl. 758 (1901).

6. *Dowling v. Feeley*, 72 Ga. 557, 567 (1884) (probate vouchers).

7. *Johnson v. Gilson*, 4 Esp. 21 (1801).

1. *Yates v. Carnsew*, 3 C. & P. 99 (1828).

documents are produced during and as part of the same original transaction, and one of them is introduced in evidence, the proof of the other may be required by the judge, should he feel that the two writings are so connected with each other that reading of both is essential to the understanding of the one originally introduced in evidence.<sup>2</sup> But the mere fact that there were other documents made at or about the same time is not in itself a sufficient reason for requiring that each be produced if one is admitted.<sup>3</sup> Receiving a document in evidence entails usually the reception of writings or other facts which are required in order fully to understand that which is admitted.

A closely analogous principle is that which admits verbal declarations as part of the *res gestæ*,<sup>4</sup> whether considered as independently relevant<sup>5</sup> or as constituting evidence of the facts asserted in the statement.<sup>6</sup> When a transaction is to be placed before a tribunal in its entirety, it is at once obvious as a matter of logic that a verbal act differs in no essential particular from any other. That belief or disbelief in the truth of the proposition asserted flows as logically from its being made as any other indirect consequence is disguised merely by the anomalous "rule against hearsay."<sup>7</sup>

**§ 523. ([2] *Completeness Demanded; Documents*); Incorporation by Relation.**—Completeness may demand the production of documents so related to those already in evidence as to be essential to their adequate understanding. An answer to a question, for example, is not fully intelligible without knowledge of that question.<sup>1</sup> Should a statement in an answer in chancery be offered as constituting an admission, the portion of the bill to which it is in reply should also be produced.<sup>2</sup>

2. *Stuckey v. O'Neal*, 86 Ark. 145, 109 S. W. 1164 (1908); *State v. Blydenburg*, (Ia. 1907) 112 N. W. 634; *Grabowski v. State*, 126 Wis. 447, 105 N. W. 805 (1905). *Hewitt v. Piggott*, 5 C. & P. 75 (1831) (letter produced with an answer in chancery in other proceedings).

4. *Infra*, § 2581.

5. *Infra*, §§ 2581 *et seq.*

6. *Infra*, §§ 2698 *et seq.*

7. *Infra*, § 2700 *et seq.*

1. Where ancient interrogatories

are lost, the answers are, none the less, received. *Rowe v. Brenton*, 8 B. & C. 737, 765 (1828).

2. *Pennell v. Meyer*, 8 C. & P. 470 (1838). On the trial of an action, when it is proposed on one side to read an answer to a bill in chancery, if the other side insist upon it the whole of the bill, and not the interrogatory parts merely, must be read in evidence. *Pennell v. Meyer*, 8 C. & P. 470 (1838).

If a letter is introduced that to which it is in reply is rendered competent;<sup>3</sup> and, indeed, will be required,<sup>4</sup> as in cases of oral conversation,<sup>5</sup> whenever available;<sup>6</sup>—extracts from it not being deemed a sufficient compliance with the rule.<sup>7</sup> Where, however, the letter originally offered is intelligible<sup>8</sup> and not obviously incomplete<sup>9</sup> as it stands and it further appears that the letter to which it is in answer<sup>10</sup> or the documents enclosed or referred to are in the possession of the adverse party, the balance of convenience may well be found in receiving the letter as offered, leaving the work of supplementing or amplifying it to the opposite side at a subsequent stage.

3. *Security Trust Co. v. Robb*, (N. J. 1906) 73 C. C. A. 302, 142 Fed. 78; *Tilton v. Beecher*, N. Y., Abbott's Rep. II, 270 (1875). Where a letter offered in evidence is in reply to one received by the writer, the earlier letter is as a rule admissible, both because of the fact that the letter in reply is frequently unintelligible without it but also because the writer of the reply by referring in it to the previous letter impliedly makes the latter, to this extent at least, part of his own communication. *Trischet v. Ins. Co.*, 14 Gray (Mass.) 457 (1860).

4. *Walson v. Moore*, 1 C. & K. 626 (1844). "We can perceive no just distinction between oral conversation and written correspondence in this respect." *Trischet v. Ins. Co.*, 14 Gray (Mass.) 457 (1860).

5. Parts of a correspondence or conversation necessary to the complete understanding of such conversation or correspondence are, as a rule, admissible by way of supplementation, if any portion of the correspondence or conversation is received. *Trischet v. Ins. Co.*, 14 Gray (Mass.) 457 (1860). "If we have the sermon, let us have the text." *Tilton v. Beecher*, N. Y., Abbott's Rep. II, 270 (1875).

6. *Hayward R. C. v. Duncklee*, 30 Vt. 29, 39 (1856).

7. *Coats v. Gregory*, 10 Ind. 345, 346 (1858).

8. *Brayley v. Ross*, 33 Iowa 505 (1871); *New Hampshire T. Co. v. Korsmeyer, etc., Co.*, 57 Neb. 784, 78 N. W. 703 (1899).

9. *Stone v. Sanborn*, 104 Mass. 319, 324 (1870).

10. *Illinois*.—*Barnes v. Trust Co.*, 169 Ill. 112, 48 N. E. 31 (1897).

*Iowa*.—*Brayley v. Ross*, 33 Iowa 505, 508 (1871).

*Massachusetts*.—*Stone v. Sanborn*, 104 Mass. 319, 324 (1870).

*Nebraska*.—*New Hampshire T. Co. v. Korsmeyer P. & H. Co.*, 57 Neb. 784, 78 N. W. 303 (1899).

*England*.—*DeMedina v. Owen*, 3 C. & K. 72 (1850); *Barrymore v. Taylor*, 1 Esp. 326 (1795). "In either case, whether the communications are by successive letters or by distinct conversations, the party introducing the second in evidence may, if he pleases, introduce the first also, and if he does not, the other party may. The actual custody of the papers does not affect the question which party shall introduce them, but only the steps to be taken to compel their production." *Stone v. Sanborn*, 104 Mass. 319, 324 (1870). The practice is the same even in criminal cases. *U. S. v. Doeblar*, 1 Baldw. (U. S.) 519, 522 (1832) (forgery).

§ 524. ([2] *Completeness Demanded; Documents*); *Obligation to Introduce into Evidence Resulting from Demand and Inspection*.—Under a certain set of circumstances, the law of procedure itself overrides the option of the party to produce a document in his power and compels him to put it in evidence. This occurs where he who subsequently is obligated to become the proponent of the document has given notice to his adversary requiring the latter to produce the writing, and the latter has in fact produced it. The demanding party has now availed himself of the opportunity so secured of inspecting the document. He is no longer at liberty to decline to keep the examined document out of evidence; he must, by the rule originally laid down in England, offer the whole writing<sup>1</sup> “if at all material to the issue.”<sup>2</sup> The document is thereby made evidence for both parties.<sup>3</sup> The object which the court in so ordering had in view was to punish and thereby discourage “fishing” for the adversary’s evidence. Should a litigant so far receive the benefit of the court’s procedure as to obtain information, he must use it, when obtained.<sup>4</sup> If his original demand for the document has been made *bona fide* he must have had some reason for supposing the information contained in it would be beneficial to his side of the case. If it should turn out when the document comes into his possession that he has been mistaken as to the value of it to him, there is no unfairness in requiring that he should abide by the result of the hazard which he has himself voluntarily taken.<sup>5</sup> Otherwise, he could pry with-

1. *Calvert v. Flower*, 7 C. & P. 386 (1836); *Wharara v. Routledge*, 5 Esp. 235 (1805).

2. *Wilson v. Bowie*, 1 C. & P. 8, 10 (1823).

3. *Com. v. Davidson*, 1 Cush. (Mass.) 33, 44 (1848).

4. “The notice to produce a paper, requires it to be produced in *evidence*, and when once called for and produced, it is of course in evidence, and I think it cannot be called for on any other terms . . . And in addition to what has been said, I think the alternative that the party giving the notice, if the paper be not produced, may go into evidence of its contents, shows not only that he must be supposed to be apprized of them, but

that he cannot have it in his power to compel a previous inspection.” *Lawrence v. Van Horne*, 1 Caines (N. Y.) 276, 285 (1803).

5. A paper produced upon notice at a trial, and received and examined by the party calling for it, may be put in evidence by the party producing it if the party who called for it declines to use it, although it was called for under a misapprehension of its contents. “The party seeking for it, [the paper required to be produced] acts on the supposition that it contains matter favorable to his side of the case. He therefore assumes the risk of making it evidence; and cannot be heard to say, after he has

out penalty. If his notice to produce has been given merely to see how matters stand as a sort of gambling venture, the demandant has fully deserved to be punished in the event of ill success. In such an event, no injury could happen to the interests of substantial justice by enforcing the application of the rule. For while the proponent of the evidence is punished for endeavoring to do what he should in the interests of justice be permitted and aided to do, viz., ascertain the truth, the ultimate effect of the rule is to prevent the proponent from *suppressing* it merely because he has, upon examination, found the truth to be different from what he expected or, perhaps, hoped to find it to be.

§ 525. ( [2] *Completeness Demanded; Documents; Obligation to Introduce into Evidence Resulting from Demand and Inspection* ); A Contradictory View.—The value of this rule of administration and the legal validity of the reasoning on which it is based have been vehemently questioned by courts of high standing. The ground of objection is partly the anomaly of refusing the party notifying for production the same option of inspecting the documents produced before deciding whether to offer them in evidence which he would have had if he had obtained possession of them in equity through the process for obtaining discovery;<sup>1</sup> partly because it is the litigant producing upon notice who is, in reality, he who is juggling with the court. He has the remedy in his own hands so far as any hardship to himself is concerned. All he need do, if he thinks it will injuriously affect him to produce the document is not to produce it, when asked to do so.<sup>2</sup> If, on the other hand, he sees fit to produce, it is because he thinks that so doing helps him; and he is enabled to insist on getting the benefit of this advantage under the rule which compels the demandant to offer it in evidence.<sup>3</sup> In England, this early practice

ascertained its contents by inspection, that he intended to call for a different paper, or, in other words, that its contents were not such as he expected. If there is no doubt as to the identity of the document, the party who produces it has the right to insist on its being read to the jury; and the court cannot, in the exercise of their discretion, deny him this privilege." *Clark v. Fletcher*, 1 Allen (Mass.) 53, 57 (1861).

1. *Lawrence v. Van Horne*, 1 Caines (N. Y.) 276, 286 (1803).

2. *Lawrence v. Van Horne*, 1 Caines (N. Y.) 276, 286 (1803).

3. *Austin v. Thomson*, 45 N. H. 113, 117 (1863); *Huckins v. Ins. Co.*, 31 N. H. 238, 240, 247 (1855). "The plaintiff was not obliged to produce his ledger, and could attach to it the condition which he did." *Huckins v. Ins. Co.*, 31 N. H. 238, 240, 247 (1855).

has been abandoned.<sup>4</sup> It has, however, been adopted and persists in a majority of American jurisdictions<sup>5</sup> while repudiated in others.<sup>6</sup> If statutory enactments and the comments of the courts applying are accepted as guides to the future, the rule is rather discredited even in the house of its friends.<sup>7</sup>

*On principle*, both parties should be required to produce their documents and put them in evidence or neither should be so compelled. The fairer rule, from an administrative point of view, would require that production, in all cases, should be compulsory. The right of counsel to inspect documents used in the cross-examination of his witnesses has, of course, no relation to the principle under consideration.<sup>8</sup>

### § 526. ([2] *Completeness Demanded*); Surplusage Rejected.—

While the court may properly require, in the interest of truth,

4. Parnell Commission's Proceedings, Times' Rep. pt. 26, p. 169 (1888).

5. *Delaware*.—Read v. Randel, 2 Har. 500 (1839).

*Georgia*.—Cushman v. Coleman, 92 Ga. 772, 19 S. E. 46 (1893).

*Maine*.—Blake v. Russ, 33 Me. 360 (1851).

*Massachusetts*.—Long v. Drew, 114 Mass. 77, 80 (1873); Clark v. Fletcher, 1 Allen 53, 57 (1861).

*Mississippi*.—Anderson v. Root, 8 Sm. & M. 362, 364 (1847).

*Pennsylvania*.—Withers v. Gillespy, 7 S. & R. 10, 14 (1821).

*Texas*.—Saunders v. Duval, 19 Tex. 467, 472 (1857).

*United States*.—U. S. v. Mitchell, 2 Wash. C. C. 478 (1811); Edison El. L. Co. v. U. S. El. L. Co., 45 Fed. 55, 59 (1891); Jordan v. Wilkins, 2 Wash. C. C. 482 (1811).

**Production on notice is not sufficient.**—Inspection must have been had by the party calling for it. Randel v. Chesap. & Del. Canal Co., 1 Har. (Del.) 233, 284 (1832); U. S. v. Mitchell, 2 Wash. C. C. 478 (1811). Inspection granted as a matter of courtesy and not in pursuance of a formal demand does not invoke the operation of the rule. Farmers' & M.

Bank v. Israel, 6 S. & R. (Pa.) 293, 296 (1820). Documents inspected on a former trial need not be produced in evidence on a second. Cushman v. Coleman, 92 Ga. 772, 19 S. E. 46 (1893). See also Wooten v. Nall, 18 Ga. 609, 614 (1855). "Merely calling for the books, although in answer to such call they are produced, will not make them evidence. It would not by the English rule as stated 1 Phill. Ev. 440, where it is said, if one party calls for books in the possession of another, but declines to use them when produced, the mere calling for them will not make them evidence; but if the party calling for them inspects them, he thereby does make them evidence, although he does not introduce them." Com. v. Davidson, 1 Cush. (Mass.) 33, 45 (1848).

6. Laufer v. Traction Co., 68 Conn. 475, 37 Atl. 379 (1897); Carradine v. Hotchkiss, 120 N. Y. 608, 611, 24 N. E. 1020 (1890); Austin v. Thomson, 45 N. H. 113, 116 (1863).

7. Withers v. Gillespy, 7 S. & R. (Pa.) 10, 14 (1821). "With the wisdom of the rule we have nothing to do." Wooten v. Nall, 18 Ga. 609, 614 (1855).

8. R. v. Ramsden, 2 C. & P. 603 (1827).



that any statement, oral or documentary, should go to the jury in a completed form, the same interests require that any excess over a reasonable completeness should not be permitted to injure the proper effect of that which is necessary. That improper matter is joined with that properly in the document, will not, in itself, require that all should be rejected.<sup>1</sup> Where, however, the inadmissible and objectionable is so joined with the admissible that it cannot be separated all may properly be rejected.<sup>2</sup>

**§ 527. Principles of Administration; (B.) Furtherance of Justice; (3) Prevent Surprise.**—It is the duty of the presiding judge to prevent surprise upon a litigant;—that his substantive rights shall not suffer by unforeseen developments in the case which could not have been anticipated and prevented by the exercise of ordinary prudence. The judge's solicitude that there be no miscarriage of justice will be proportionate to the importance of the consequences of the untoward event to the party affected by it; and also to the degree of culpability of the respective parties for the existence of the situation which is presented. It may be the duty of the court to adjourn the hearing or continue the case, or even to award a new trial,<sup>1</sup> according to circumstances. An example of surprise is furnished where material evidence becomes unavailable by reason of some subtle technicality not likely to have occurred to a party or his counsel.<sup>2</sup> So the unexpected contradiction or impeachment of a material witness may authorize a continuance.<sup>3</sup>

*Dramatic incidents of a trial*, which cannot be prevented and for which no one is responsible, cannot be, of course, made the basis of a successful application for a continuance or motion for

1. *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484 (1859); *Halliburton v. Fletcher*, 22 Ark. 453 (1861); *Adams v. Lee*, 82 Ind. 587 (1882).

2. *Pike v. Crehore*, 40 Me. 503 (1855). See also *Tibbetts v. Baker*, 32 Me. 25 (1850).

1. *Norfolk & W. Ry. Co. v. Coffey*, (Va. 1905) 51 S. E. 729.

2. *Pirrung v. Supreme Council of Catholic Mut. Ben. Ass'n*, 93 N. Y. Suppl. 575, 104 App. Div. 571 (1905).

3. Where defendant, charged with murder, defended on the ground that

deceased had made insulting remarks about defendant's wife, which had been communicated to him on the day of the killing, and the credibility of the witnesses testifying to the remarks is attacked, a continuance should be granted to defendant to procure other witnesses, to whom similar remarks had been made by deceased at different times, although they had not been communicated to defendant. *Fossett v. State*, (Tex. Crim. App. 1900) 55 S. W. 497.

a new trial, although it is easy to infer that by arousing the emotions of the jury, or otherwise, they may be highly prejudicial to one of the parties. Of this nature is the sudden giving way of over strained nerves by witnesses or parties,<sup>4</sup> the fainting in court of persons who are interested as relatives<sup>5</sup> or witnesses more intimately concerned with the litigation.

*A fortiori*, a reasonable apprehension by a party that on account of the hysterical condition of a necessary witness,<sup>6</sup> or for some other reason, his interests may be exposed to the effects of such an occurrence, furnishes no ground for a continuance.

**§ 528. ([3] *Prevent Surprise*); Action of Appellate Courts.**—Adjournment or continuance on the ground of surprise is a question of administration. When, therefore, reason has been employed, the exercise of the power will not be reviewed on appeal. Where, however, its action is unreasonable the ruling of the trial court may be reversed.<sup>1</sup>

**§ 528a. ([3] *Prevent Surprise*; Action of Appellate Courts); Amendment of Pleadings.**—Prominent among causes assigned for surprise warranting a stay of proceedings is in connection with a change in the pleadings. Where the allowance of an amendment to a pleading so alters the forensic position of the opposite party that he is not able to proceed without delay except by impairing the chances for a successful issue in his favor,<sup>1</sup> he will ordinarily

4. *Western Union Telegraph Co. v. Shaw*, (Tex. Civ. App. 1905) 90 S. W. 58.

5. *Graves v. Rivers*, (Ga. App. 1908) 60 S. E. 274 (mother).

6. *Rucker v. State*, (Ark. 1905) 90 S. W. 151 (prosecutrix in seduction).

1. *Pirrung v. Supreme Council of Catholic Mut. Ben. Ass'n*, 93 N. Y. S. 575, 104 App. Div. 571 (1905). For some further consideration of the allowance of adjournments or continuances, see *supra*, § 180. Proper administrative indulgence of a party in the matter of continuance is obviously conditioned by the operation of the canon for expediting trials. *Infra*, §§ 544 *et seq.*

1. *California*.—*Marr v. Rhodes*, 131 Cal. 267, 63 Pac. 364 (1900).

*Colorado*.—*Denver & R. G. R. Co. v. Loveland*, (App. 1901) 64 Pac. 381.

*Georgia*.—*Craddock v. Kelly*, 129 Ga. 818, 60 S. E. 193 (1908); *Sparks Imp. Co. v. Jones*, 4 Ga. App. 61, 60 S. E. 810 (1908); *Gurr v. Carter*, 2 Ga. App. 268, 58 S. E. 488 (1907).

*Iowa*.—*Flint v. Atlas Mut. Ins. Co.*, 134 Iowa 531, 112 N. W. 1 (1907).

*Kansas*.—*Vale v. Trader*, (App. 1897) 48 Pac. 458.

*Minnesota*.—*Despatch Laundry Co. v. Employers' Liability Assur. Corp.*, 105 Minn. 384, 118 N. W. 152 (1908) (raising new issues) [rehearing granted, 105 Minn. 384, 117 N. W. 506].

*Nebraska*.—*Bliss v. Beck*, 114 N. W. 162 (1907); *Dunn v. Bozarth*, 59 Neb. 244, 80 N. W. 811 (1899).

be given the benefit of a continuance on the ground of surprise.<sup>2</sup> The rule is enforced with particular strictness in criminal cases.<sup>3</sup> In either class of action the matter is one of administration.<sup>4</sup> Should the amendment be a formal one,<sup>5</sup> as the substitution of

*South Dakota*.—Kennedy v. Agricultural Ins. Co. of Sioux Falls, 110 N. W. 116 (1906).

*Texas*.—Horwitz v. La Roche, (Civ. App. 1908) 107 S. W. 1148; Witliff v. Spreen, (Civ. App. 1908) 112 S. W. 98 (alleging other conspirators).

*Washington*.—Wright v. Northern Pac. Ry. Co., 38 Wash. 64, 80 Pac. 197 (1905); Eldridge v. Young America & C. Consol. Min. Co., (Wash. 1902) 67 Pac. 703.

**2. Action of others.**—The same forensic situation is presented where the unexpected action of a co-party to a cause or of one connected in such a way with the proceedings as to affect the other, surprises the latter and puts him in a position from which time alone affords a reasonable opportunity for extricating himself. Vaught v. Murray, 24 Ky. L. Rep. 1587, 71 S. W. 924 (1903). For reverse reasons, a party who proceeds against several whose legal position is the same and who has received an answer from certain of them cannot well claim to be surprised by the filing of a similar pleading by one of the others. Slingluff v. Hall, (N. C. 1899) 32 S. E. 739.

**3. Foreman v. State**, (Miss. 1909) 48 So. 611 (embezzlement from another society). The accused may, however, be required to show that he intends in good faith a defense to the amended complaint. Williams v. State, (Tex. Cr. App. 1905) 87 S. W. 1155.

**Adding new witnesses without notice.**—The mere fact that the state has added new witnesses to the information without notice to accused does not necessarily entitle him to a continuance. State v. Myers, (Mo. 1906) 94 S. W. 242. Similarly, other formal irregularities in the list of jurors served on a criminal de-

fendant do not constitute prejudicial surprise. State v. Duperier, 115 La. 478, 39 So. 455 (1905) (names by initial; non-existent persons). The subject may be regulated by statute. State v. McClain, (Iowa 1906) 106 N. W. 376.

**4. American Ins. Co. v. Bailey & Musgrove**, 6 Ga. App. 424 (1909); Georgia, F. & A. Ry. Co. v. Sasser, (Ga. App. 1908) 61 S. E. 505; Chicago, R. I. & G. Ry. Co. v. Groner, (Tex. Civ. App. 1906) 95 S. W. 1118.

**5. Georgia.**—Morrison v. Morrison, 29 S. E. 125 (1897) (claiming interest on note).

*Illinois*.—B. Shoninger Co. v. Mann, 219 Ill. 242, 76 N. E. 354 (1905); Franklin v. Krum, 70 Ill. App. 649 (1897) (increasing *ad damnum*); Cozens v. Chicago Hydraulic Press Brick Co., 166 Ill. 213, 46 N. E. 788 (1897) [judgment affirmed, 64 Ill. App. 569 (1895)].

*Indian Territory*.—Purcell Mill & Elevator Co. v. Kirkland, 47 S. W. 311 (1898).

*Indiana*.—Mitchelltree School Tp. of Martin Co. v. Hall, (App. 1903) 68 N. E. 919; North British & Mercantile Ins. Co. v. Rudy, 26 Ind. App. 472, 60 N. E. 9 (1901).

*Kansas*.—Chandler v. Parker, 65 Kan. 860, 70 Pac. 368 (1902) (alleging higher value); Union Pac. Ry. Co. v. Motzner, (Kan. App. 1898) 55 Pac. 670.

*Kentucky*.—Sterns Coal Co. v. Evans' Adm'r, 33 Ky. L. Rep. 755, 111 S. W. 308 (1908).

*Michigan*.—Milliken v. City of St. Clair, 99 N. W. 7, 10 Detroit Leg. N. 1030 (1904).

*New Mexico*.—Ross v. Carr, 103 Pac. 307 (1909) (raising *ad damnum* to meet the evidence).

*Texas*.—El Paso & S. W. R. Co. v.

the name of one use-plaintiff for that of another,<sup>6</sup> in order to make the allegations correspond to the proof,<sup>7</sup> or the like,<sup>8</sup> nothing in the situation requires the presiding judge to award a continuance to avoid surprise. This is especially true where the party asking for it makes no showing that he could not safely proceed at the present time.<sup>9</sup> In the same way, it will be felt by a presiding judge that no continuance is required unless

Harris & Liebman, (Civ. App. 1908) 110 S. W. 145; Ft. Worth & D. C. Ry. Co. v. Partin, (Civ. App. 1903) 76 S. W. 236; Texas & N. O. R. Co. v. Bancroft, (Tex. Civ. App. 1900) 56 S. W. 606 (filling blanks). Where only the same evidence is needed to meet an amended pleading as an original one the amendment may be regarded as formal. *Shiner v. Shiner*, (Tex. Civ. App. 1897) 40 S. W. 439. If the party have been informed that the amendment would be allowed, sufficiently early to enable him to prepare for trial he can scarcely claim to be surprised by its actual allowance. *Amos v. Stockert*, (W. Va. 1899) 34 S. E. 821. See *Kessler v. Bank*, 21 Tex. Civ. App. 98 (1899). See also *Jordan v. Schuerman*, (Ariz. 1898) 53 Pac. 579.

6. *Bracken v. Pennsylvania R. Co.*, 222 Pa. St. 410, 71 Atl. 926 (1909).

7. *Georgia*.—*Fraser v. State*, 112 Ga. 13, 37 S. E. 114 (1900).

*Illinois*.—*Wabash R. Co. v. Campbell*, 219 Ill. 312, 76 N. E. 346 (1905) [judgment affirmed, 117 Ill. App. 630].

*Iowa*.—*Tyler v. Bowen*, 100 N. W. 505 (1904).

*Michigan*.—*Crane Lumber Co. v. Bellows*, 74 N. W. 481 (1898).

*Montana*.—*Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 27 Mont. 288, 70 Pac. 1114 (1902) [decree modified on rehearing 71 Pac. 1005 (1903)].

*New York*.—*Rosenberg v. Third Ave. R. Co.*, 61 N. Y. Suppl. 1052, 47 App. Div. 323 (1900) [citing *Thompson v. Hicks*, 37 N. Y. Suppl. 340, 1 App. Div. 275 (1896); *Davis v. Railroad Co.*, 110 N. Y. 646, 17 N. E. 733

(1888); *distinguishing Patterson v. Railroad Co.*, 49 N. Y. Suppl. 796, 26 App. Div. 336 (1898); *Anderson v. Railway Co.*, 55 N. Y. Suppl. 290, 36 App. Div. 309 (1899); *Hoffman v. Railroad Co.*, 61 N. Y. Suppl. 590 (1899)].

An immaterial variance between the evidence and the allegations will not constitute a surprise which will be the proper basis of a continuance. *Nieberg v. Greenberg*, 91 N. Y. Suppl. 83 (1904).

8. *Merrieles v. Wabash R. Co.*, 163 Mo. 470, 63 S. W. 718 (1901) (specifications of negligence); *Houston & T. C. R. Co. v. Cluck*, (Tex. Civ. App. 1904) 84 S. W. 852 (amplified original grounds); *Lampe v. Jacobsen* (Wash. 1907) 90 Pac. 654.

9. *Georgia*.—*Atlanta Land & Loan Co. v. Haile*, 106 Ga. 498, 32 S. E. 606 (1899).

*Indiana*.—*Brandt v. State*, (App. 1897) 46 N. E. 682.

*Iowa*.—*Foote v. Burlington Gas-light Co.*, 103 Iowa 576, 72 N. W. 755 (1897).

*Michigan*.—*Crane Lumber Co. v. Bellows*, 74 N. W. 481 (1898).

*Texas*.—*Missouri, K. & T. Ry. Co. of Texas v. Brantley*, (Civ. App. 1901) 62 S. W. 94.

*Washington*.—*Lampe v. Jacobsen*, 90 Pac. 654 (1907).

*West Virginia*.—*Bank of Ravenswood v. Hamilton*, 27 S. E. 296 (1897). The party claiming to be surprised by an amendment may properly be required to show that he has at least a plausible defence to the pleading as amended. *Cirwithin v. Mills*, 2 Marv. 232, 43 Atl. 151 (1896).

there is a reasonable prospect that the party asking for it can procure additional evidence, or that an investigation into the facts is needed or would probably prove beneficial.<sup>10</sup>

*The party entitled to a continuance* on the ground of surprise caused by the allowance of an amendment is, as a rule, the opposite party. In the absence of exceptional circumstances, the party moving the amendment will not be entitled to a continuance upon that ground.<sup>11</sup>

**§ 528b. ([3] *Prevent Surprise; Action of Appellate Courts*); Decisions on Dilatory Pleas.**—In case of decisions by the court upon dilatory pleas<sup>1</sup> or other formal matters,<sup>2</sup> the nature of which might reasonably have been anticipated, some proof of threatened prejudice other than the party's allegation or statement that he is surprised at the result, will be required to warrant a continuance. On the other hand, it may be equally clear that where the result of the court's action is to place a party in a situation different from what he could fairly have foreseen, the continuance is not only reasonable,<sup>3</sup> but may even be necessary to the ends of justice. A ruling other than a party has expected or even than the court has intimated, will not, however, necessarily constitute unfair treatment, where a reasonable opportunity for protecting his interests is afforded the party against whom the court finally decides.<sup>4</sup>

**§ 528c. ([3] *Prevent Surprise; Action of Appellate Courts*); Testimony.**—Where the testimony given at a trial is such that it could not reasonably have been anticipated by the party against whom it is offered, he will, if it is material to the decision of the case,<sup>1</sup> be entitled to an opportunity of meeting it, by adjourn-

10. *International & G. N. R. Co. v. Howell*, (Tex. 1908) 111 S. W. 142 [judgment affirmed, (Tex. Civ. App. 1907) 105 S. W. 560].

11. *McDonald v. Holbrook, Cabot & Daly Contracting Co.*, 93 N. Y. Suppl. 920, 105 App. Div. 90 (1905).

1. *St. Louis, I. M. & S. Ry. Co. v. Smith*, (Ark. 1907) 100 S. W. 884 (plea in abatement).

2. *Vulcan Ironworks v. Burrell Const. Co.*, (Wash. 1905) 81 Pac. 836 (motions for non-suit).

3. *Crotty v. City of Danbury*, 79 Conn. 379, 65 Atl. 147 (1906).

4. *Sparks v. Green*, 69 S. C. 198, 48 S. E. 61 (1904); *Fidelity & Deposit Co. of Maryland v. L. Bueki & Son Lumber Co.*, 189 U. S. 135, 23 S. Ct. 582, 47 L. ed. 744 (1903).

1. *Dempsey v. Taylor*, 4 Tex. Civ. App. 126, 23 S. W. 220 (1893). Counsel cannot fairly claim to be surprised because the opposing party has failed to afford a favorable opportunity for contradiction as was anticipated.

ment,<sup>2</sup> or continuance,<sup>3</sup> if this be the only adequate means of facing the situation.<sup>4</sup> Such an order may be of especial importance in a criminal case.<sup>5</sup>

**§ 528d. ([3] *Prevent Surprise; Action of Appellate Courts*); *Testimony*); Failure in own Evidence.**—A party may reasonably be surprised by the unexpected failure in his own evidence,<sup>1</sup> documentary<sup>2</sup> or oral,<sup>3</sup> as well as by an unlooked for assault from his opponent. Thus where a party has reasonably relied upon secondary evidence and the reception of this is objected to, with-

*Branch v. Du Bose*, 55 Ga. 21 (1875); *Woodcock v. Sutton*, 8 Ky. L. Rep. 616 (1887). See also *Missouri Pac. Ry. Co. v. Kuthman*, 2 Willson (Tex.) Civ. Cas. Ct. App., § 463 (1884).

2. *Heyman v. Singer*, 99 N. Y. Suppl. 942, 51 Misc. 18 (1906).

**Absence of judge from courtroom.**—The fact that the presiding justice left the courtroom during a trial, while the jury was out, does not adjourn the court. *Chichester v. Winton Motor Carriage Co.*, 96 N. Y. Suppl. 1006, 110 App. Div. 78 (1905). Where, however, the jury are present in court during the temporary absence of the judge a somewhat different question is presented. If objection to the judge's absence from the courtroom during the argument of a case to the jury is seasonably made and properly presented such conduct should be regarded as unreasonable, except where, in a civil case or misdemeanor, it plainly appears to the reviewing court that the cause of the objecting party was not prejudiced by what occurred during the judge's absence. *Wells v. O'Hare*, 209 Ill. 627, 70 N. E. 1056 (1904) [judgment reversed, 110 Ill. App. 7 (1903)]. See also *Smith v. Sherwood*, (Wis. 1897) 70 N. W. 682. A litigant is not prejudiced by the action of the judge in sitting at a table among the members of the bar in presence of the jury. *Seawell v. Carolina Cent. R. Co.*, 132 N. C. 856, 44 S. E. 610 (1903) [rehearing denied, 45 S. E. 850].

3. *Louisville & N. R. Co. v. Bell*, (Ky. 1909) 119 S. W. 782; *Johnson v. Com.* 32 Ky. L. Rep. 1117, 107 S. W. 768 (1908).

4. *Louisiana*.—*Davis v. Millaudon*, 14 La. Ann. 808 (1859).

*Mississippi*.—*Garrett v. Carlton*, 65 Miss. 188, 3 So. 376 (1887).

*New York*.—*Freeland v. Brooklyn Heights R. Co.*, 66 N. Y. Suppl. 321, 54 App. Div. 90 (1900).

*Texas*.—*Collins v. Boyd*, (Civ. App. 1900) 59 S. W. 831.

*Washington*.—*Straw-Ellsworth Mfg. Co. v. Cain*, 55 Pac. 321 (1898).

*United States*.—*Le Roy v. Delaware Ins. Co.*, Fed. Cas. No. 8,270 [2 Wash. C. C. 223] (1808). Necessity for the adjournment must, however, be affirmatively shown. *Alabama Steel & Wire Co. v. Wrenn*, 136 Ala. 475, 34 So. 970 (1903).

5. *Lindle v. Com.*, 23 Ky. L. Rep. 1307, 64 S. W. 986 (1901); *Lowry v. Com.*, 23 Ky. L. Rep. 1240, 63 S. W. 977 (1901).

1. *Threadgill v. Bickerstaff*, 7 Tex. Civ. App. 406, 26 S. W. 739 (1894); *Texas & P. Ry. Co. v. Boggs*, (Tex. Civ. App. 1895) 30 S. W. 1089 (failure of counsel to comply with stipulation).

2. *Infra*, § 528h.

3. *Shipp v. Suggett*, 48 Ky. (9 B. Monr.) 5 (1848) (drunken witness). *Infra*, § 528g.

out sufficient notice, he may be given a short adjournment in which to procure the primary grade of proof.<sup>4</sup> In the same way, if an important witness should abandon the trial without leave from a party an adjournment until a bench warrant can be served upon him may reasonably be demanded from the court.<sup>5</sup> In the same way, where a witness produced by one of the parties unexpectedly shows hostility to him and testifies to the contrary effect of that which was to have been anticipated from him, a continuance may be granted.<sup>6</sup> When material testimony is suppressed by the court, without which the party in whose favor it was taken cannot safely proceed to trial, the court, upon the application of such party, and upon such terms as may be just, may reasonably grant a continuance.<sup>7</sup>

**§ 528e. ([3] *Prevent Surprise; Action of Appellate Courts*); *Testimony*); Due Diligence Must be Shown.**—In general, a court is not reasonably to be required to suspend the trial of a cause to enable a party to procure additional evidence,<sup>1</sup> if he could have obtained it for himself in sufficient season by due diligence;<sup>2</sup> and the same rule may properly be applied even in a criminal case.<sup>3</sup>

*A fortiori*, there is no surprise where the testimony actually given has been clearly foreshadowed by the nature of the issue<sup>4</sup>

4. *Reiss v. Pfeiffer*, 103 N. Y. Suppl. 478, 117 App. Div. 880 (1907) (records). And see *Borland v. Chicago, M. & St. P. Ry. Co.*, 78 Iowa 94, 42 N. W. 590 (1889) (deposition); *Moore v. Smith*, 88 Ky. 151, 10 S. W. 380 (1889) (deposition).

5. *Blasland-Parcels-Jordan Shoe Co. v. Hicks*, 70 Mo. App. 301 (1897).

6. *Maynard v. Cleveland*, 76 Ga. 52 (1885).

7. *Spielman v. Flynn*, 19 Neb. 342, 27 N. W. 224 (1886).

1. *Zipperer v. City of Savannah*, 128 Ga. 135, 57 S. E. 311 (1907); *Block v. Sherry*, 87 N. Y. Suppl. 160, 43 Misc. 342 (1904); *Silver v. Elias*, 68 N. Y. Suppl. 851 (1901); *Turner v. State*, (Tex. Cr. App. 1905) 89 S. W. 975 (motion for change of venue).

2. *Pinson v. Bass*, 114 Ga. 575, 40 S. E. 747 (1902); *Sheedy v. City of*

*Chicago*, 221 Ill. 111, 77 N. E. 539 (1906) (measuring a sewer); *St. Louis, W. & W. R. Co. v. Ransom*, 29 Kan. 298 (1883). One having full means for acquiring knowledge as to what testimony will be used against him, who goes to trial without taking measures to ascertain what it is to be, is not entitled to a continuance on the ground of surprise, in the absence of any misleading act or declaration of the adverse party. *Burrow v. Brown*, 59 Tex. 457 (1883).

3. *Eatman v. State*, (Ala. 1904) 36 So. 16.

4. *Ellis v. U. S.*, (Ind. Terr. 1906) 97 S. W. 1013; *El Paso Southwestern R. Co. v. Barrett*, (Tex. Civ. App. 1907) 101 S. W. 1025 (deposition); *Texas & P. Ry. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. 994 (1893) (deposition).

or the previous evidence in the case.<sup>5</sup> The same rule may reasonably be applied to evidence of any facts which a litigant would naturally be called upon to meet.<sup>6</sup>

**§ 528f. ([3] *Prevent Surprise; Action of Appellate Courts; Testimony*); Change of Testimony.**—On the other hand, a change of testimony from that given at a former trial<sup>1</sup> or from what was, for some other reason, fairly to be expected at a later stage,<sup>2</sup> may well furnish sufficient ground for a motion for a continuance on account of surprise.<sup>3</sup> Much, in any case, may properly depend upon the substantial merits and relative skill of the parties. Should it appear, for example, that the party claiming a surprise has been actually the victim of oppression<sup>4</sup> and was at the trial put at a disadvantage by reason of his own stupidity<sup>5</sup> or the unskillfulness of his counsel, a continuance will be the more readily ordered in an appellate court.

**§ 528g. ([3] *Prevent Surprise; Action of Appellate Courts; Testimony*); Absence of Witnesses.**—Where the testimony of a witness becomes material by reason of unforeseen evidence which a party, without fault of his own, is unexpectedly called upon to meet,<sup>1</sup> a continuance may properly be granted upon the principles

5. *Hopkins v. State*, (Tex. Cr. App. 1901) 64 S. W. 933; *Gulf, C. & S. F. Ry. Co. v. Brown*, (Tex. Civ. App. 1897) 40 S. W. 608; *Bailey v. State*, (Tex. Cr. App. 1897) 40 S. W. 281; *Merrill v. O'Bryan*, (Wash. 1908) 93 Pac. 917 (affidavit).

6. **Impeaching evidence not ground of surprise.**—The fact that the defendant is taken by surprise, by evidence impeaching his credibility, is no ground for a continuance or a new trial. Every man is supposed to be able to support his general character for truth and veracity in the community in which he lives, especially when he has lived in that community for several years. *Lynes v. Reed*, 40 Ga. 237 (1869).

1. *McDonald v. Holbrook, Cabot & Daly Contracting Co.*, 93 N. Y. Suppl. 920, 105 App. Div. 90 (1905).

2. A continuance on this ground may be refused where many witnesses are prepared to testify on the point. *Blair v. State*, (Neb. 1904) 101 N.

W. 17. Should the *prima facie* scope and object of the claim be unexpectedly amplified in the evidence a continuance may be granted if the other side is *bona fide* surprised. *Kessler v. First Nat. Bank*, (Tex. Civ. App. 1899) 51 S. W. 62.

3. *Day v. Com.*, (Ky. 1909) 120 S. W. 296; *Sheldon v. Bahner*, 4 Pa. Co. Ct. R. 16 (1887) (unexpected construction of rule of court). The change of evidence should, to have the effect of constituting a surprise warranting a continuance be upon a material and controverted point. *Dupree v. State*, 56 Tex. Cr. R. 206, 119 S. W. 685 (1909).

4. *Whitaker v. Whitaker*, (Ky. 1897) 43 S. W. 464.

5. *Whitaker v. Whitaker*, (Ky. 1897) 43 S. W. 464.

1. *Schwarzschild & Sulzberger Co. v. New York City Ry. Co.*, 90 N. Y. Suppl. 374 (1904) (gone home at 6 p. m.).



above stated. The rule is otherwise where a litigant has reason to know that the testimony of the absent witness would be needed at the trial and has neglected to secure it. It may fairly be said that in the absence of a showing of diligence in procuring the attendance of a witness as to his probable whereabouts, and as to what efforts, if any, have been made to procure his attendance after the necessity for having his testimony became obvious, the court does not abuse its discretion in refusing a postponement, even for a short period of time.<sup>2</sup> Should it appear, in any case, that the party is directly responsible for the absence of which he complains, as where he has neglected to subpoena the witness,<sup>3</sup> or has voluntarily excused him,<sup>4</sup> any claim to a continuance may fairly be regarded as having been waived.

**§ 528h. ( [3] *Prevent Surprise; Action of Appellate Courts* ); Production of Documents.**—The rule is the same with regard to the production of papers. The court has full power to protect a party from surprise due to the introduction of documents by the opposite party under circumstances not reasonably to have been anticipated by him.<sup>1</sup> If necessary for doing justice, the judge may continue the case.<sup>2</sup> A motion for a continuance should be promptly made. On the other hand, the fair diligence of counsel may properly be stimulated by a rule that where a party might reasonably have anticipated that a certain paper would be needed in connection with a trial, counsel will not be awarded an adjournment in which to procure it.<sup>3</sup> Nor will the party against whom papers are offered which he might reasonably have foreseen, from the nature of the action, or other cause, would probably be tendered in evidence, be regarded as surprised upon their actual

2. *Midland Valley R. Co. v. Hamilton*, 84 Ark. 81, 104 S. W. 540 (1907) (three hours).

3. *Kozlowski v. City of Chicago*, 113 Ill. App. 513 (1904); *Missouri, K. & T. Ry. Co. of Texas v. Price*, (Tex. Civ. App. 1908) 106 S. W. 700.

4. *Missouri, K. & T. Ry. Co. of Texas v. Price*, (Tex. Civ. App. 1908) 106 S. W. 700.

1. *Leverett v. Tift*, 6 Ga. App. 90, 64 S. E. 317 (1909); *Dare v. McNutt*, 1 Ind. (1 Cart.) 148 (1848); *Bronaugh v. Bowles*, 3 La. 120 (1831)

(interrogatories); *Strass v. Marine Ins. Co.*, Fed. Cas. No. 13,518 [1 Cranch. C. C. 343] (1806) (deposition).

2. *Leverett v. Tift*, 6 Ga. App. 90, 64 S. E. 317 (1909). A motion for a continuance should be promptly made. *McLear v. Hapgood*, 85 Cal. 557, 24 Pac. 788 (1890).

3. *Wilcox v. Mims*, 95 Ga. 564, 20 S. E. 382 (1894) (interrogatories); *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209 (1905).

production.<sup>4</sup> In any event, the right of a court to continue a case that a party to it may procure additional documentary evidence,<sup>5</sup> or in order that he may lay a foundation for the receipt of secondary proof of unavailable papers,<sup>6</sup> is beyond question. Nor is the rejection of immaterial documents a suitable ground for claiming surprise.<sup>7</sup>

**§ 528i. ([3] *Prevent Surprise; Action of Appellate Courts*); Time and Place of Hearing.**—Where a party, without his fault, is surprised as to the time or place of holding court, the trial judge will be justified in granting a continuance.<sup>1</sup> A rearrangement of cases on the court's docket may have this effect.<sup>2</sup>

**§ 528j. ([3] *Prevent Surprise; Action of Appellate Courts*); Surprise Must be Prejudicial.**—The surprise against which the presiding judge is bound, so far as consistent with his other administrative duties, to protect a litigant is one which clearly impairs the latter's chances of success, i. e., is prejudicial to him.<sup>1</sup>

4. *Robinson v. Francis*, 8 Miss. (7 How.) 458 (1843); *E. Frank Coe Co. v. Eichenberg*, 22 Pa. Super. Ct. 287 (1903); *Morrison v. State*, (Tex. Cr. App. 1899) 51 S. W. 358 (letters). A motion for continuance will be less readily allowed if seasonable notice have been given that objection would be made to the admission of the evidence which was subsequently excluded. *Allen v. Hoxey*, 37 Tex. 320 (1872).

5. *Doe v. Doe*, 37 N. H. 268 (1858); *Griffin v. McKinney*, (Tex. Civ. App. 1901) 62 S. W. 78 (copies of foreign law); *Grigsby v. May*, 57 Tex. 255 (1882); *Waskern v. Diamond*, Fed. Cas. No. 17,248 (1855) (depositions).

6. *State v. Cooper*, (Tenn. Ch. App. 1899) 53 S. W. 391. See *E. F. Kirwan Mfg. Co. v. Truxton*, 1 Pennewill 409 (1898); *Slingluff v. Hall*, 124 N. C. 397 (1899); *Straw-Ellsworth Mfg. Co. v. Cain*, 20 Wash. 351 (1898).

7. *Lyons & E. P. Toll Road Co. v. People*, 29 Colo. 434, 68 Pac. 275 (1902).

1. *Ross v. Austill*, 2 Cal. 183 (1852).

2. *Elliott v. Cadwallader*, 14 Iowa 67 (1862).

1. The exclusion of inadmissible evidence furnishes no ground for surprise. *McCutchin v. Bankston*, 2 Ga. 244 (1847); *Simpson v. Johnson*, (Tex. Civ. App. 1898) 44 S. W. 1076. The fact that the same evidence was admitted without objection at a former trial does not constitute the subsequent exclusion a surprise. *Turner v. Tubersing*, 67 Ga. 161 (1881). Nor does the fact that the opposing witnesses testify differently than they have told the objecting party they would, constitute such a threatened prejudice as will be deemed a surprise. *Brock v. Com.*, 33 Ky. L. Rep. 630, 110 S. W. 878 (1908). See also *Texas Cent. Ry. Co. v. Brock*, (Tex. Civ. App. 1895) 30 S. W. 274.

**Improper conduct on the part of the judge** which takes place after verdict rendered can scarcely be deemed prejudicial. *Central of Georgia Ry. Co. v. Perkerson*, 115 Ga. 547, 41 S. E. 1018 (1902); *Perkerson v. Central of Georgia Ry. Co.*, 115 Ga. 547, 41 S. E. 1018 (1902).

Some right of the party claiming to be aggrieved must have been violated. Thus, for example, if a litigant is merely deprived by correction of an erroneous ruling of the right to favorable action by an appellate tribunal, upon the original ruling, he is in no way prejudiced. Thus, the withdrawal, before argument, of incompetent evidence previously admitted<sup>2</sup> is not, in itself, a surprise of which a party is entitled to complain. So a defendant cannot claim a surprise when the plaintiff merely discontinues as to a portion of his demand.<sup>3</sup> In like manner, should the evidence for which the court is asked to continue the case be practically cumulative<sup>4</sup> or relevant only upon an immaterial issue<sup>5</sup> no error has been committed for which reversal should be had.

**§ 529. ([3] *Prevent Surprise*); Protection against Unfair Treatment.**—A broad canon of administration, so inclusive that but occasional instances can, here and there, be given of its application, is that the court will, in furtherance of justice, protect each party from unfair treatment. This may be threatened either from the opposite party or from the judge himself. In whichever guise the danger may present itself, the administrative duty of the court to remove it is clear. The parties have *procedural* rights, granted under rules of law, which bind the action of the court. The observance of the present canon of administration constitutes, in a similar way, a necessary conditioning limitation upon judicial discretion<sup>1</sup> as this term is understood in the modern English law of evidence. Any act, or omission, on the part of judge or opposing counsel which tends unreasonably to place one of the parties at a disadvantage compared to his opponent regarding the issue of the litigation other than that due to his own conduct or the substantial merits of his cause, constitutes unfair treatment.

**§ 529a. ([3] *Prevent Surprise; Protection Against Unfair Treatment*); Unfair Comment.**—The rules of procedure, frequently constitutional or statutory, which, in a majority of American states, forbid a presiding judge to comment upon the evidence

2. *Mitchell v. Edeburn*, 37 Pa. Super. Ct. 223 (1908).

3. *Crandall v. Lynch*, 20 App. D. C. 73 (1902); *Smith v. Sullivan*, 20 App. D. C. 553 (1902).

4. *Norfolk & W. Ry. Co. v. Spears*, (Va. 1909) 65 S. E. 482.

5. *Lindsley v. Parks*, (Tex. Civ. App. 1897) 43 S. W. 277.

1. *Supra*, § 177.

given in a cause, have been elsewhere stated.<sup>1</sup> As a matter of *administration*, however, as an effort to promote the abounding of justice in the results of litigation, a trial judge will carefully seek to avoid any comment, whether or not strictly forbidden by law, which may in the least work injustice to the cause of a litigant. The weight which the jury attach to the utterances of the judge, their anxiety to seek a clue from him which may, in a case of bewildering uncertainty, relieve them from their own duty will make him extremely cautious that his prejudice shall not supplant the orderly administration of law. The trial judge will, therefore, at all times, carefully refrain from interpolating remarks which indicate to the jury the opinion which he has formed on a material point in dispute,<sup>2</sup> or as to what facts are<sup>3</sup> or are not<sup>4</sup> proved.<sup>5</sup> He may even refrain from stating as to what facts there is evidence.<sup>6</sup> The judge will not, for example, permit himself to say to a defendant, regarding a telegram which the latter claims was not delivered, "You are responsible for it."<sup>7</sup> It

1. *Supra*, § 281.

2. *Georgia Ry. & Electric Co. v. Baker*, 1 Ga. App. 832, 58 S. E. 88 (1907); *Thomson v. Kelley*, (Tex. Civ. App. 1906) 97 S. W. 326.

3. *Picken v. City of Atlanta*, 114 Ga. 970, 41 S. E. 58 (1902); *In re Knox's Will*, (Iowa 1904) 98 N. W. 468; *Paxton v. Knox*, (Iowa 1904) 98 N. W. 468; *Selley v. American Lubricator Co.*, (Iowa 1903) 93 N. W. 590; *Texas & Louisiana Lumber Co. v. Rose*, (Tex. Civ. App. 1907) 103 S. W. 444; *Hynes v. Winston*, (Tex. Civ. App. 1897) 40 S. W. 1025.

4. *Atlantic Coast Line R. Co. v. Powell*, 127 Ga. 805, 9 L. R. A. (N. S.) 769, 56 S. E. 1006 (1907); *Coldren v. Le Gore*, (Iowa 1902) 91 N. W. 1066.

5. The demeanor of a judge may be as unfair to a party as his verbal expressions. *City of Newkirk v. Dimmers*, 17 Okl. 525, 87 Pac. 603 (1906).

6. *Patten v. Town of Auburn*, (Wash. 1906) 84 Pac. 594. He will be especially careful not to do this when the evidence is but partially in and he is liable to announce merely

a prejudgment injurious to one of the parties. *Chicago City Ry. Co. v. Wall*, 93 Ill. App. 411 (1901); *McBane v. Angle*, (Tex. Civ. App. 1902) 69 S. W. 433 (attempt at bribery).

7. *Western Union Telegraph Co. v. Northcutt*, (Ala. 1909) 48 So. 553.

**Comment on facts.**—Such a practice may, at times, be obviously necessary to compliance on the part of a judge with the procedural rules which direct him to refrain from comment upon the facts. *Howeth v. Carter*, (Tex. Civ. App. 1900) 56 S. W. 539. *Citing Smith v. Dunman*, (Tex. Civ. App. 1895) 29 S. W. 432; *Hynes v. Winston*, (Tex. Civ. App. 1897) 40 S. W. 1025; *Sargent v. Lawrence*, (Tex. Civ. App. 1897) 40 S. W. 1075; *McMinn v. Whelan*, 27 Cal. 300 (1865). In the federal courts no error is committed by a trial judge in commenting upon the facts where no material rule of law is incorrectly stated by him. *Union Pac. R. Co. v. Thomas*, 152 Fed. 365, 81 C. C. A. 491 (1907). A corresponding freedom of collateral observation is, as a consequence, permitted to such a judge. It has even been ruled that

has been rather sophistically held that a statement calculated to indicate the judge's opinion as to the weight of the evidence is not prejudicial to a party if the observation is not addressed

provisions prohibiting the court from commenting on the evidence refer only to instructions given after the case has been closed and the arguments of counsel concluded, and do not apply to remarks made by the judge during the examination of witnesses. *Partelow v. Newton & B. St. Ry. Co.*, (Mass. 1907) 81 N. E. 894. On the contrary, comments by the judge as to the credibility of various witnesses may well be prejudicial. *Florida Cent. & P. R. Co. v. Lucas*, 110 Ga. 121, 35 S. E. 283 (1900); *Swenson v. Erickson*, 90 Ill. App. 358 (1900). See also *Roberson v. State*, 40 Fla. 509, 24 So. 474 (1898); *State v. Hughes*, 33 Kan. 23, 5 Pac. 381 (1885); *Williams v. West Bay City*, 119 Mich. 395, 78 N. W. 328 (1899). Whether an instruction to the jury to disregard an objectionable comment of the court will cure the evil effect of what has been done, will vary with the circumstances of each case. Mere flippancy and impropriety may have trivial consequences which may be obviated in this way. *St. Louis & S. W. Ry. Co. v. Elgin Condensed Milk Co.*, 175 Ill. 557, 51 N. E. 911 (1898) [judgment affirmed, 74 Ill. App. 619 (1898)]; *Reilly v. Eastman's Co. of New York*, 57 N. Y. Suppl. 825, 27 Misc. 322 (1899). A clear glimpse into the mind of the court, revealing to the jury the deliberate judgment of an experienced trier of causes, assumed to be indifferent between the parties, may leave effects which cannot be obliterated in this way. *Swan v. Keough*, 54 N. Y. Suppl. 474, 35 App. Div. 80 (1898); *Davison v. Herring*, 48 N. Y. Suppl. 760, 24 App. Div. 402 (1897).

Mere ejaculations by the judge, made on his own motion, and not in response to a request for rulings, are theoretically improper even if

sound in point of law. *Houston & T. C. R. Co. v. Shapard*, (Tex. Civ. App. 1909) 118 S. W. 596. The practice, however, is inveterate, and, in the absence of actual prejudice, may be regarded as an unavoidable if not justifiable incident of a trial at law.

*Illinois*.—*Hill v. Montgomery*, 184 Ill. 220, 56 N. E. 320 (1900) [judgment affirmed, 84 Ill. App. 300 (1899)].

*Iowa*.—*Gross v. Feehan*, 81 N. W. 235 (1899).

*Kentucky*.—*American Fire Ins. Co. v. Bland*, 40 S. W. 670 (1897)

*Missouri*.—*Crossan v. Crossan*, 169 Mo. 631, 70 S. W. 136 (1902); *Bottom v. Croal*, 89 Mo. App. 613 (1901).

*New York*.—*Devlin v. New York City Ry. Co.*, 102 N. Y. Suppl. 430, 116 App. Div. 894 (1907); *Continental Nat. Bank v. Tradesmen's Nat. Bank*, 173 N. Y. 272, 65 N. E. 1108 (1903); *Baker v. Riedel*, 52 N. Y. Suppl. 832, 24 Misc. 119 (1898).

*Pennsylvania*.—*McFeaters v. Pat-tison*, 188 Pa. St. 270, 41 Atl. 609 (1898).

*South Carolina*.—*Egan v. Bissell*, 32 S. E. 1 (1898).

*Wisconsin*.—*Doan v. Town of Wil-low Springs*, 76 N. W. 1104 (1898). No objection exists to questions by the judge calculated merely to make evidence more clear and specific. *Miller v. Dumon*, 24 Wash. 648, 64 Pac. 804 (1901). *Infra*, § 537. It is to be remembered moreover that it is not necessary that the court should give its ruling in a formal rather than in a colloquial manner.

*Arkansas*.—*Southwestern Tele-graph & Telephone Co. v. Myane*, 86 Ark. 548, 111 S. W. 987 (1908).

*Connecticut*.—*Fuller v. Johnson*, 80 Conn. 493, 68 Atl. 977 (1908).

*Georgia*.—*Boswell v. Gillen*, 131 Ga. 310, 62 S. E. 187 (1908).

to the jury,<sup>8</sup> though made in their hearing.<sup>9</sup> However this may be, it has been decided that the error, if any, may be cured by appropriate instructions as to the absolute right of the jury to judge as to the existence of the facts themselves.<sup>10</sup>

**§ 529b. ([3] Prevent Surprise; Protection Against Unfair Treatment; Unfair Comment); Incidental Comment Permitted.—**

A certain incidental comment by the court is not unreasonable, especially where the jury are distinctly instructed that questions of fact in issue are to be decided by them. It is not, for example, unreasonable for the judge in discussing with counsel the admissibility of evidence,<sup>1</sup> the propriety of a nonsuit,<sup>2</sup> the direction of

*Missouri*.—*Barney v. Spangler*, 131 Mo. App. 58, 109 S. W. 855 (1908).

*South Dakota*.—*Palmer v. Schurz*, 117 N. W. 150 (1908).

*Texas*.—*Kaaek v. Stanton*, (Civ. App. 1908) 112 S. W. 702; *Alexander v. McGaffey*, (Civ. App. 1905) 88 S. W. 462.

**Jocularity.**—A jocular remark by a presiding judge is not, as a rule, prejudicial, if correctly understood. *City of Americus v. Tower*, 3 Ga. App. 159, 59 S. E. 434 (1907); *City of Columbus v. Ogletree*, (Ga. 1897) 29 S. E. 749; *City of Frankfort v. Coleman*, (Ind. App. 1898) 49 N. E. 474 (speaking of certain witnesses as "saloon keepers and gentlemen of elegant leisure"); *Texas Midland R. R. v. Byrd*, (Tex. Civ. App. 1908) 110 S. W. 199. Accordingly, such an observation when it cannot reasonably lead to a wrong inference will not constitute error. *Halley v. Tichenor*, (Iowa 1903) 94 N. W. 472; *Lee v. Dow*, (N. H. 1904) 59 Atl. 374; *Webb v. Atlantic Coast Line R. Co.*, 76 S. C. 193, 56 S. E. 954, 9 L. R. A. (N. S.) 1218 (1907). *Per contra*, where a humorous suggestion from the court reflects injuriously upon a party or his counsel, the administrative action may be unreasonable and reversal follow. *Chicago City Ry. Co. v. Enroth*, 113 Ill. App. 285 (1904); *Perkins v. Knisely*, 204 Ill. 275, 68 N. E. 486 (1903) [judg-

ment reversed, 102 Ill. App. 562 (1902)]; *Chicago City Ry. Co. v. Cooney*, 196 Ill. 466, 63 N. E. 1029 (1902) [judgment affirmed, 95 Ill. App. 471 (1901)].

8. *McFeat v. Philadelphia, W. & B. R. Co.*, (Del. 1908) 69 Atl. 744.

9. Where the jury do not hear the objectionable remark, no prejudice has been suffered. *Gracz v. Anderson*, 104 Minn. 476, 116 N. W. 1116 (1908); *Coulter v. Barker's Estate*, (Minn. 1906) 107 N. W. 823.

10. *McFeat v. Philadelphia, W. & B. R. Co.*, (Del. 1908) 69 Atl. 744.

1. *California*.—*Bradbury v. McHenry*, 57 Pac. 999 (1899).

*Georgia*.—*Hampton v. City of Macon*, 113 Ga. 93, 38 S. E. 387 (1901) (view).

*Illinois*.—*St. Louis & S. W. Ry. Co. v. Elgin Condensed Milk Co.*, 175 Ill. 557, 51 N. E. 911 (1898) [judgment affirmed, 74 Ill. App. 619 (1898)].

*Iowa*.—*Herrstrom v. Newton & N. W. R. Co.*, 105 N. W. 436 (1905); *Wissler v. City of Atlantic*, 94 N. W. 131 (1904).

*Missouri*.—*Fullerton v. Fordyce*, 44 S. W. 1053 (1897).

*New York*.—*Lederman v. Rahaim*, 102 N. Y. Suppl. 526 (1907).

*South Carolina*.—*Heiden v. Atlantic Coast Line R. Co.*, 84 S. C. 117, 65 S. E. 987 (1909); *Miles v.*

a verdict, or other similar questions,<sup>3</sup> to refer to the evidence.<sup>4</sup>

Postal Tel. Cable Co., (S. C. 1899) 33 S. E. 493.

*Tennessee*.—Continental Nat. Bank v. First Nat. Bank, 1 Tenn. Ch. App. 449 (1902).

*Texas*.—The Oriental v. Barclay, (Civ. App. 1897) 41 S. W. 117.

*West Virginia*.—State v. Prater, 43 S. E. 230 (1903).

*Wisconsin*.—Lightfoot v. Winnebago Traction Co., 102 N. W. 30 (1905). Where a judge directs a verdict, his reasons for so doing are immaterial. Central Guarantee Trust & Safe Deposit Co. v. White, 206 Pa. 611, 56 Atl. 76 (1903). It is proper for a judge, when objections to testimony are being persistently made, to inform counsel what he considers is or is not proper testimony on an issue. D. H. Fleming & Son. v. Pullen, (Tex. Civ. App. 1906) 97 S. W. 109. Such a ruling tends materially to expedite a trial. *Infra*, § 544.

The obvious limitation is to be observed that the judge cannot usurp, in this way, the functions of the jury. Kleinert v. Federal Brewing Co., 95 N. Y. Suppl. 406, 107 App. Div. 485 (1905); Bath v. Houston & T. C. Ry. Co., (Tex. Civ. App. 1904) 78 S. W. 993; Davis v. Dregne, (Wis. 1903) 97 N. W. 512. Nor can he properly use the opportunity for attacking a counsel's good faith to the court. Kleinert v. Federal Brewing Co., 95 N. Y. Suppl. 406, 107 App. Div. 485 (1905); Dallas Consol. Electric St. Ry. Co. v. McAllister, (Tex. Civ. App. 1905) 90 S. W. 933. He should not in this way assert, expressly or by necessary implication, that a party has been guilty of fraud or other illegality. Morrison v. Dickey, 119 Ga. 698, 46 S. E. 863 (1904) (fraud); Kramer v. Northwestern Elevator Co., (Minn. 1904) 98 N. W. 96 (stealing). Testimony should be admitted without any comment calculated to effect its

weight with the jury. Lewter v. Lindley, (Tex. Civ. App. 1905) 89 S. W. 784. In such a connection, it may be essential to identify the *contention* of counsel. Prescott v. Fletcher, 133 Ga. 404, 65 S. E. 877 (1909). In any case, it is worth while to observe that no prejudice will be assumed to arise where the fact mentioned by the presiding judge is one about which there can be no dispute. Louisville & E. R. Co. v. Vincent, 29 Ky. L. Rep. 1049, 96 S. W. 898 (1906); Lyles v. Western Union Telegraph Co., 84 S. C. 1, 65 S. E. 832 (1909).

2. Continental Ins. Co. v. Wickham, 110 Ga. 129, 35 S. E. 287 (1900); Cave v. Anderson, 50 S. C. 293, 27 S. E. 693 (1897). It is unreasonable, however, for a trial judge to enter upon an extended and argumentative discussion of the merits of the case, and in so doing practically intimate his opinion as to what the verdict should be. Louisville & N. R. Co. v. Tift, 100 Ga. 86, 27 S. E. 765 (1896). Where, however, the rulings are based upon a theory of the law which is subsequently changed in the instructions with no opportunity to the party to remedy the injury so created, prejudicial error may arise. Harkinson v. Harkinson, 101 Fed. 71, 41 C. C. A. 201 (1900).

3. Elgin, J. & E. Ry. Co. v. Lawlor, 132 Ill. App. 280 (1907) [judgment affirmed, 229 Ill. 621, 82 N. E. 407]; Stoeber v. St. Louis Transit Co., 203 Mo. 702, 102 S. W. 651 (1907) (motion to strike out evidence); Fidelity Mut. Fire Ins. Co. v. Murphy, (Neb. 1903) 95 N. W. 702 (overruling dilatory motions).

4. Where a trial judge, on rejecting evidence, sees fit to comment upon its materiality or value, the action may well be justified. *In re City of Seattle*, 52 Wash. 226, 100 Pac. 330 (1909); Manhattan Bldg. Co. v. City

In explaining his rulings,<sup>5</sup> the court may properly touch upon the facts involved or point out the statements of witnesses, provided he does not go out of the line of legitimate discussion on the topics presented, or use such language as to indicate apparent or actual judicial approval or disparagement of any witness or of any part of the evidence.<sup>6</sup>

§ 529c. ([3] *Prevent Surprise; Protection Against Unfair Treatment; Unfair Comment*); *Unreasonable Comment*.—On the other hand, to characterize the statement of a witness as “very fair and unbiased,”<sup>1</sup> or to suggest that certain evidence, if believed, is or is not<sup>2</sup> conclusive, that other facts are or are not very material,<sup>3</sup> may well be regarded as objectionable.<sup>4</sup> As a general

of Seattle, 52 Wash. 226, 100 Pac. 330 (1909).

5. *Alabama*.—Birmingham Ry. & Electric Co. v. Ellard, 135 Ala. 433, 33 So. 276 (1903).

*Georgia*.—Central of Georgia Ry. Co. v. Harper, 124 Ga. 836, 53 S. E. 391 (1906) (motion to dismiss).

*Iowa*.—Fritz v. Chicago Grain & Elevator Co., 114 N. W. 193 (1907).

*New York*.—Diamond v. Planet Mills Mig. Co., 89 N. Y. Suppl. 635, 97 App. Div. 43 (1904).

*South Carolina*.—J. C. Stevenson Co. v. Bethea, 79 S. C. 478, 61 S. E. 99 (1908); Tucker v. Charleston & W. C. Ry. Co., (S. C. 1898) 28 S. E. 943.

*Washington*.—Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124 (1903). Informing the jury that certain instructions are given at the request of a particular party is not reversible error, though the practise is bad. Meyer v. Milwaukee Electric Ry. & Light Co., (Wis. 1903) 93 N. W. 6.

*Prima facie case*.—It is not error for the court to decide at the close of plaintiff's direct examination that he has made out a *prima facie* case. Whitaker v. Engle, (Mich. 1896) 69 N. W. 493.

6. Realty Co. v. Ellis, 4 Ga. App. 402, 61 S. E. 832 (1908).

*Characterizing the proceedings*.—A

certain warmth of color in characterizing pending proceedings may be conceded to the zeal of counsel. Even the judge may properly indulge in comment upon the effect of admitted or not controverted facts, without prejudice to the rights of either party. Sperry v. Seidel, 218 Pa. 16, 66 Atl. 853 (1907) (abusive legal process).

1. Edwards v. City of Cedar Rapids, (Iowa 1908) 116 N. W. 323 (expert physician). A judge should not, in the hearing of a jury, compliment a witness. Alexander v. State, 114 Ga. 266, 40 S. E. 231 (1901). See also McMinn v. Whelan, 27 Cal. 300 (1865).

2. Haynes v. City of Hillsdale, (Mich. 1897) 71 N. W. 466; St. Louis & S. F. R. Co. v. Lane, (Tex. Civ. App. 1908) 110 S. W. 530.

3. Howland v. Oakland Consol. St. Ry. Co., 115 Cal. 487, 47 Pac. 255 (1896); Ruppert v. Wolf, 4 App. D. C. 556 (1896) Levels v. St. Louis & H. Ry. Co., 196 Mo. 606, 94 S. W. 275 (1906) (insinuation was an ugly one unless explained); Schneider v. Great Northern Ry. Co., (Wash. 1907) 91 Pac. 565.

4. McKissick v. Oregon Short Line Ry. Co., 13 Idaho 195, 89 Pac. 629 (1907).



rule, it is unreasonable for a presiding judge to intimate, in connection with a ruling upon the admissibility of evidence, his opinion as to the validity of the claim advanced by either party,<sup>5</sup> or regarding the credibility of the evidence by which the litigant is seeking to support it.<sup>6</sup>

**§ 529d. ([3] Prevent Surprise; Protection Against Unfair Treatment; Unfair Comment); Comments on Law.**—Whatever may be thought of the good judgment of a trial court who shall undertake to criticize unfavorably the rule of law which he is announcing to the jury, such a course does not, in itself, constitute unfair treatment of the party for whom the rule operates. Even the disgust of a judge who has been overruled in an appellate court on being compelled to state the law otherwise than he himself has done in an earlier case may be regarded as nothing more than an exhibition of bad taste.<sup>1</sup> That a certain decision does not apply to the case in hand<sup>2</sup> or that given instructions tendered by counsel do not represent the court's view of the law,<sup>3</sup> and similar observations<sup>4</sup> are remarks which a judge is *prima facie* entitled to make. On the contrary, observations of the trial judge in the presence of, and calculated to mislead, the jury as to the law governing the case on trial, constitute reversible error.<sup>5</sup>

**§ 529e. ([3] Prevent Surprise; Protection Against Unfair Treatment); Influence of Spectators.**—Aware of the psychic influence of the dramatic features of a trial, to which reference is elsewhere made,<sup>1</sup> the presiding judge will seek to prevent the issue of the trial from being affected by applause,<sup>2</sup> or other manifestation of feeling, on the part of the audience.

5. *Swan v. Keough*, 54 N. Y. Suppl. 474, 35 App. Div. 80 (1898); *Marcom v. Adams*, (N. C. 1898) 29 S. E. 333; *The Oriental v. Barclay*, (Tex. Civ. App. 1897) 41 S. W. 117.

6. *P., C., C. & St. L. Ry. Co. v. Burroughs*, 6 Ohio Dec. 527, 5 Ohio N. P. 12 (1897).

1. Where, a case is retried after a reversal by the superior court, it is not prejudicial error for the trial judge to say to the jury: "Whatever regret I may personally feel, as a judge, that any such doctrine should have crept in the books, it is none of my business. That is the law

of this case, as I understand it, to be laid down by the superior court." *Lee v. Williams*, 30 Pa. Super. Ct., 349, 357 (1906).

2. *Martin v. Peddy*, 120 Ga. 1079, 48 S. E. 420 (1904).

3. *Lake Shore & M. S. Ry. Co. v. Ford*, 18 Ohio Cir. Ct. R. 239 (1899).

4. *Kreuger v. Sylvester*, (Iowa 1897) 69 N. W. 1059.

5. *Brinckerhoff v. Briggs*, 92 Ill. App. 537 (1900).

1. *Supra*, § 184.

2. *Central of Georgia Ry. Co. v. Mote*, 131 Ga. 166, 62 S. E. 164 (1908).

**§ 529f. ([3] *Prevent Surprise; Protection Against Unfair Treatment*); Misquoting Evidence.**—To misquote the evidence of a witness upon a material point may be a form of unfair treatment against which a party is reasonably entitled to the protection of the judge. Against the action of a litigant so offending the court will promptly afford his assistance to the injured party. Naturally, moreover, he will be careful that his own quotations from the evidence shall be correct, or so modified by a reference to the power and duty of the jury to judge of the testimony<sup>1</sup> that any inexactness is calculated to do but little harm. On the contrary, a double injury may be done a litigant by reprimanding his counsel<sup>2</sup> on account of an alleged misquotation by him of the evidence when he has, in point of fact, stated it correctly.<sup>3</sup>

*Refusal to quote evidence.* While it is the duty of the judge to protect from misquotation of evidence, it may be equally his duty to cause proper and accurate extracts from it to be received. In other words, it may be unfair treatment of a party to refuse his reasonable request that a portion of the evidence be read to the jury.<sup>4</sup>

**§ 529g. ([3] *Prevent Surprise; Protection Against Unfair Treatment*); Reprimanding Counsel.**—The interests of parties may be injuriously affected at times, by reprimands addressed by the judge to their counsel.<sup>1</sup> For example, the parties are entitled to employ the rules of law as they stand. If certain of these are regarded by the judge with disfavor, he must still refrain from making adverse comment upon the course of counsel<sup>2</sup> who is merely endeavoring to enforce a rule of law to the benefit of which his client is entitled. In like manner, the judge will not intimate that objecting to incompetent evidence is an effort on the part of counsel to suppress the truth;<sup>3</sup>—even where such may well be the natural result of the counsel's course. In much

1. *Prescott v. Fletcher*, 133 Ga. 404, 65 S. E. 877 (1909); *Lee v. Williams*, 30 Pa. Super. Ct. 349, 357 (1906).

2. *Infra*, § 529g.

3. *Rose v. Kansas City*, 125 Mo. App. 231, 102 S. W. 578 (1907).

4. *McLoughlin v. Syracuse Rapid Transit Ry. Co.*, 101 N. Y. Suppl. 196, 115 App. Div. 774 (1906).

1. *Woodson v. Holmes*, 117 Ga. 19, 43 S. E. 467 (1903).

2. It is improper for the court to refer to expert testimony as "boughten testimony." *People v. Jennings*, (Mich. 1903) 94 N. W. 216, 10 Detroit Leg. N. 39.

3. *Adams v. Fisher*, 83 Neb. 686, 120 N. W. 194 (1909).

the same way, a party has a legal right to pursue his lawful claims or defenses as he may see fit and the court will not intimate that his refusal to adjust a matter in suit by a particular form of compromise was obstinate or spiteful.<sup>4</sup> Still less will a judge suffer his action to be swayed by personal hostility to counsel of one of the parties.<sup>5</sup> Nor is it reasonable administration for a presiding judge to exhibit an impatience calculated to suggest that exceptions taken by one of the parties are groundless or made in bad faith,<sup>6</sup> that an examination is being stupidly conducted,<sup>7</sup> or the like.

*It is equally clear*, however, that the court is not only permitted but at times required to reprimand counsel for any acts calculated to impair the dignity of the court or bring the administration of justice into contempt.<sup>8</sup> A judge may, for example, speak sharply to an attorney who shall persist in asking questions which the judge has repeatedly excluded,<sup>9</sup> or attempt to read to the jury a document which has been ruled out.<sup>10</sup>

**§ 529h. ([3] *Prevent Surprise; Protection Against Unfair Treatment*); Reprimanding a Party or His Witnesses.**—Nothing unfair to a party is done where the judge, in reasonable dis-

4. *Allen v. Kidd*, 197 Mass. 256, 84 N. E. 122 (1908). It is improper for the court, in the hearing of the jury, to remark that he regards the defense of usury, on which defendant relies, as an unconscionable one. *Jennings v. Kosmak*, 45 N. Y. Suppl. 802, 20 Misc. Rep. 300 (1897) [judgment reversed, 43 N. Y. Suppl. 1134 (1897)].

5. A manifestly hostile attitude by the judge toward defendant's counsel, both during trial and in instructions, was necessarily prejudicial. *Tuchfeld v. Plattner*, 116 N. Y. Suppl. 693 (1909). It is almost equally improper for the judge to intimate that the course of counsel is dictated by personal animosity to himself. *McLeod v. Wilson*, (Ga. 1899) 33 S. E. 851.

6. *Landers v. Quincy, O. & K. C. R. Co.*, 134 Mo. App. 80, 114 S. W. 543 (1908) (you can except all you

want to); *Knox v. Fuller*, (Wash. 1900) 62 Pac. 131; *McLeod v. Wilson*, 108 Ga. 790 (1899).

7. *Williams v. City of West Bay City*, (Mich. 1899) 78 N. W. 328.

8. *Dallas Consol. Electric St. Ry. Co. v. Broadhurst*, (Tex. Civ. App. 1902) 68 S. W. 315 (calling more witnesses than agreed). The judge may take the same course where a lawyer improperly interferes with his adversary's examination. *Laporte v. Cook*, 22 R. I. 554, 48 Atl. 798 (1901).

9. *Chicago City Ry. Co. v. Shaw*, 220 Ill. 532, 77 N. E. 139 (1906); *Crowell v. McGoan*, (Iowa 1898) 76 N. W. 672; *Hein v. Mildebrandt*, (Wis. 1908) 115 N. W. 121; *infra*, § 551.

10. *Finan v. New York Cent. & H. R. R. Co.*, 97 N. Y. Suppl. 859, 111 App. Div. 383 (1906).

charge of his executive or police powers,<sup>1</sup> has occasion to reprimand one of his witnesses or even to commit him for contempt.<sup>2</sup>

*A fortiori*, no injury is done a party by a mere prohibition of smoking in the court room, though the action then on trial involves the effects of tobacco fumes in nauseating a lady passenger on the defendant's train.<sup>3</sup> Should it happen, however, that a remark of this nature is made in presence of the jury it may well be deemed irrational administration warranting a reversal of the judgment.<sup>4</sup> Where the misconduct of the party which is brought to the attention of the court is official, the judge, as part of the administration of government<sup>5</sup> may properly exercise greater freedom of reprimand.<sup>6</sup> In much the same way, it may be unreasonable for a trial judge to rebuke a witness in such a way as to suggest lack of credibility.<sup>7</sup>

*A party may be reprimanded* or even threatened<sup>8</sup> by the presiding judge where the fact is not brought to the attention of the jury.<sup>9</sup>

**§ 529i. ([3] Prevent Surprise; Protection Against Unfair Treatment); Effect of Waiver.**—A party who might otherwise be prejudiced by the action of a judge may place himself in a position where he is not justly entitled to take advantage of it in an appellate court.<sup>1</sup> This may happen, for example, where the party claiming to be aggrieved declines to avail himself of a reasonable offer on the part of the judge to repair the consequences of the latter's erroneous action.<sup>2</sup> Where, moreover, a litigant consents

1. *Supra*, § 204.

2. *Marcum v. Hargis*, 31 Ky. L. Rep. 1117, 104 S. W. 693 (1907) (drunkenness in court) *Seawell v. Carolina Cent. R. Co.*, 132 N. C. 856, 44 S. E. 610 (1903) [rehearing denied, 45 S. E. 850] (laughing).

3. *International & G. N. R. Co. v. Duncan*, (Tex. Civ. App. 1909) 121 S. W. 362.

4. *Wilson v. White*, (Tex. Civ. App. 1902) 69 S. W. 989. The court should protect a party against unfair comments upon his failure to produce a witness. *McKim v. Foley*, 170 Mass. 426, 49 N. E. 625 (1898).

5. *Infra*, §§ 637 *et seq.*

6. *Sallade v. Schuylkill County*, 19 Pa. Super. Ct. 191 (1902) (poor-board).

7. *Kane v. Kinnare*, 69 Ill. App. 81 (1897) ("she talks and talks but I can't see that anything she has said is evidence in this case").

8. *Zing v. Lahart*, (N. D. 1907) 110 N. W. 931 (criminal prosecution).

9. *Zink v. Lahart*, (N. D. 1907) 110 N. W. 931. That the judge erroneously supposes that his prejudicial remark was not overheard by the jury is of no consequence. *Riddle v. Riddle*, (Tex. Civ. App. 1901) 62 S. W. 970.

1. *Richardson v. State*, (Tex. Cr. App. 1906) 94 S. W. 1016.

2. *Richards v. City of Ann Arbor*, 152 Mich. 15, 115 N. W. 1047, 15 Detroit Leg. N. 142 (1908).

that the trial shall take a certain course,<sup>3</sup> e. g., that questions of law should be argued in presence of the jury<sup>4</sup> or that talesmen should be added to a jury without waiting for the arrival of the regular panel,<sup>5</sup> he cannot complain of the legitimate consequences flowing from the adoption of the procedure. Waiver and estoppel are, it may be observed, often merely alternative statements of the same rule of law. For example, one who introduces a new issue into a case cannot claim that it furnishes ground for a continuance by reason of surprise.<sup>6</sup> Nor can a party ordinarily claim to be surprised by acts of his own agents.<sup>7</sup> Where a surprise has actually been caused to a party, he will be required to take immediate steps for his own protection. He will not be given the benefit of the alleged surprise as the basis of a motion for a new trial.<sup>8</sup>

**§ 530. ( [3] *Prevent Surprise* ); Protect Witnesses from Annoyance.**— The furtherance of justice requires that its administration should be made to press with as little of hardship as possible upon witnesses. The judge may, therefore, reasonably so exercise his administrative powers as to protect the witness from all avoidable annoyance. The sacrifices of time and convenience usually exacted as the price of testifying at all, he cannot well control. But the insult, innuendo and gibes of counsel may, by a vigilant judge be, in large measure, averted from their victim. In view of the administrative powers at his command,<sup>1</sup> it would be impossible, even were it desirable, for the presiding justice to escape responsibility in this matter.<sup>2</sup> Where a party becomes a witness there is a compensation in the resentful action of the tribunal for

3. *Farley v. Gate City Gaslight Co.*, (Ga. 1898) 31 S. E. 193; *Spanghel v. Spanghel*, 57 N. Y. Suppl. 7, 39 App. Div. 5 (1899) (call but five witnesses).

4. *Moore v. Rose*, 130 Mo. App. 668, 108 S. W. 1105 (1908).

5. *Rice v. Dewberry*, (Tex. Civ. App. 1906) 93 S. W. 715.

6. *Houston & T. C. R. Co. v. Lemair*, (Tex. Civ. App. 1909) 119 S. W. 1162.

7. *Aetna Ins. Co. v. Sparks*, 62 Ga. 187 (1879).

8. *Smith v. State*, (Tex. Cr. App. 1899) 51 S. W. 358.

1. *Supra*, § 174.

2. "In the presence of the judge any misbehavior, which, being witnessed at the time by the judge, is regarded by him without censure, becomes in effect the act, the misbehavior, of the judge. On him more particularly should the reproach of it lie; because, for the connivance (which is in effect the authorization) of it, he cannot ever possess any of those excuses, which may ever and anon present themselves on the part of the advocate." Bentham, *Jud. Ev.*, vol. II, bk. III, c. V.

this sort of treatment. The witness who is not a party, and to whom the verdict makes no recompense, may reasonably hope to be spared from insult, where he himself is free from fault. It is much against the public interest, moreover, that the practical position of one who gives testimony in court should be made so irksome, annoying and even, at times, torturing, that persons having knowledge of material circumstances should make, as they at present are forced to do, every effort to prevent the fact of such knowledge from becoming known, in order to escape what they feel is likely to prove a trying ordeal. Nor is this all. The social loss consists not only in the removal of evidence from the use of justice; it lies also in the greatly impaired moral quality and credibility of the evidence of witnesses who cannot thus escape giving their testimony. It is no more reasonable to expect that a witness perturbed, irritated or even terrified by the assaults of a brutal examination should give clear, accurate and consistent testimony than it would to anticipate that a muddy stream will furnish pellucid water.<sup>3</sup> Judge Lowrie, of Pennsylvania, puts the embarrassing position of a witness and the corresponding duty of the presiding judge none too strongly:<sup>4</sup> "Witnesses often

3. "Add to this that a mind rudely assailed naturally shuts itself against its assailant, and reluctantly communicates the truths that it possesses." *Elliott v. Boyles*, 31 Pa. 66 (1857), per Lowrie, J. "Witnesses, and particularly illiterate witnesses, must always be liable to give imperfect or erroneous evidence, even when orally examined in open Court. The novelty of the situation, the agitation and hurry which accompanies it, the cajolery or intimidation to which the witness may be subjected, the want of questions calculated to excite those recollections which might clear up every difficulty, and the confusion occasioned by cross-examination, as it is too often conducted, may give rise to important errors and omissions." *Johnston v. Todd*, 5 Beav. 601 (1843), per Lord (Langdale), M. R.

A popular view.—The manner in which such sorry exhibitions affect the public appreciation of justice may

be judged from the utterances of the great novelists whose ideas are moulders of public opinion to an extent which it is difficult for intelligent administration to overcome. A sample instance indeed may be taken from Anthony Trollope, *The Three Clerks*, Chap. XL (857). See also Dickens, *Pickwick Papers*, Chap. XXXV.

4. *Elliott v. Boyles*, 31 Pa. St. 66 (1837). Where a witness on the stand is wantonly attacked by the attorney of the opposite party without any provocation whatever, the act of the trial judge in reproving such attorney is proper. *Heffernan v. O'Neill*, (Neb. 1901) 96 N. W. 244. In like manner, the judge upon being appealed to by a witness for further time in which to answer the questions of counsel, is justified in directing that sufficient time be allowed her for the purpose. *Birmingham Ry. & Electric Co. v. Ellard*, 135 Ala. 433, 33 So. 276 (1903).

suffer very unjustly from this undue earnestness of counsel, and they are entitled to the watchful protection of the court. In the court they stand as strangers, surrounded with unfamiliar circumstances, giving rise to an embarrassment known only to themselves; and in mere generosity and common humanity they are entitled to be treated, by those accustomed to such scenes, with great consideration — at least until it becomes manifest that they are disposed to be disingenuous.”

*A more striking inversion* of the natural and fitting in the relation between parties and witnesses it would be difficult to imagine than that system of administration which puts an innocent witness absolutely at the mercy of a trained advocate whose sole chance of success in defending a criminal consists perhaps in this opportunity to break down the probative force of his testimony by inquiries into every act of his almost forgotten past or by so confusing, browbeating or jeering at him as to introduce contradiction; while, at the same time, it prevents any officer of justice from asking the criminal himself a single question which may in the least degree incriminate him and which, in general, surrounds him with such safeguards that only in the clearest case can a final conviction be obtained. It is, for example, by no means ideal administration of justice to permit a burglar's counsel to ask the unfortunate man whose plate has been stolen and whose only connection with the case is to identify the marks on it, “whether or not,” when a very young man he had not eloped with a friend's wife; while it declines to allow the prosecuting officers of public justice to ask the alleged burglar where he was on the night that the silver was stolen.

**§ 531. ([3] *Prevent Surprise; Protect Witnesses from Annoyance*); Cross-examination.**— The principal occasion for the objectionable and offensive treatment of witnesses is upon cross-examination. Here the zeal of counsel has been most frequently betrayed into excesses. If this enthusiasm is honest, an intimation from the court usually suffices for its control.<sup>1</sup> A cross-examination in any way abusive is improper, and can only, so

1. “When the presiding judge is respected and prudent, a hint kindly given is generally all that is needed to restrain such ardor, when it does not arise in any degree from habitual

want of respect for the rights of others and for the order of public business.” *Elliott v. Boyles*, 31 Pa. 66 (1857).

far as the witness is concerned, be repressed by the presiding judge. In the same way, it may be proper for the court to intimate to counsel that the cross-examination of a particular witness is being unduly protracted.<sup>2</sup>

**§ 532. ( [3] *Prevent Surprise; Protect Witnesses from Annoyance; Cross-examination* ); A Reasonable Limitation.**— It by no means follows that the course of a judge in allowing a witness to be intimidated or otherwise annoyed is, in all cases, bad administration. The object of this treatment may richly merit such an experience; the interests of justice may demand that he be so treated. In undertaking to limit the rights of counsel, as to tone, gesture, manner as well as substance of examination, the possible existence of fraud, bad faith, perjury must not be overlooked. It may well be that advocates are too ready to assume the existence of these elements in testimony which bear against them.<sup>1</sup> Or it may be that the course which assumes bad faith may be injudicious for the counsel himself;—that he who adopts the harsher mode of dealing, is taking desperate chances for his client; that if he succeeds, it will probably be in spite of the sympathy which the jury feel for the badgered witness; that if he fail, it will be with a force of resentment which the client is fairly sure to have strongly brought home to him.<sup>2</sup> But none of

2. *Crane Lumber Co. v. Bellows*, (Mich. 1898) 74 N. W. 481.

1. "It is entirely natural that in the public trial of causes the earnestness of counsel should often become unduly intense; and it is not possible to prevent this without such an attribution and exercise of power as would be entirely inconsistent with that freedom of thought that is necessary to all thorough investigation. The remedy for it is to be found in inner rather than in outer discipline. Those who are zealously seeking the truth cannot always be watchful to measure their demeanor and expressions in accordance with the feelings or even with the rights of others. This zeal, even when inordinate must be excused, because it is necessary in the search of truth; and generally it is not possible to condemn it as misguided or

excessive until its fault has been proved by the discovery of the truth in the opposite direction; and possibly its very excess may have contributed to the discovery." *Elliott v. Boyles*, 31 Pa. 66 (1857).

2. "The heart of the Court and jury, and all disinterested manliness, spontaneously recoil at a harsh and unfair treatment of them, and the cause that adopts such treatment is very apt to suffer by it. It is only where weakness sits in judgment that it can benefit any cause." *Elliott v. Boyles*, 31 Pa. 66 (1857). "Considering the subject merely as a matter of discretion, the adoption of an unfair conduct in cross-examination has often an effect repugnant to the interests which it professes to promote." 2 *Evans' Pothier*, 263 (1806).



these infirmative considerations affect the administrative duty of the presiding judge, except so far as they bear upon the question whether there is reasonable ground for thinking that the cause of truth requires the rough handling of a witness. None of them preclude a counsel, who has ground for suspecting bad faith on the part of the witness, from resorting to any forensic means he may deem expedient for its exposure. Fraud is *pro-  
tean*; there is no specific for its detection.<sup>3</sup> Where, therefore, it is plausibly claimed by counsel, expressly or by necessary implication, that the witness is perjuring himself, either actively or by suppression, intimidation or other drastic treatment may be entirely justified as an instrument in the ascertainment of truth.<sup>4</sup>

*The Statutory Regulation.*—As a rule, the action of the legislature is in accordance with the sentiments of excellent judicial administrators. Thus, the statute of Arkansas<sup>5</sup> provides that “the court shall exercise a reasonable control over the mode of interrogation, so as to make it rapid, distinct, as little annoying to the witness and as effective for the extraction of the truth as may be.” The legislature of California, after using the same language, as the Arkansas statute just quoted, proceeds as follows:<sup>6</sup> “But, subject to this rule, the parties may put such pertinent and legal questions as they see fit.” The California code of civil procedure adds, in a later section:<sup>7</sup> “It is the right of the witness to be protected from irrelevant, improper, or insulting questions, and from harsh or insulting demeanor.” The Connecticut legislature has provided:<sup>8</sup> “During the trial of a cause, witnesses shall not be interrupted except for the purpose of having notes of their testimony taken by the stenographer.” The commonwealth of

3. It is not judicious to attempt the enforcement of an administrative rule in this particular as unqualified as Bentham's rule. Bentham, *Jud. Ev.*, Vol. II, bk. III, c. V. “Every expression of reproach, as if for established mendacity: every such manifestation, however expressed—by language, gesture, countenance, tone of voice (especially at the outset of the examination)—ought to be abstained from by the examining advocate.”

4. “Whatever can elicit the actual dispositions of the witness with respect to the event,—whatever can de-

tect the operation of a concerted plan of testimony, or bring into light the incidental facts and circumstances that the witness may be supposed to have suppressed,—in short, whatever may be expected fairly to promote the real manifestation of the merits of the cause, is not only justifiable but meritorious.” 2 Evans' *Pothier*, 268 (1806).

5. Ark. Stats., 1894, § 2955.

6. Cal. C. C. P. 1872, § 2044.

7. Cal. C. C. P. 1872, § 2066.

8. Conn. Gen. St. 1887, § 768.

Kentucky enacts an ideal rule of administration:<sup>9</sup> Court is to exercise a "reasonable control" over interrogation, so as to make it "as little annoying to the witness and as effective for the extraction of the truth as may be."

*Innuendo.*—Counsel should rarely be permitted to comment upon the evidence they are eliciting.<sup>10</sup> An appropriate opportunity will be reserved for such observations at a later stage. At that of examination, the principal effect of such comment, and often, apparently, its exclusive object, is to embarrass the witness.

*Intimidation.*—Any question which tends to intimidate<sup>11</sup> or embarrass a witness is objectionable. For a judge to decline to check this, is to sanction it. As Bentham observes:<sup>12</sup> "Browbeating is that sort of offense which never can be committed by any advocate who has not the judge for his accomplice."

*Sneering.*—It is not permissible for a counsel to sneer at the witness, especially when repeating his answer. Thus, where a witness had answered "Yes, I have seen him," counsel was not allowed to rejoin: "That is, you *imagine* you have!"<sup>13</sup>

*Judicial Apology.*—It has been suggested that where the test as applied by counsel shows that a meritorious witness has, without adequate cause, been subjected to pain or annoyance in the interest of justice, that the matter should not be allowed merely to drop. A citizen has been required to make a painful and unnecessary sacrifice for the cause of justice and some recognition should be made of the fact. The presiding judge has consented to the testing of the veracity of a witness by means of a most cruel exposure to pain and humiliation. This has been shown to have been an injustice—by a tribunal consecrated to the service of justice. The public prestige and dignity of judicial administration has been far more deeply injured than could be done by any mere breach of the peace in open court. To permit the matter to rest at that point;—an injured man smarting under a sense of wrong, a baffled counsel still hoping that he may in some way yet reap a profit with the jury out of the process—has seemed to certain jurists a travesty upon ordinary commonplace fairness,

9. Ky. C. C. P. 1895, § 593.

12. Bentham, *Jud. Ev.*, Vol. I. Bk.

10. Ings' Trial, 33 How. St. Tr. 957, 999 (1820).

II, Ch. IX, § IV.

11. Haines v. Ins. Co., 52 N. H. 470 (1872).

13. *People v. Darrant*, 116 Cal. 179, 48 Pac. 75 (1897).

nothing being said as to an enlightened administration of public justice.<sup>14</sup>

§ 533. ( [3] *Prevent Surprise; Protect Witnesses from Annoyance; Cross-examination*); *An Anti-Social Attitude*.—Possibly in no connection does the anti-social tendency of the purely personal element of litigation show itself in more unmistakable light, than in connection with the intimidation and other abuse of persons giving testimony. The passions of the parties are seen to extend not only to their adversaries but even to the witnesses by which the latter are forced to prove their case, however innocent they may be. The evil goes still deeper when the passions of clients are permitted to affect the public conduct of the honorable profession who are the representatives and ministers of justice. Wherever the line between the custody of private interests and the conservation of the public concern in judicial administration is properly to be drawn, it certainly must exclude from the forces which exert a controlling influence upon members of the bar the selfish unintelligent hatred or greed which may dominate their clients.<sup>1</sup> Yet it is so well-balanced an observer as Mr. W. D. Evans, who after noting the well-recognized conclusion that the abuse of witnesses, unless justified by the result, recoils disastrously upon the side which employs these methods, is forced to add: "But however unfavorable an injudicious asperity of cross-examination may be to the advancement of a cause, it, for

14. "When, on the false supposition of a disposition to mendacity, an honest witness has been treated accordingly by the cross-examining advocate (the judge having suffered the examination to be conducted in that manner, for the sake of truth)—at the close of which examination all doubts respecting the probity of the witness have been dispelled,—it is a moral duty on the part of the judge to do what depends on him towards soothing the irritation sustained by the witness' mind; to wit, by expressing his own satisfaction respecting the probity of the witness, and the sympathy and regret excited by the irritation he has undergone." Bentham, *Jud. Ev.*, Vol. II, bk. III, c. V.

1. "I conceive that a client has no right to expect from his counsel an endeavor to assist his cause, or what is a more frequent object, to gratify his passions, by unmerited abuse, by embarrassing or intimidating witnesses of whose veracity he has no real suspicion, or by conveying an impression of discredit which he does not actually feel; and that where such expectations are intimated, there is an imperious duty upon the advocate, who, while the protector of private right is also the minister of public justice, which requires them to be repelled." 2 Evans' *Pothier*, 268 (1806).

the most part, is congenial to the wishes of the party; the neglect of it is regarded as an indifference to his interests and a dereliction of duty; and the practice of it is one of the surest harbingers of professional success.”<sup>2</sup>

§ 534. **Principles of Administration; (B) Furtherance of Justice; (4) Judge May Interrogate Witnesses.**—Nothing more readily arouses the indignation of counsel who are seeking to obtain an unjust advantage than a question asked of a witness by the judge either directly or by a suggestion to the counsel conducting an examination. The one who is thoroughly impressed with the litigious aspect of the administration of justice,<sup>1</sup> with the conception that forensic contests are mere trials of intellectual prowess or financial endurance, it well may seem little short of an impertinence for a judge to intervene in this way. If the state has provided the elaborate and costly machinery of courts of justice merely for the purpose of affording a safe and convenient opportunity for one of her citizens to outwit another to his own personal profit, there is much ground for such an objection. Evidently such questions may mean the clouding of many a bright prospect of misleading a jury or claiming, when too late to remedy the defect, that a formal, but absolutely necessary part of an opponent's case is lacking. But if the object of a trial is, first, to ascertain truth by the light of reason, and, then, do justice — conventionalized, indeed — justice according to law — upon the basis of this truth, then the judge is not only justified but required to elicit a fact whenever these interests of truth and justice would suffer if he did not.

*It is but reasonable* that the judge should wait, before intervening, until the parties have had a full and fair opportunity of developing their cases in their own way. On cross-examination, for example, a well meant intrusion may ruin a carefully planned test of truth which might otherwise have been of great value for the purposes intended. The examining counsel cannot inform the judge as to his purpose without acquainting the witness and his counsel with the same facts at the same time.

*Espousing one side* of a controversy, is an entirely different matter. The court is not senior counsel for either of the parties and the natural advantages of skill and preparedness cannot be

2. Evans' Pothier, 268 (1806).

1. *Supra*, § 303.

offset by the appearance of the judge as *deus ex machina*. To adopt such a course early in the trial, while the case is but partly developed, is, therefore, just and intolerable grievance. The judge is not permitted to regard himself as leading counsel for one of the parties.<sup>2</sup> The court cannot take sides and manage the hearing for a forensic favorite. The action of the trial judge, in practically conducting plaintiff's case by examining plaintiff and his witnesses while on the stand, as to points not yet touched on by the counsel, by asking them questions which would have been incompetent if asked by plaintiff's counsel, and which were leading and suggestive,<sup>3</sup> is manifestly an irrational exercise of administrative power.<sup>4</sup>

*Limitation upon right.*—The judge may elicit evidence; he should not intimate his opinion as to the case, its merits or the credibility of witnesses. The right of a judge, for the promotion of justice, to interrogate a witness is not affected by the constitutional provision forbidding judges to comment upon the evidence in the case.<sup>5</sup> In any case, the court will not interrogate a party or witness in such a manner as to indicate to the jury the

2. *Bartley v. State*, 55 Neb. 294, 75 N. W. 832 (1898)

3. It is error for the presiding judge during the progress of a trial to ask leading and suggestive questions during the cross-examination of a hesitating plaintiff. *Kramer v. Riss*, 77 Ill. App. 623 (1898).

4. *Bolte v. Third Ave. R. Co.*, 56 N. Y. Supp. 1038, 38 App. Div. 234 (1899).

"When the counsel for the defendant expostulated with the court for assuming the examination of these witnesses to the extent to which it was done, he was told that the right of the court to ask questions was absolute, and that a judge had the right to do so whenever he believed that the interest of justice and the circumstances of the case required it. This statement may be very true, but yet it is possible for a judge to deprive a party of a fair trial, even without intending to do so, by unduly undertaking the conduct of the case for one party or the

other, when such conduct results, or may result, in a plain exhibition to the jury of his own opinions in respect to the case.

Necessarily, the cases upon this subject are not numerous, but yet there are such cases in the books, and, whenever the question has been presented to an appellate tribunal, it has held that if, upon a fair consideration of the case, it appears that the action of the judge at the trial was such as to unduly influence the jury in behalf of one party or another, by assuming the duty of counsel, and conducting the trial of the case, it was a sufficient ground for reversal. "*Wheeler v. Wallace*, 53 Mich. 355, 19 N. W. 33 (1884); *Dunn v. People*, 172 Ill. 582, 50 N. E. 137 (1898)." *Bolte v. Third Ave. R. Co.*, 56 N. Y. Supp. 1038, 1042 (1899), *per Rumsey, J.*

5. *Wilson v. Ohio River & C. Ry. Co.*, (S. C. 1898) 30 S. E. 406. *Supra*, § 281.

judgment which he may have formed regarding the truth of a disputed matter of fact, especially if such a fact be a material one.<sup>6</sup> On the other hand, he may not properly ask immaterial questions calculated to arouse the passions and prejudices of a jury.<sup>7</sup> In the same way, while the judge may question witnesses to bring the facts properly before the jury, he must so frame his questions as not to indicate his own opinion, and not to lay undue stress on particular features of the witness' testimony tending to impeach him.<sup>8</sup>

**§ 535. ([4] Judge May Interrogate Witnesses); To Enable Judge to Charge the Jury.**—While the prohibition in many of the American states which forbids the presiding judge to comment on the evidence in his charge to the jury, elsewhere somewhat considered,<sup>1</sup> has, in connection with other concurrent influences, tended to establish the practice of abstention from interference on the part of a judge, the custom of interrogation by the court has always existed. The judge must charge the jury; he must therefore, have as complete a knowledge of the facts of the case as possible.<sup>2</sup>

*Relevancy Required.*—The questions of the judge must relate to some material or constituent fact in the case. He would not be

6. *Bryant v. Anderson*, 5 Ga. App. 517, 63 S. E. 638 (1909).

7. *Flinn v. Ferry*, 127 Cal. 648, 60 Pac. 434 (1900).

8. *Barlow Bros. Co. v. Parsons*, 73 Conn. 696, 49 Atl. 205 (1901); *Merritt v. Bush*, 122 Ill. App. 189 (1905); *State v. Allen*, (Iowa 1896) 69 N. W. 274. Should the examination clearly show the judge's opinion on the question of credibility, it is matter for reversal. *City of Flint v. Stockdale's Estate*, 157 Mich. 593, 122 N. W. 279, 16 Detroit Leg. N. 493 (1909).

1. *Supra*, §§ 276 *et seq.*

2. "It is undoubtedly necessary that the judge who presided should acquire as full knowledge of the facts and circumstances of the case on trial as possible, in order that he may instruct the jury, and correctly, to the extent his duty demands, shape the de-

termination of the litigated matters, that justice may not miscarry, but may prevail; and doubtless it is allowable at times, and under some circumstances, for the presiding judge to interrogate a witness. The exact extent or [times] when the exigencies may warrant an exercise of this right are matters which are not capable of very precise statement, but it may be said that the right herein questioned is one which should be very sparingly exercised, and, generally, counsel for the parties should be relied on and allowed to manage and bring out their own case. The actions of the judge in this respect should never be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause." Per Harrison, C. J. *Bartley v. State*, 55 Neb. 294, 75 N. W. 832 (1898).

at liberty to gratify his curiosity by inquiring as to the political views of a witness.<sup>3</sup>

*A Contrary View.*—The interrogation has been held improper except where the witness fails to understand the questions put to him.<sup>4</sup> Disapproval has been suggested as to the interrogation of a witness in states where the judge is required not to comment to the jury on the evidence. Such a question has been held objectionable as tending to suggest a belief in the guilt of one accused of crime.<sup>5</sup> It has been expressly said, however, that there is no conflict between the constitutional provision and the power of the judge to interrogate.<sup>6</sup>

**§ 536. ([4] Judge May Interrogate Witnesses); Magistrates, Arbitrators, etc.**—This power and duty of interrogation is not limited to judges. It applies also to inferior magistrates or persons exercising temporary judicial functions, such as arbitrators.<sup>1</sup>

**§ 537. ([4] Judge May Interrogate Witnesses); In Order to Elicit Material Facts.**—But the judge may interrogate a witness for a higher purpose than to enable him to give the jury full instructions. Beside his function of offering light to the jury, he has a duty to justice. He should therefore ask any question calculated to present new and material evidence. It may properly be said in any case as was said by Judge Bickwell in the supreme court of Indiana:<sup>1</sup> “A circuit judge presiding at a trial is not a mere moderator between contending parties; he is a sworn officer charged with grave public duties. In order to establish justice and maintain truth and prevent wrong, he has a large discretion in the application of rules of practice. . . . There is nothing wrong in the court’s asking the witness any question the answer to which would likely throw any light upon the testimony.”

As Sir Henry Hawkins puts it: “Although a judge has no right to cross-examine for the one side or the other, he has a right to put a question in an impartial manner for clearing

3. *Sharp v. Treece*, 1 Heisk. 446, 448 (1870).

4. *Fager v. State*, 22 Neb. 332, 338 (1887).

5. *People v. Bowers*, 79 Cal. 415, 21 Pac. 752 (1889); *Leo v. State*, 63 Neb. 723, 89 N. W. 303 (1902).

6. *Wilson v. R. Co.*, 52 S. C. 537, 30 S. E. 406 (1898).

1. *Butler v. Boyles*, 10 Humph. 155 (1849).

1. *Huffman v. Cauble*, 86 Ind. 591, 596 (1882).

up a doubtful piece of evidence, and for taking every precaution that injustice is not done by any omission on the part of counsel." <sup>2</sup> The importance of this power of interrogation to the cause of justice, and the temper with which it should be, and usually is, exercised, are admirably stated by Judge Lumpkin of the supreme court of Georgia: <sup>3</sup> "We know of no limit to the right which belongs to the court of interrogating witnesses, either in civil or criminal cases, especially the latter. The life or death of a man may hang upon a full development of the truth. The presumption that this liberty will not be honorably and impartially exercised is not to be tolerated for a moment. When they see, therefore, that a material fact has been omitted which ought to be brought out, it is not only the right but the duty of the presiding judge to call the attention of the witness to it, whether it makes for or against the prosecution; his aim being neither to punish the innocent nor screen the guilty, but to administer the law correctly." <sup>4</sup> But this interrogation must "be done within such bounds as control attorneys in similar interrogations." <sup>5</sup>

2. 1 Brampton's Remin. p. 211.

3. Epps v. State, 19 Ga. 118 (1855).

4. Alabama.—Real v. State, 35 So. 58 (1903); Milton v. Rowland, 11 Ala. 737 (1847).

Colorado.—Kansas P. R. Co. v. Miller, 2 Colo. 442, 452, 470 (1874).

Connecticut.—Barlow B. Co. v. Parsons, 73 Conn. 696, 49 Atl. 205 (1901).

Georgia.—Kearney v. State, 101 Ga. 803, 29 S. E. 127 (1897); Bowden v. Achor, 95 Ga. 243, 22 S. E. 271 (1895).

Illinois.—Featherstone v. People, 194 Ill. 325, 62 N. E. 685 (1902).

Indiana.—Huffman v. Cauble, 86 Ind. 591, 596 (1882); Lefever v. Johnson, 79 Ind. 554, 556 (1881).

Iowa.—State v. Spiers, 103 Iowa 711, 73 N. W. 336 (1897).

Massachusetts.—Palmer v. White, 10 Cush. 321 (1852).

Nebraska.—South Omaha v. Fennell, 94 N. W. 632 (1903); Nightingale v. State, 62 Neb. 371, 87 N. W. 158 (1901).

North Carolina.—State v. Lee, 80 N. C. 483, 485 (1879).

Oklahoma.—De Ford v. Painter, 3 Okl. 80, 41 Pac. 96 (1895).

Tennessee.—State v. Hargroves, 104 Tenn. 112, 56 S. W. 857 (1900); Graham v. McReynolds, 90 Tenn. 673, 692, 18 S. W. 272 (1891); McDonald v. State, 89 Tenn. 161, 164, 14 S. W. 487 (1890).

Texas.—C. Cr. P. § 772 (1895).

Vermont.—State v. Noakes, 70 Vt. 247, 40 Atl. 249 (1898).

Wisconsin.—Lowe v. State, 96 N. W. 417 (1903).

Canada.—Coulson v. Disborough, 2 Q. B. 316 (1894). "It is also his duty to propound to the witnesses such questions as he may deem necessary to elicit any relevant and material evidence." Sparks v. State, 59 Ala. 82, 87 (1877). The judge should not so interrogate as to discredit the witness. Gordan v. Irvine, 105 Ga. 144, 31 S. E. 151 (1898). "Taking the cross-examination of several of the witnesses out of the hands of the solicitor," is not objectionable. State v. Atkinson, 33 S. C. 100, 107, 11 S. E. 693 (1890). "A judge is not a mere figure-head." Hill v.



*Suggestions to Counsel.*—The trial judge is not required to ask the questions personally. He may suggest them to counsel.<sup>6</sup>

**§ 538. ([4] Judge May Interrogate Witnesses); Range of Inquiry.**—The only limitation upon the range of the judge's interrogation is that the power should be reasonably exercised. The questions should be relevant, and so framed as not to prejudice either of the parties. As is said by the supreme court of Georgia,<sup>1</sup> a judge may ask a witness "any legal question he pleases." Where the judge is forbidden to comment on the evidence in charging the jury, for the judge to indicate by his question his opinion as to a material fact, would constitute prejudice.<sup>2</sup> The propriety of the employment of this, or, indeed, any particular method of ascertaining truth is a question of administration, or as is more commonly said, of discretion.<sup>3</sup> Circumstances may well arise under which the use by the presiding judge of the power of interrogation would be improper;—either at all,<sup>4</sup> or in the particular form of question adopted.

**§ 539. ([4] Judge May Interrogate Witnesses); Form of Question.**—The judge employed in a disinterested questioning of a witness presents such guaranties of being engaged on a search for truth for its own sake that he is very properly absolved from

State, 5 Lea 725, 731 (1880). The judge will be permitted to interrogate the witness "when necessary to elicit the truth." *Lowe v. State*, (Wis. 1903) 96 N. W. 417. "It is the duty of the judge to receive every offer of evidence, apparently material, suggested to him, though the parties themselves through negligence, ignorance, or corrupt collusion, should not bring it forward. A judge is not placed in that high situation merely as a passive instrument of parties. He has a duty of his own independent of them, and that duty is to investigate the truth." . . . *Hastings' Trial*, 31 Parl. Hist. 348 (1794). Per Mr. *Edmund Burke*.

5. *State v. Lockett*, 168 Mo. 480, 68 S. W. 563 (1902).

6. *State v. Noakes*, 70 Vt. 247, 40 Atl. 249 (1898).

1. *Epps v. State*, 19 Ga. 111 (1855).

See also *White v. State*, 56 Ga. 385 (1876). A judge may properly call the attention of a witness to a statement by him which is apparently incredible and ask him if he really means it. *Elgin, J. & E. Ry. Co. v. Lawlor*, 229 Ill. 621, 82 N. E. 407 (1907) [*affirming* judgment, 132 Ill. App. 280]. In general, the judge may, and, indeed, should, assist a witness to correct his testimony in such a way as to make it conform to the truth.

2. *Harris v. State*, 61 Ga. 359 (1878). See also *supra*, § 529a.

3. *Dunn v. People*, 172 Ill. 582, 50 N. E. 137 (1898); *Huffman v. Caudle*, 86 Ind. 591, 596 (1882); *Com. v. Galavan*, 9 All. 272, 274 (1852); *People v. Stevens*, 47 Mich. 413, 418, 11 N. W. 220 (1882).

4. *State v. Crotts*, 22 Wash. 245, 60 Pac. 408 (1900).

many of the limitations in point of form which judicial administration has found it necessary to impose upon the self-serving zeal of litigants. He may ask leading questions.<sup>1</sup> Said Lord Chief Justice Ellenborough, on this subject:<sup>2</sup> "I have always understood, after some little experience, that the meaning of a leading question was this, and this only: That the judge restrains an advocate who produces a witness on one particular side of a question, and who may be supposed to have a leaning to that side of the question, from putting such interrogatories as may operate as an instruction to that witness how he is to reply to favor the party for whom he is adduced. The counsel on the other side, however, may put what questions he pleases, and frame them as best suits his purpose, because then the rule is changed; for there is no danger that the witness will be too complying. But even in a case where evidence is brought forward to support a particular fact, if the witness is obviously adverse to the party calling him, then again the rule does not prevail, and the most leading interrogatories are allowed. But to say that the judge on the bench may not put what questions and in what form he pleases can only originate in that dullness and stupidity which is the curse of the age."<sup>3</sup>

**§ 540. Principles of Administration; B. Furtherance of Justice; (5) Judge May Call Additional Witnesses.**—As Burke says,<sup>1</sup> a presiding judge is not "a passive instrument between the parties." Where the social demands of justice are likely to suffer by an avoidable inadequacy of proof, the court may, of its own motion, seek to supply it. Thus, if a material witness, available to the parties, is not produced, the judge may cause him to be sworn and testify.<sup>2</sup> As Lord Esher, Master of the Rolls, said in 1894:<sup>3</sup> "If there be a person whom neither party to an action chooses

1. *See* WITNESSES.

2. 25 Hansard Parl. Deb. 207 (1813).

3. 25 Hansard Parl. Deb. 207 (1813).

1. Report of Committee on Warren Hastings's Trial, 31 Parl. Hist. 348, (1794), per Mr. Edmund Burke. "It is the duty of the judge to receive every offer of evidence, apparently material, suggested to him, though the parties themselves through negligence, ignorance, or corrupt collusion, should

not bring it forward. A judge is not placed in that high situation merely as a passive instrument of parties. He has a duty of his own, independent of them and that duty is to investigate the truth."

2. *Selph v. State*, 22 Fla. 537, 548 (1886); *Hoskins v. State*, 11 Ga. 92, 97 (1852); *Fullerton v. Fordyce*, 144 Mo. 519, 44 S. W. 1053 (1898).

3. *Coulson v. Disborough*, L. R. 2 Q. B. D. 316 (1894).

to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge in my opinion, is himself entitled to call him." The judge may make the order equally whether he is<sup>4</sup> or is not sitting as a jury. His right to ask questions of a witness is subject, however, to the qualification that his questions should be put in open court. It is highly improper for a judge to interrogate a witness privately and subsequently ask him questions upon the basis of the information so obtained.<sup>5</sup> In much the same way a witness may properly be recalled for further examination at the request of the presiding judge.<sup>6</sup>

**§ 541. (*Principles of Administration; B. Furtherance of Justice*); (6) Judge Should Hold Balance of Indulgence Even.—**

A presiding judge will not be permitted to grant an indulgence to one party which he denies to the other. Should he give an instruction in a positive form at the request of one party he should, as a rule, give it in its negative form to oblige the other side.<sup>1</sup> In like manner, he cannot refuse to permit a witness to testify on rebuttal because he has disobeyed the rule for the exclusion and separation of witnesses, while permitting his testimony in chief to be contradicted.<sup>2</sup> For similar reasons a party cannot properly be permitted to introduce testimony on a given point and his adversary prevented from introducing, at an appropriate stage, evidence legitimately tending to control its logical effect.<sup>3</sup> "No fact is legally proved, in judicial proceedings, by parol evidence upon one side only, when competent and proper opposing testimony is rejected."<sup>4</sup>

*Like the Canon against Unfair Treatment,*<sup>5</sup> the rule at present under consideration is one of wide range of application. The care with which any concession accorded one party in connection with the admission of evidence out of its regular order will be offset by the allowance to the opponent of a reasonable oppor-

4. *Badische A. & S. Fabrik v. Levinstein*, L. R. 24 Ch. D. 156, 167 (1883).

5. *Littleton v. Clayton*, 77 Ala. 571, 575 (1884). See also *Sparks v. State*, 59 Ala. 82, 87 (1877).

6. *Fitzgerald v. Benner*, 219 Ill. 485, 76 N. E. 709 (1906). For an interesting and instructive contribution to the learning of this subject see 57 L. R. A. 875.

1. *Bruce v. Wolfe*, 102 Mo. App. 384, 76 S. W. 723 (1903); *Texas & P. Ry. Co. v. Dawson*, (Tex. Civ. App. 1904) 78 S. W. 235.

2. *Illinois Cent. R. Co. v. Ely* (Miss. 1904) 35 So. 873.

3. *Paxton v. Knox*, (Iowa 1904) 98 N. W. 468.

4. *Richardson v. Lloyd*, 99 Mass. 475 (1868).

5. *Supra*, § 529.

tunity to meet the new facts<sup>6</sup> has been elsewhere noticed.<sup>7</sup> Where a party has been permitted, for instance, to introduce on rebuttal evidence which is part of his original case, his adversary cannot properly be held to the strict rules of practice in this respect.<sup>8</sup>

*Completeness Required.*—Indeed, it is in part under this principle of administration that a litigant against whom a portion of a conversation or transaction has been put in evidence or a part of a document read<sup>9</sup> will be allowed, almost as of course, to introduce the rest of the conversation,<sup>10</sup> or his version of it,<sup>11</sup> the remainder of the transaction,<sup>12</sup> or his claim with regard to it.

*Moulding Course of Trial.*—In like manner, where one party has been permitted to offer evidence on a particular subject<sup>13</sup> or to use some special class of evidence,<sup>14</sup> his adversary will be conceded the privilege of meeting him upon the same ground<sup>15</sup> or with the same weapons.<sup>16</sup>

6. *State v. Smith*, (La. 1908) 45 So. 415.

7. *Supra* §§ 329 *et seq.*

8. *Flowers v. State*, (Miss. 1905) 37 So. 814.

9. *Supra*, §§ 500 *et seq.*

10. *Supra*, §§ 489 *et seq.*

11. *Ray v. State*, (Ala. 1906) 41 South 519; *Hoggson & Pettis Mfg. Co. v. Sears*, 77 Conn. 587, 60 Atl. 133 (1905).

12. *Supra*, § 522.

13. *McElevaney v. McDiarmid*, 131 Ga. 97, 62 S. E. 20 (1908); *Alpena Tp. v. Mainville*, 153 Mich. 732, 117 N. W. 338, 15 Detroit Leg. N. 605 (1908).

14. *Bates v. Hall*, (Colo. 1908) 98 Pac. 3 (parol evidence); *Missouri, K. & T. Ry. Co. of Texas v. Steele*, (Tex. Civ. App. 1908) 110 S. W. 171.

15. *Alabama*.—*Alabama Great So. Ry. Co. v. Guest*, (Ala. 1905) 39 So. 654.

*Colorado*.—*Jefferson Min. Co. v. Anchoria-Leland Min. & Mill Co.*, 75 Pac. 1070, 64 L. R. A. 925 (1904).

*Illionis*.—*Kuhn v. Eppstein*, 239 Ill. 555, 88 N. E. 174 (1909); *William Grace Co. v. Larson*, 227 Ill. 101, 81 N. E. 44 (1907) [*affirming judgment*, 129 Ill. App. 290

(1906)]; *White v. Western State Bank*, 119 Ill. App. 354 (1905); *Cook v. Lantz*, 116 Ill. App. 472 (1904) (compromise).

*Iowa*.—*Kelly v. Chicago, R. I. & P. Ry. Co.*, (Iowa 1908) 114 N. W. 536.

*Louisiana*.—*State v. Lively*, 119 La. 363, 44 So. 128 (1907).

*Michigan*.—*Proctor v. Hobart M. Cable Co.*, 145 Mich. 503, 108 N. W. 992, 13 Detroit Leg. N. 644 (1906).

*Minnesota*.—*Peters v. Schultz*, 107 Minn. 29, 119 N. W. 385 (1909).

*Missouri*.—*Crawford v. Kansas City Stockyards Co.*, 215 Mo. 394, 114 S. W. 1057 (1908).

*Montana*.—*Yank v. Bordeaux*, 29 Mont. 74, 74 Pac. 77 (1903).

*New York*.—*Jetter v. Zeller*, 104 N. Y. S. 229, 119 App. Div. 179 (1907).

*North Carolina*.—*Parker v. Atlantic Coast Line R. Co.*, 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827 (1903) [*rehearing denied*, *Parker v. Railroad Co.*, 43 S. E. 1005 (1902)].

*Pennsylvania*.—*Hastings v. Speer*, 34 Pa. Super. Ct. 478 (1907); *Whitney v. Haskell*, 216 Pa. 622, 66 Atl. 101 (1907) (construction of agreement).

*South Dakota*.—*Borneman v. Chi-*

*Use of Incompetent Testimony.*—The principle has even been carried so far, in certain courts, as to permit a party against whom irrelevant evidence<sup>17</sup> or that which is incompetent,<sup>18</sup> hear-say, "opinion"<sup>19</sup> or the like,<sup>20</sup> to insist upon meeting it with equally incompetent evidence of the same nature.

In a criminal case, the same right has been conceded to the prosecution where the accused has introduced without objection, legally inadmissible testimony.<sup>21</sup>

*Administrative Objection to Use of Irrelevant Testimony.*—The administrative propriety of such a course has, however, not been universally conceded. Where relevant testimony is offered, the waiver of a procedural bar by a party entitled to insist upon its observance may well be held to entitle his opponent to reply in the same way. Where, however, *irrelevant* evidence is offered, the judge will by no means necessarily feel constrained to waste the court's time in hearing it merely because the other party has led the way in doing so.<sup>22</sup> The matter may properly be regarded

cago, St. P., M. & O. Ry. Co., (S. D. 1905) 104 N. W. 208.

*Texas.*—St. Louis & S. F. R. Co. v. Sizemore, (Civ. App. 1909) 116 S. W. 403; Cobb v. Bryan (Civ. App. 1906) 97 S. W. 513; St. Louis South-western Ry. Co. of Texas v. Smith, (Tex. Civ. App. 1905) 86 S. W. 943 (expert examination of an injury).

*United States.*—Burrell v. U. S., 147 Fed. 44, 77 C. C. A. 308 (1906). Where defendant questions his own witnesses about a certain matter, he cannot complain if plaintiff questions his witnesses about the same matter. Indianapolis Traction & Terminal Co. v. Romans, (Ind. App. 1907) 79 N. E. 1068. A party who has availed himself of improper evidence cannot complain of the opposite party having gone into the same matter on cross-examination. Cronk v. Wabash R. Co., 123 Iowa 349, 98 N. W. 884 (1904).

16. Farmer's High Line Canal & Reservoir Co. v. White, (Colo. 1903) 75 Pac. 415; McIlwain v. Gaebe, 128 Ill. App. 209 (1906) (X-ray photographs); Policemen's Benev. Ass'n of City of Chicago v. Ryce, 115 Ill. App. 95 (1904) [judgment affirmed, 213

Ill. 9, 72 N. E. 764]; Merchant's Loan & Trust Co. v. Boucher, 115 Ill. App. 101 (1904).

17. Warren Live Stock Co. v. Farr, 142 Fed. 116, 73 C. C. A. 340 (1905).

18. German-Amer. Ins. Co. v. Brown, (Ark. 1905) 87 S. W. 135.

19. Provident Sav. Life Assur. Soc. v. King, 216 Ill. 416, 75 N. E. 166 (1905) [affirming judgment, 117 Ill. App. 556] (conclusion); State v. Grubb, 201 Mo. 585, 99 S. W. 1083 (1906) (handwriting); Ahnert v. Union Ry. Co. of N. Y. City, 110 N. Y. Suppl. 376 (1908); Lefevre v. Silo, 98 N. Y. Suppl. 321, 112 App. Div. 464 (1906) (conclusion).

20. Aetna Ins. Co. v. Fitze, (Tex. Civ. App. 1904), 78 S. W. 370 (compromise offer). Where plaintiff gave secondary evidence without objection, defendant should have been allowed to give similar contradictory evidence. McCormack v. Mandlebaum, 92 N. Y. S. 425, 102 App. Div. 302 (1905).

21. People v. Duncan, (Cal. App. 1908) 96 Pac. 414 (hearsay).

22. Union Steel & Chain Co. v. Wagoner, (Colo. 1906) 85 Pac. 836.

as one of administration.<sup>23</sup> The violation of the administrative canon requiring that trials should be expedited is still less in the public interest where the effect of the irrelevant testimony offered in rebuttal is calculated not only to prolong the trial but to bring it to an irrational result, by misleading the jury.

**§ 542. (*Principles of Administration; B. Furtherance of Justice*); (7) Judge Should Require Full Disclosure.**— Limited, by the substantive or procedural law in conceding various privileges of silence,<sup>1</sup> as may have been the administrative principle that the interests of justice require disclosure of material facts, the principle itself is a sound and valuable one, and should be accorded force and extension. In certain connections this is recognized. Thus, the “best evidence rule” requires that the most probative evidence should be given.<sup>2</sup> A verbal or written statement introduced into evidence must be made as complete as is essential to fairness.<sup>3</sup> It follows that a party is not entitled, as a matter of right, to withdraw legal and competent evidence, voluntarily introduced by him, which is favorable to his adversary.<sup>4</sup> While the interests of public justice may require a full disclosure on the part of a witness, the attempt to break down the testimony of one whom the judge regards as mistaken<sup>5</sup> may more properly be left to counsel. Zeal on the part of a presiding judge to secure a particular issue of a trial is seldom conducive to increased popular respect for judicial administration.<sup>6</sup>

**§ 543. (*Principles of Administration; B. Furtherance of Justice*); (8) Judge May Suggest Proper Amendments.**— A presiding judge may suggest amendments to the pleadings, in order

23. *Bennett v. Susser*, 191 Mass. 329, 77 N. E. 884 (1906).

1. *See WITNESSES.*

2. *Supra*, §§ 480 *et seq.*

3. *Supra*, §§ 489 *et seq.*

4. *Zipperer v. City of Savannah*, 128 Ga. 135, 57 S. E. 311 (1907).

5. Where, in a prosecution for robbery, a witness had testified positively in support of defendant's alibi as to the place where he saw defendant on or about the time of the alleged robbery, it was improper for the court to catechise the witness at length as to whether he was abso-

lutely sure that the defendant was at the place stated, and to tell the witness that if he was mistaken he could correct his statement, and to ask him to think and see whether or not he was not mistaken, and to correct his testimony if there was any doubt in his mind concerning his testimony. *Glover v. United States*, 147 Fed. 426, 77 C. C. A. 450 (1906).

6. No objection exists to the court's offering a witness any reasonable opportunity for explanation. *Owens v. State*, (Tex. Cr. App. 1906) 96 S. W. 31. *Supra*, § 538.

that they may correspond more completely with the proofs introduced in evidence.<sup>1</sup> It is not, for example, improper for a trial judge to recommend to a plaintiff the adding of another count to his declaration, setting forth with more clearness and detail matters covered by a general averment, the effect of which would be merely to divide his causes of action and present them in separate counts.<sup>2</sup>

**§ 544. Principles of Administration; (C) Expedite Trials.—**

If the first fundamental canon of judicial administration be the preservation of the substantive rights of the litigants,<sup>1</sup> and the second is found to be the furtherance of justice,<sup>2</sup> little question can exist as to what is properly classed as next in social importance. It is that justice should be made as *speedy* as is consistent with its being accurate and complete. Not without reason is it that in Magna Charta as careful provision is made against the delay of justice as against either its sale or denial. There is, in reality, under many constantly recurring circumstances, but slight difference to the petitioner for justice between its delay and its denial. Beyond a certain point, to delay justice in any case, is to deny it. "Undue delay is a denial of justice."<sup>3</sup> The expediting of trials is therefore in the direction of the furtherance of justice, and, therefore, is well within the administrative duty of the court. This is recognized and, indeed, certain eminent jurists<sup>4</sup>

1. *J. W. Bishop Co. v. Shelhorse*, (U. S., Va. 1905) 72 C. C. A. 337, 141 Fed. 643.

2. *J. W. Bishop Co. v. Shelhorse*, 141 Fed. 643, 72 C. C. A. 337 (1905). For some consideration of the formal nature of such an amendment, see *supra*, § 528a.

1. *Supra*, §§ 332 *et seq.*

2. *Supra*, §§ 463 *et seq.*

3. *Post v. Bklyn. Heights R. R. Co.*, 195 N. Y. 62 (1909).

4. For example, Baron Rolfe, in deciding that the cross-examiner must rest content with the witness' answer on an immaterial point, says: "The laws of evidence on this subject, as to what ought and what ought not to be received, must be considered as founded on a sort of comparative consideration of the time to be occupied

in examinations of this nature and the time which it is practicable to bestow upon them. If we lived for a thousand years, instead of about sixty or seventy, and every case were of sufficient importance, it might be possible, and perhaps proper, to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded, or what portion of it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that could be; in fact, mankind find it to be impossible. Therefore some line must be drawn. I take it the established rule is, that you may contradict any portion of the testimony that is given in support or contradiction of the issue be-

have stated this canon in terms which might well be misunderstood as implying a feeling that some arbitrary limit in time was imposed upon the length of a trial. This is not the case. No furtherance of justice, as a whole, can take place by declining to accord to a case all the time reasonably necessary to diagnose every material fact merely in order to advance a case standing later on the docket.<sup>5</sup> The present canon of administration prescribes economy in the use of time. It permits any expenditure which is reasonably necessary for the purpose of doing justice.<sup>6</sup> It cautions merely against time's waste; nothing is said against its useful employment.<sup>7</sup>

tween the parties. That is clear. Then, undoubtedly, mankind have felt that, as facts are frequently to be proved by the testimony of men of suspicious character, you may inquire into the genuineness and truthfulness of the party who gives such testimony. And undoubtedly there is some rule as to what you can contradict in respect of such evidence, and what you cannot, although it is not very easy to reconcile the rule with any positive principle; and I conceive the rule which permits evidence to be given to contradict a person who is not actuated by any improper motives, may be taken to trench a little upon that which does not allow you to contradict him when he says, 'I am not infamous.' That is, however, the rule that is established, and may be adhered to." Attorney-General *v. Hitchcock*, 1 Exch. 91, 105 (1847).

5. "We are much pressed with the argument that it would be attended with great inconvenience if we permit a party to try his right to an office by showing that his adversary received a greater number of illegal votes than the ascertained majority given him. It is said that in a general State election the time necessarily occupied in such a trial might consume more than eighty-three years. It is the first time I have ever heard it urged that a party who had a conceded right should not have

a remedy to enforce it, because a large consumption of time would take place before his right could be established. If a party has a legal title to an office, it surely can be no legal reason for denying him the opportunity to establish it, that such process will require the examination of a large number of witnesses and consume much time in the proceeding. Rights of parties cannot be determined on such a basis." *People v. Pease*, 27 N. Y. 45, 61 (1863).

6. "The trial to which parties are entitled is not an endless one, nor one unreasonably protracted and exhausting. There may be a vast amount of evidence, relevant in a certain legal sense, but so unimportant, when compared with an abundance of better evidence easily available, as to be properly excluded. The parties being allowed, upon collateral issues, an equal range, amply sufficient for the purposes of justice, under the circumstances of the particular case, they are not necessarily entitled, as a matter of law, to go further in that direction." *Amoskeag Mfg. Co. v. Head*, 59 N. H. 332 (1879), per Doe, C. J.

7. "We enforce a legal obligation, and we admit any defense which shews that there is no legal obligation or a legal excuse for not fulfilling it; but in no case that we know of is it ever said that a defense shall be admitted if it is easily proved and



*The contrary conception* is one appropriate to an age which required that every criminal trial should be finished within the day;<sup>8</sup>—out of which the law has evolved, into higher things, largely through the indignant protests of judges themselves.<sup>9</sup>

*Methods Employed.*—In seeking this objective of administration—the attainment of substantial justice as speedily as is consistent with the adequacy of the result itself—courts proceed, in addition to minor and more incidental methods, by these principal ways: (1) Such a use of its judicial knowledge and power to rule as to the existence of *prima facie* states of evidence as will prevent diverting of attention from the facts really in dispute and keep the case as it were constantly turning on its hinge; (2) controlling the range of inquiry at any stage to the reasonable requirements of proof; (3) eliminating evidence of slight, collateral, or remote logical bearing; (4) regulating introduction of cumulative evidence; (5) limiting number of witnesses; (6) restricting repetition of question; (7) restricting repetition of testimony; (8) restricting length of argument; (9) restricting length of examination, number of counsel, etc.

**§ 545. (Principles of Administration; C. Expedite Trials); Reason Required.**—Any method must be reasonable. Any arbitrary limitation upon the course of the trial made in advance of the arising of the actual situation as fixing a limit to the number of permissible requests for rulings,<sup>1</sup> may be unreasonable.

**§ 546. (Principles of Administration; C. Expedite Trials); (1) Rulings as to Prima Facie Case.**—Reasonable dispatch of judicial business requires the elimination of mere redundancy in

rejected if it would give the Court great trouble to investigate." Godard v. Gray, L. R. 6 Q. B. 139, 152 (1870).

8. The rule which prevailed then (1699), and long afterwards, of finishing all criminal trials in one day must often have produced cruel injustice. Many of the cases I have referred to were tried in a superficial, perfunctory way. . . . The right of the Court to adjourn in cases of treason or felony was not fully established till the treason trials of 1794." Stephen's History of the Criminal Law, I, 422, 403.

9. "What is necessary to an end the law allows, is never too long. 'Non sunt longa quibus nihil est quod demere possis' is as true as an axiom in Euclid." Bushel's Case, 6 How. St. Tr. 999, 1003, Vaughan 135, 3 Keb. 322, 1 Mod. 119 (1670).

1. "A hard and fast rule, limiting in advance the number of instructions to be tendered by each party, is unreasonable." Chicago Union Traction Co. v. Ludlow, 108 Ill. App. 357 (1903).

proof. The power must, necessarily, reside somewhere of preventing a party from doing more than proving his immediate case. He should not be permitted to go further than this, anticipate possible defenses and answer them. He should not be at liberty to suppose that his evidence will be attacked on a particular point, or the credibility of certain of his witnesses assailed and proceed to repair as part of his original case the breach in its proof before it is made. He should not, as has been said,<sup>1</sup> be allowed to reinforce a story complete in itself by a mass of merely consistent facts. A purely consistent fact usually has very little probative value. It is in the nature of a "finishing touch," which adds, possibly, symmetry but not strength. It may be necessary to go into all these matters later;—if the case develops along these lines. But when a party has proved a complete case in his own behalf, which as it lies at that time the jury are apt to believe if they are ever going to believe it, and should follow if they believe it, anything further from that side, at that point, would be a waste of time. The judge alone is in a position to prevent this loss;—by declaring that a *prima facie* case has been established and calling upon the other side to state its position. It seems clear that this power is not only necessary for the dispatch of business, but salutary, and, when wisely handled, very much in the public interest. It is equally obvious, however, for what reason judges have proved themselves not only cautious in the use of this power but anxious, even during its conscious exercise, to conceal the real nature of what they were doing under some other name. Usually, we have a "presumption,"<sup>2</sup> or a statement as to the "burden of proof." Any ruling as to the existence of a *prima facie* case unquestionably invades the province of the jury; and, *pro tanto*, curbs the right of a party to place his case before them in his own way. Hence, a necessity for indirection in judicial method has continually been felt in this connection. The administrative danger is an entirely different one;—lest the court rule that a *prima facie* case has been established before the jury have seen cause to reach the requisite stage of belief to that effect. The jury lags mentally behind the court. Possibly more evidence would have produced the result of mental certainty on their part had the court been a little less prompt in thus forestalling the action of the jury. The power, nevertheless, is a necessary one;

1. *Supra*, § 52.

2. *Infra*, § 1085.

and the fact of possible injustice from its exercise furnishes merely matter for caution in curtailing the proof of facts which, under the circumstances of a particular case, may be constituent in their nature. It is the most potent method of expediting causes which it is in the power of the court to employ.

**§ 547. (*Principles of Administration; C. Expedite Trials*);**

**(2) Range of Examination.**—With this object of securing all expediting consistent with care and thoroughness, the court may limit the range of the examination of witnesses. On every direct examination a point is reached when the witness has fairly told his story and will be credited, if he is to be believed at all. In the same way, on cross-examination, a witness' story in chief finally becomes tested to a reasonable extent. If it is to be supplemented at all, the supplementing has been done. If the witness is to be discredited, the result has been accomplished, or a satisfactory foundation laid for doing so.<sup>1</sup> The question which arises on cross-examination is one of far greater nicety than the corresponding inquiry present on direct examination; and much must be left to the good faith of counsel. But when, either on direct or cross-examination, the counsel has had a reasonable opportunity of advancing in the manner appropriate to any stage the interests intrusted to him, the court may and should, intervene to prevent repetition and the turning of sterile furrows.<sup>2</sup>

**§ 548. (*Principles of Administration; C. Expedite Trials*);**

**(3) Inquiry into Collateral Matters Restricted.**—While proving such material facts, bearing upon or involved in the issue, as lie in a party's power to produce is a matter of right,<sup>1</sup> how far the court will permit litigants to go in showing collateral facts which tend to corroborate their contentions or to test or discredit that of an opponent is within the administrative function. In view of the great variety and ramification of deliberative facts, gradually shading off in point of logical relation to those which are constituent, it is obvious that a line must, as a practical matter, be drawn

1. See WITNESSES.

2. *Aurora v. Hillman*, 90 Ill. 61 (1878); *Stroh v. South Covington*, etc., R. Co., 78 S. W. 1120, 25 Ky. L. Rep. 1868 (1904); *Davis v. U. S.*, 165 U. S. 373, 17 S. Ct. 360, 41 L. ed. 750 (1897). For example he may also

properly decline to allow an examining counsel to repeat a question which the witness has already fully answered. *Aurora v. Hillman*, 90 Ill. 61 (1878). See *Infra*, § 551.

1. *Com. v. Gray*, 129 Mass. 474 (1880).

somewhere. Under certain general principles of administration<sup>2</sup> this line is drawn by the court, in the exercise of reasonable discretion,<sup>3</sup> as between the demands of truth and the necessity for handling causes with a reasonable degree of expedition.

*Corroboration.*—How far a party shall be permitted to corroborate the material statements of his witnesses by proof of collateral facts is within the administrative function of the court.<sup>4</sup>

**§ 549. (*Principles of Administration; C. Expedite Trials*);**

**(4) Introduction of Cumulative Evidence Regulated.**—Cumulative evidence is evidence of the same kind to the same point. A stage will usually be reached in any case at which the proof will be found to have been introduced with such fullness that if the contention of the litigant in support of which it is adduced is to be credited at all by the tribunal, it will be believed then. To go further, in this line, until at least conflict of evidence is developed on the point is to weary the jury, waste time and weaken the effect, by suggesting the existence of some hidden doubt on the part of the proponent beyond what appears on the surface. The court, therefore, is justified as a matter of administration, in excluding such additional or cumulative evidence.<sup>1</sup> The court may properly refuse to allow parties to introduce matters already in evidence.<sup>2</sup> While the power of a trial judge to reject cumulative evidence has been denied,<sup>3</sup> it cannot be doubted that the exercise of such a power may be entirely justified.

2. *Supra*, §§ 332 *et seq.*

3. *Com. v. Williams*, 105 Mass. 62 (1870).

4. *Com. v. Williams*, 105 Mass. 62 (1870).

1. *Arkansas*.—*Olmstead v. Hill*, 2 Ark. 346 (1839).

*California*.—*Noonan v. Nunan*, 76 Cal. 44, 18 Pac. 98 (1888).

*Connecticut*.—*Waller v. Graves*, 20 Conn. 305 (1850).

*Georgia*.—*White v. Columbus Iron Works Co.*, 113 Ga. 577, 38 S. E. 944 (1901).

*Indiana*.—*Farmers', etc., Bldg., etc., Assoc. v. Rector*, 22 Ind. App. 101, 53 N. E. 297 (1899).

*Maine*.—*Glidden v. Dunlap*, 28 Me. 379 (1848).

*Massachusetts*.—*Parker v. Hardy*, 24 Pick. 246 (1837).

*Mississippi*.—*Wilson v. Williams*, 52 Miss. 487 (1876).

*Missouri*.—*Craighead v. Wells*, 21 Mo. 404 (1855).

*New York*.—*People v. New York* Super. Ct., 10 Wend. 285 (1833).

2. *Johnson v. Crookston Lumber Co.*, (Minn. 1904) 100 N. W. 225; *Siegelman v. Jones*, 103 Mo. App. 172, 77 S. W. 307 (1903); *Carr v. American Locomotive Co.*, 26 R. I. 180, 58 Atl. 678 (1904); *Camp v. League*, (Tex. Civ. App. 1906) 92 S. W. 1062.

3. *Perkins v. Rice*, 187 Mass. 28, 72 N. E. 323 (1904).

**§ 550. (*Principles of Administration; C. Expedite Trials*);**

**(5) Judge May Limit Number of Witnesses.**—Where no gain to the cause of justice may be anticipated from the calling of a large number of witnesses to a given point, it is not required by good administration that they be all heard. The court may well limit the witnesses to a reasonable number.<sup>1</sup> Thus on a question of a bid at an auction at which two hundred persons were present the judge may well restrict the number on each side to five.<sup>2</sup> In like manner on a question regarding the utility of a patent the number of witnesses may be limited to fifteen.<sup>3</sup> A party is not entitled to complain that the judge thinks it wise to employ the public time in hearing a large number of witnesses.<sup>4</sup> Nor can he so object even where the judge, in so doing, is exceeding a limitation which he himself has hitherto imposed.<sup>5</sup> The judge may limit the number of expert,<sup>6</sup> or other witnesses which the parties shall be at liberty to call upon a given point, and with this exercise of administrative power an appellate court will not interfere so long as it is reasonably exercised. If the action is unreasonable it will be reversed.<sup>7</sup>

**§ 551. (*Principles of Administration; C. Expedite Trials*);**

**(6) Right to Restrict Repetition of Questions; Direct Examination.**—The necessity for expediting trials frequently precludes the court from permitting the repetition of questions, especially on direct examination. Where the inquiry has already been excluded insisting upon repeating it is highly objectionable;<sup>1</sup>—unless the state of the evidence, the subject-matter of the offer or some other condition of the situation has been so modified since the last tender as to afford fair reason for a belief that the judge's action may be different than when the question was first asked. Where the question which it is sought to repeat is one which has already

1. *Burt-Brabb Lumber Co. v. Crawford*, 27 Ky. L. Rep. 798, 86 S. W. 702 (1905); *White v. City of Boston*, 186 Mass. 65, 71 N. E. 75 (1904); *Swope v. City of Seattle*, 36 Wash. 113, 78 Pac. 607 (1904).

2. *Austin v. Smith & Holliday*, (Iowa 1906) 109 N. W. 289.

3. *J. H. Clark Co. v. Rice*, 127 Wis. 451, 106 N. W. 231 (1906).

4. *Taylor v. Security Life, etc., Co.*, 145 N. C. 383, 59 S. E. 139 (1907).

5. *Brady v. Shirley*, (S. D. 1904) 101 N. W. 886.

6. *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882 (1879); *Powers v. McKenzie*, 90 Tenn. 167, 182, 16 S. W. 559 (1891).

7. *St. Louis, M. & S. E. R. Co. v. Aubuchon*, 199 Mo. 352, 97 S. W. 867 (1906).

1. *Jones v. Stevens*, 36 Neb. 849, 852, 55 N. W. 251 (1893).

been allowed either specifically or in a substantially similar form, permitting it to be again asked is entirely a question of administration.<sup>2</sup> To repeat a question once excluded for any other purpose than to seek, in good faith, its introduction after a change of condition in the proof, is opposed to the canon under consideration.

**§ 552. (*Principles of Administration; C. Expedite Trials*);**

**(6) Right to Restrict Repetition of Questions; Cross-examination.—**

On cross-examination, a somewhat different situation is presented. Asking a witness at this stage, to repeat the evidence given on direct examination may well serve to test the truth of the original statements, and be, therefore, entirely within the legitimate rights of the party.<sup>1</sup> Ability to repeat a story not only involves memory and accuracy; it throws valuable light on the question as to whether a narrative concerns actual facts, in which case, the reality of the events or circumstances narrated will enable the witness to repeat them as often as asked, with substantial accuracy; or, the story is a fabricated one, in which event, attempts at repetition may well break down, unless the story is a short one, or learned with remarkable thoroughness and retentiveness of memory. The limits of insistence upon repetition are questions of administration. But, in general, as the supreme court of Michigan say:<sup>2</sup> “The only safe general rule upon cross-examination is to allow the party cross-examining to go over the whole subject or subjects to which the direct examination related.” “We know of no rule of practice,” say the same court,<sup>3</sup> “that prohibits an attorney from requesting a witness to repeat what he has testified to upon a particular point in his direct examination. He has a right to have it repeated, for the purpose not only of testing the recollection of the witness, but of ascertaining whether he makes a statement at variance with what he testified to in chief.”<sup>4</sup> The trial judge is quite at liberty, and, indeed,

2. *Singer & T. S. Co. v. Hutchinson*, 184 Ill. 169, 56 N. E. 353 (1900); *Simon v. Home Ins. Co.*, 58 Mich. 278, 25 N. W. 190 (1885); *Ulrich v. People*, 39 Mich. 245, 251 (1878).

1. *Supra*, § 377.

2. *O'Donnell v. Segar*, 25 Mich. 367, 371 (1872), per Christiancy, C. J.

3. *Zucher v. Karpeles*, 88 Mich. 424,

50 N. W. 373 (1891), per Champlin, C. J.

4. *Alabama*.—*Wesley v. State*, 52 Ala. 182, 188 (1875).

*Maryland*.—*Brown v. State*, 72 Md. 468, 475, 20 Atl. 186 (1890); *Schwartz v. Yearly*, 31 Md. 270, 276 (1869).

for purposes of expediting trials, required, to place reasonable limitations upon the exercise of this mode of testing. "Of course it would not be permissible for an attorney to pass through the whole of the direct examination and ask the witness to repeat it; and such was not the case here. The attorney had not abused his privilege; nor, as it appears from the record, unnecessarily consumed the time of the court in a fruitless attempt at cross-examination."<sup>5</sup> Such may be regarded as the established rule.<sup>6</sup>

**§ 553. (Principles of Administration; C. Expedite Trials; [6] Right to Restrict Repetition of Questions); Repeating Question Asked on Cross-examination.**—Where perjury is claimed, by reputable counsel, directly or by implication from conduct, the court, in exercise of its administrative function for the furtherance of justice, may permit repetition on cross-examination, not alone of the same questions asked on direct examination but of questions asked on cross-examination, to which the examiner cannot get an answer or only one with which he is not satisfied as being in accordance with the facts. He will, if permitted, ask the same question until he gets either an answer, or one which he thinks is true. With many, perhaps most, witnesses the test is one of the most effective that can be employed. Where the

*Michigan.*—Gutsch v. McIlhargey, 69 Mich. 377, 37 N. W. 303 (1888).

*Pennsylvania.*—Stern v. Stanton, 184 Pa. 468, 39 Atl. 404 (1898).

*Texas.*—Shaw v. State, 32 Tex. Cr. 155, 169, 22 N. W. 588 (1893); Railway v. Pool, 70 Tex. 715 (1888).

*Wisconsin.*—McMahon v. Waterworks Co., 95 Wis. 640, 70 N. W. 829 (1897).

*United States.*—Middlesex B. Co. v. Smith, 83 Fed. 133, 27 C. C. A. 485 (1897). "How many times the same question should be repeated on cross-examination . . . and how far the witness should be compelled to answer were matters within the discretion of the presiding judge." Demerritt v. Randall, 116 Mass. 331 (1874). "We are wholly unable to perceive any such element of improbability in her direct narrative . . . as to warrant such a wide and unusual departure from

the ordinary and usual methods." People v. Barberi, 149 N. Y. 256, 43 N. E. 635 (1896) (question repeated seven or eight times).

**5.** Zucker v. Karpeles, 88 Mich. 424, 50 N. W. 373 (1891), per Champlin, C. J.,

**6.** People v. Rader, 136 Cal. 253, 68 Pac. 706 (1902); Mathis v. State, (Fla. 1903) 34 So. 287; Winkleman v. R. Co., 62 Iowa 11, 17 (1883); Odiorne v. Bacon, 5 Cush. 185, 191 (1850). He refers also to 61st day, Times Report, pt. 15, p. 149; Kennedy's Trial, p. 6 (Mongan's Celebrated Trials in Ireland); R. v. Bernard, 8 St. Tr. (N. S.) 887, 958 (1858). Such a ruling is not objectionable as a comment upon the weight of evidence. Highley v. Metzger, 187 Ill. 237, 58 N. E. 407 (1900) [judgment affirmed—86 Ill. App. 573].

mind of the witness is interposing a barrier of falsehood or equivocation between the examiner and the true state of his own mind, the effect of repeating the question, psychologically, is not unlike that of an ancient battering ram. Each blow, delivered at the same point adds its quota of disintegrating force until the barrier is broken down. The auto-suggestion of the witness that he remain steadfast to the prearranged story is steadily undermined by the counter suggestion of the insistent questions, until it weakens, totters, falls. The expedient is a desperate one; but, in a master hand, it often succeeds where others fail. Apparently its use offends against the canon which requires the expediting of trials. Where, however, it serves to detect perjury, it is, in reality, a most excellent way of expediting the cause. Where no such gain is promised, a trial judge may exclude questions on cross-examination which are chiefly argumentative or combative in their nature.<sup>1</sup> In general, constant going over the same topic on cross-examination may be prevented without abuse of discretion.<sup>2</sup> A trial judge has an administrative function to put a stop to prolonged and useless examination of a witness.<sup>3</sup> Any other threatened waste of time may be dealt with in the same way. Thus, where counsel stated that he did not hope to obtain anything by a certain line of cross-examination that he was about to enter upon, there was no error in refusing to permit him to proceed with it.<sup>4</sup>

**§ 554. (Principles of Administration; C. Expedite Trials);**

**(7) Right to Restrict Repetition of Testimony.**—The court may properly decline to permit the consumption of time by the unreasonable repetition by a witness of his testimony. A trial judge must exercise some discretion as to the repetition of testimony, and where this function is not unreasonably employed, there is no error in refusing to allow a witness to repeat himself.<sup>1</sup>

1. *Clay v. Sullivan*, (Ala. 1908) 47 So. 153.

2. *Leimgruber v. Leimgruber* (Ind. 1908) 86 N. E. 73; *State v. Wren*, 121 La. 55, 46 So. 99 (1908); *Fuqua v. Com.*, 26 Ky. Law Rep. 420, 81 S. W. 923 (1904); *Odegard v. North Wisconsin Lumber Co.*, 130 Wis. 659, 110 N. W. 809 (1907).

3. *State v. Rodriguez*, 115 La. 1004, 40 So. 438 (1906).

4. *Union Ry. Co. v. Hunton*, 114 Tenn. 609, 88 S. W. 182 (1905).

1. *Gracy v. Atlantic Coast Line R. Co.*, (Fla. 1907) 42 So. 903; *Stern v. Bradner Smith & Co.*, 225 Ill. 430, 80 N. E. 307 (1907) [*affirming* 127 Ill. App. 640 (1906)]; *Missouri, K. & T. Ry. Co. v. Garrett*, (Tex. Civ. App. 1906) 96 S. W. 53; *Gulf, C. & S. F. Ry. Co. v. Hays*, (Tex. Civ. App. 1905) 89 S. W. 29; *Griswold*



Similarly it is not permitted to a witness to repeat evidence stated by his counsel which can lead to no legal result. An offer of evidence which, taken in its entirety, fails to show a cause of action, is properly rejected.<sup>2</sup>

*There is no standard* other than reason, as applied by the trial judge to the facts of a particular case. Where justice or practical convenience require or sanction it, there is no objection to allowing the jury to hear the statement of a witness repeated. Thus, it is within his sound discretion to permit the stenographer to read three times, in the presence of the jury, certain testimony of plaintiff while testifying on his own behalf, and to allow him to correct a statement.<sup>3</sup>

**§ 554a. (*Principles of Administration; Expedite Trials*); (8) Judge may Restrict Length of Arguments.**—The court is the custodian of the public time as employed in judicial proceedings. He is most competent to decide where the right of a suitor fairly to present his case is limited by the fact that others are waiting to be heard. A division of the time which the judge feels disposed to devote to that particular matter may be made by an order of court,<sup>1</sup> with or without the agreement of the parties. So long as the judge's administrative action in this respect is reasonable it will not be disturbed. A rule of court providing that in jury trials plaintiff, or, where he has the affirmative of the issues, defendant may open and close, and that the court may announce how much time will be allowed on each side for argument, and that plaintiff may apportion the time allotted to him between his opening and closing argument, but shall not consume more than one-half thereof in closing, is a reasonable regulation, and within the power of the court to make.<sup>2</sup>

**§ 555. (*Principles of Administration; C. Expedite Trials*); (9) Judge May Restrict Length of Examination, Number of Counsel, etc.**—The court may expedite trials by declining to permit more than one counsel to intervene in the examination of any given wit-

r. Nichols, 126 Wis. 401, 105 N. W. 815 (1905).

2. Logan v. McMullen, (Cal. App. 1906) 87 Pac. 285.

3. Equitable Life Assur. Soc. v. Maverick, (Tex. Civ. App. 1904) 78 S. W. 560.

1. Munro v. Stowe, 175 Mass. 169, 55 N. E. 992 (1900).

2. Reagan v. St. Louis Transit Co., 180 Mo. 117, 79 S. W. 435 (1904).

ness. He may properly require that a counsel who has started the examination or cross-examination<sup>1</sup> of a witness should finish it without the intervention of other counsel on the same side, should more than one be retained.<sup>2</sup> The confusion, repetitions, cross-purposes, time-wasting elaboration, conflicting theories, cannot fail to protract a trial. Still, the matter is one of administration; and circumstances may arise which will justify or require a trial judge to permit more than one counsel to interrogate a witness. The practice and certain obvious considerations affecting it are thus stated by Lord Ellenborough:<sup>3</sup> "Convenience certainly requires that the examination of a witness should be carried on entirely by the gentleman who begins it, and several counsel clearly cannot be permitted to put questions to the same witness, one after another, in the manner apprehended. But I think the leading counsel has a right, in his discretion, to interpose, and to take the examination into his own hands. Very unpleasant consequences might follow if this were not allowed. If a gentleman, it being his first appearance in a court of justice, should be much embarrassed in the course of examining a witness, it would be hard if it were in the power of the opposite party to prevent his leader from stepping in to his relief. And other occasions may be imagined when it may be very important that the gentleman who conducts the cause should have the privilege of putting questions to a witness originally called by a co-adjutor." The same rule is applied where several defendants rely on separate defenses tried in the same action: "The witnesses are to be examined by the counsel successively, in the same manner as if the defense were joint and not separate."<sup>4</sup> Should the examining counsel fall ill,<sup>5</sup> or other valid excuse appear for deviation from the customary practice or administrative procedure in this respect,<sup>6</sup> the right of the court to *permit* examination by more than one counsel is un-

1. *Walker v. McMillan*, 21 N. Br. 31, 41, 6 Can. Sup. 241, 245 (1882).

2. *Mason v. Ditchbourne*, 1 M. & Rob. 460, 462 (1835).

3. *Doe v. Roe*, 2 Cowp. 280 (1809).

4. *Chippendale v. Masson*, 4 Campb. 174 (1815), per Gibbs, C. J.

The contrary course may be reasonable under certain circumstances. *Ridgway v. Philip*, 1 C. M. & R. 415, 417 (1834). Such cross-examination

will be permitted even where, as a general matter, examination by more than one counsel is prohibited by rule of court. *State v. Bryant*, 55 Mo. 75 (1874).

5. *Tilton v. Beecher*, Abbott's Rep. I, 552 (1875).

6. *Citizens' Bank v. Fromholz*, 64 Neb. 284, 89 N. W. 775 (1902); *Doe v. Roe*, 2 Campb. 280 (1809).

doubted. When such a deviation is allowed, the trial judge may still, in the interests of expediting business, intervene or prescribe general conditions to avoid useless repetition<sup>7</sup> or other waste of the court's time.

*Different Stages.*—It is important to observe that the mischief against which the practice was intended to protect the administration of justice does not arise where different counsel propose to examine the witness *at separate stages*. The trial is not retarded by such a course; the rule, therefore, is not applied. No requirement as a rule is made, for example, that a counsel who has examined a witness at one stage is the only man who can examine him for the same side at a subsequent one.<sup>8</sup> The court will permit other counsel on the same side to assist their examining associate in any way except intervening in the examination. As said by Lord Ellenborough,<sup>9</sup> they may suggest questions to him. An associate may take and argue objections as to evidence.<sup>10</sup>

**§ 556. Principles of Administration; (D.) Judge Should Aim to Give Certainty to Substantive Law.**—The final general canon of administration is that of legal certainty. Litigation should be so conducted as not only to (A) secure and enforce the substantive rights of the parties,<sup>1</sup> (B) further justice,<sup>2</sup> (C) do it in as speedy a manner as is consistent with the higher ends,<sup>3</sup> but also (D) to create and establish a more complete and perfect system of substantive law.

*In seeking to secure to the community as a whole the benefit of the litigation between individuals, the judiciary as a body, having a continuous tradition and a constant object, endeavors to utilize the results of repeated jury trials for making the rules of law more precise and definite. Such action is evidently in the line of the public interest. "Supposing a state of facts often repeated in practice is it to be imagined that the court is to go on leaving the standard to the jury forever." <sup>4</sup> It is important that some general rule or principle should, if possible, be distilled from repeated action by juries upon a given state of affairs. In proportion as*

7. Kasson's Est., 127 Cal. 496, 59 Pac. 950 (1900).

8. Olive v. State, 11 Neb. 1, 25, 7 N. W. 444 (1881).

9. *Supra*, § 555.

10. Baumier v. Antian, 65 Mich. 31, 31 N. W. 888 (1887).

1. *Supra*, §§ 332 *et seq.*

2. *Supra*, §§ 463 *et seq.*

3. *Supra*, §§ 544 *et seq.*

4. Holmes, Common Law, 123.

the debatable ground between liability and its absence is reduced by making the line of distinction clearer the cause of jurisprudence is advanced.<sup>5</sup>

Where successive juries upon substantially similar facts evidence by their decisions a fairly uniform tendency to draw a particular inference from these facts, the judge may, in committing the decision of the same question to a jury call attention to this inference, if approved by him, as being a reasonable one, which the jury may properly consider, giving it such weight as they may think proper. The court has announced a "presumption of fact," so called.<sup>6</sup> Should this tentative and provisional effort to establish a principle in the matter be confirmed by subsequent verdicts and appear to be in the public interest, a further step is taken. The court will instruct the jury that when this inference of fact is found to exist they may, unless and until additional facts appear to vary its effect, assume it to be correct and act upon it. In other words, the inference is ruled to be, *prima facie*, true. This is the announcement of an assumption or in the more usual phrase, "presumption of law."

A settled and uniform usage to hold an established inference *prima facie* correct may, however, practically form part of the standards of conduct maintained in the community. Its recognized and therefore anticipated regularity may be such as to render any departure from it in a particular case inequitable because a surprise on the party affected. Other considerations of public policy make it desirable that the law should be rendered certain or, very possibly, that a particular rule should be established.<sup>7</sup>

5. *Supra*, §§ 146 *et seq.*

6. *Infra*, § 1027.

7. "Grants are frequently presumed from a principle of quieting the possession." *Hillary v. Waller*, 12 Vesey 239, 252 (1806).

**Living and legal memory.**—An instance is furnished by the earlier law in England relating to cases of prescriptive right. It finally came to be established, as an inference or "presumption" of fact that when a party had given evidence of a usage during *living* memory it would be inferred that the same usage continued during the whole period of *legal* memory (fixed by Stat. 32 H. 8 at 60

years). But large interests of property became dependent upon the continued enforcement of the presumption. Great loss and hardship might well be caused by permitting it to be disregarded or offset in any particular case. The inference, therefore was not "an ordinary question of fact." *Bryant v. Foot*, L. R. 2 Q. B. 172, per Blackburn, J. (1867); *Jenkins v. Harvey*, 1 C. M. & R. 877 (1835). The rule was accordingly made a presumption of law, and in many instances, treated as conclusive;—verdicts to the contrary being uniformly set aside.

The inference is, therefore, declared to be irrebuttable. The "presumption" is said to be "conclusive." In reality a rule has been added to the substantive law relating to the matter about which the inference is concerned.<sup>8</sup> A very desirable legal result is thus accomplished; the law has been made more definite. The experience of the community has registered itself into its body of laws and the latter more nearly adapted to present conditions. Still, the regularity of judicial precedent has not been, in appearance, in the least affected. It is all legitimate legal growth, tempered with the common sense and conservatism of common law judges in dealing with practical problems. Nothing is discarded until finally forced out; the judge is weaving continually the necessary new material into the old. It is not surprising, however, that the care used in obscuring the process occasionally leads to ambiguity.

*To avoid the appearance of judicial legislation* or for other reasons, the court is apt to use language adapted to the statement of a rule of law, and color is lent to this presentation of the matter by the general assumption that where all facts are found their legal effect is a "matter of law."<sup>9</sup>

**§ 556a. (Principles of Administration; D. Judge Should Aim to Give Certainty to Substantive Law); Use of Reason.—**

In few respects has greater certainty been conferred upon the substantive law than by the imposition of *reason*, logical or legal, as the proper test of extra judicial and judicial conduct alike. Legal conduct, in many respects, is that which is reasonable;<sup>1</sup> and the limits of reasonableness, in various aspects of human activity, are constantly being fixed and narrowed by the influence of judicial administration. Much of this valuable work

8. *Lost grant*.—The entire process of carrying an inference of fact into the substantive law of a given subject is illustrated by the various steps taken by the courts in presuming the existence of a lost grant from adverse possession for a given period.

9. *Supra*, § 119. But compare the language of Williams, J., in *Pearce v. Lansdowne*, 69 L. T. Rep. 316 (1893). "I do not quite know why the functions of the judge and those of the

jury are not kept properly separate in dealing with these acts of Parliament, but there seems to be a sort of notion that if the facts of the particular case are admitted, the result is that the functions of the judge and the jury are thereby altered, and that the jury ceases to be the tribunal which is to draw the necessary inferences of fact and that it becomes the duty of the judge to draw them."

1. *Supra*, § 146.

in conferring certainty upon substantive law is being done by the appellate courts.<sup>2</sup>

At the same time, the substantive right of parties litigant to the use of reason<sup>3</sup> is, *pari passu*, being established by appellate courts as the supreme test of correct procedural and administrative action on the part of inferior tribunals to an extent which would seem well to warrant a brief examination before proceeding to the very important topic of Judicial Knowledge which is to form the subject of the following chapter. The same use of reason which the trial<sup>4</sup> judge properly seeks, at every turn, to enforce upon the jury, finally reversing their action by awarding a new trial should they have failed to employ it, appellate courts are constantly applying, both as a standard of concession and requirement to the action of the trial judge, whether his function be judicial, administrative or executive.

**§ 557. Action of Appellate Court; Judicial Function of Trial Judge; Substantive Law.**— Any ruling as to substantive law, whether in open or confused<sup>1</sup> connection with administrative or judicial rulings, is clearly subject to review. On ordinary principles, any ruling as to matter of substantive law or procedure, incidental to a subsidiary finding<sup>2</sup> as that deciding a subordinate issue of fact in a particular way renders certain evidence admissible or inadmissible,<sup>3</sup> that the court has or has not a discretion in the matter may constitute error. Under these circumstances if the substantive rights of the party said to be aggrieved appear to have been injuriously affected, the result reached by the trial court will be modified or annulled;— unless, indeed, as is the rule in certain jurisdictions, it shall appear that no possible injury could have been done by the ruling in question.<sup>4</sup>

**§ 558. (Action of Appellate Courts; Judicial Function of Trial Judge); Findings of Fact.**— A finding by the trial judge as to a preliminary or subsidiary fact may be final or provisional,<sup>1</sup> according as the ultimate determination as to the existence of the fact is or is not within the duty of the presiding judge. If it is

2. *Supra*, §§ 145 *et seq.*

3. *Supra*, §§ 385 *et seq.*

4. *Supra*, § 307.

1. *Supra*, §§ 267.

2. *Com. v. Coe*, 115 Mass. 481, 505 (1874).

3. *Com. v. Gray*, 129 Mass. 474 (1880).

4. *Com. v. Gray*, 129 Mass. 474 (1880).

1. *Supra*, §§ 79 *et seq.*

within his province and is justified by the rules of reasoning,<sup>2</sup> it is "a finality as much as the verdict of a jury upon a question of fact"<sup>3</sup> and will not be reviewed in an appellate court in a civil<sup>4</sup> or criminal<sup>5</sup> proceeding;— unless the judge sees fit to permit a revision.<sup>6</sup> But in respect to failure to exercise the faculty of reason in making an inference of fact the appellate court stands to the judge presiding at *nisi prius* in much the same position that the presiding justice himself occupies as regards the trial jury. To fail in exercising the reasoning faculties through ignorance, prejudice, lack of competent evidence upon which a finding could be based,<sup>7</sup> or for any other cause, is in violation of the rule of substantive law requiring the use of reason and is subject to correction on review at the hands of an appellate court.

**§ 559. (Action of Appellate Courts; Judicial Function of Trial Judge; Findings of Fact); Facts Conditioning Admissibility.**

— While the action of the presiding justice in submitting evidence to the jury is not reversible in an appellate tribunal, if the finding of a preliminary fact necessary to admissibility is logically permissible, the party may ask that the jury, in discharging their function of weighing the evidence submitted, should reverse the finding of the judge as to the existence of the preliminary fact.<sup>1</sup> The usual effect of the ruling that evidence, the admissi-

**2. How far discretionary.**— The determination of a subsidiary question of fact is said necessarily to rest chiefly "in the discretion of the presiding judge." *Lane v. Moore*, 151 Mass. 87, 91 (1890). This may be doubted, if by discretion is implied irresponsible action. See *Com. v. Gray*, 129 Mass. 474 (1880). Discretion may be properly predicated of the exercise of an administrative function but hardly of an act of judgment based upon evidence. The finding of a judge is no more a matter of discretion, than that of a jury would be.

**3.** *Lane v. Moore*, 151 Mass. 87 (remoteness of declarations showing mental condition) (1890); *State v. Pike*, 49 N. H. 399 (1870).

**4.** *Walker v. Curtis*, 116 Mass. 98 (genuineness of papers) (1874); *O'Connor v. Hallinan*, 103 Mass. 547

(competency of wife as a witness) (1870).

**5.** *Com. v. Robinson*, 146 Mass. 571 (general scheme or plan) (1888); *Com. v. Gray*, 129 Mass. 474 (1880); *Com. v. Culver*, 126 Mass. 464 (confession voluntary) (1879).

**6.** *Com. v. Robinson*, 146 Mass. 571 (1888).

**7.** *Com. v. Williams*, 105 Mass. 62, 68 (1870).

**1.** If a testimony is admitted against a party's objection, on the basis of a finding by the presiding justice that a preliminary fact, necessary to admissibility exists, it may often happen that the opponent of the evidence may still ask the jury to disregard it because such fact does not in reality exist. *Com. v. Robinson*, 146 Mass. 571 (1888).

bility of which is conditioned upon the existence of a preliminary fact, may be laid before the jury, is merely that sufficient facts have been made to appear to convince the judge that the jury may, within the bounds of reason, find that the preliminary fact exists.<sup>2</sup> The ruling merely places the matter before the jury. It fails to give, in any sense, to the existence of the conditioning fact the probative weight of the judge's unqualified endorsement. "The fact of the admission of the evidence by the judge does not in a legal sense give it any greater weight with the jury;<sup>3</sup> it does not affect the burden of proof<sup>4</sup> or change the duty of the jury in weighing the whole evidence."<sup>5</sup>

**§ 560. (*Action of Appellate Courts; Judicial Function of Trial Judge; Findings of Fact; Facts Conditioning Admissibility*); Competency of Witnesses.**—For example, the finding as to the competency of a witness is not final;<sup>1</sup> where the evidence is reported for the purpose, but will be revised though with hesitancy and caution.<sup>2</sup>

**§ 561. (*Action of Appellate Courts*); Administrative Function of Trial Judge.**—It is, as has been said,<sup>1</sup> the essential characteristic of judicial administration that it is governed by the use of enlightened *reasoning*. The necessity for employing legal reason is the only limitation upon its exercise. Not the *result*, but the process of reaching it, is in the control of an appellate court. If the administrative act of the trial judge is defensible on grounds of legal reasoning, it will stand. If, on the contrary, it is not supportable on these grounds the discretion is said to be "abused" and the action is reversed. The ruling of a trial judge, for example, in refusing an interpreter may be reviewed if the effect of the ruling would be to deprive the party of a reasonable opportunity of proving his case<sup>2</sup> but the question of the qualification of a particular witness to act as an interpreter is within the

2. *Com. v. Robinson*, 146 Mass. 571 (1888).

3. *Com. v. Robinson*, 146 Mass. 571 (1888).

4. *Com. v. Robinson*, 146 Mass. 571 (1888).

5. *Com. v. Robinson*, 146 Mass. 571 (1888).

1. *Udy v. Stewart*, 10 Ont. Rep. 591 (1886). It has been properly

held, however, that unless some rule of law has been wrongly applied, the finding is not a subject of exceptions. *Com. v. Mullins*, 2 Allen (Mass.) 295 (1861).

2. *Peterson v. State*, 47 Ga. 524 (1873).

1. *Supra*, § 176

2. *Chicago, etc., Ry. Co. v. Shenk*, 131 Ill. 283, 23 N. E. 436 (1890).



judge's discretion and so not reviewable;<sup>3</sup> — unless, indeed, the discretion is so exercised as to amount to the denial of the right to have any interpreter whatever.

**§ 562. (Action of Appellate Courts); Executive Function of Trial Judge.**— The action of a presiding judge in enforcing obedience to his orders or in protecting the administration of justice is part of his function as judge, and, so long as his acts are done under the guidance of reason, their propriety is not reversible in an appellate court.<sup>1</sup> It has even been held that if the trial judge had jurisdiction his action, reasonable or unreasonable, will not be reversed.<sup>2</sup> On appeal in proceedings for contempt, questions not presented or decided in court below are not open to consideration.<sup>3</sup>

**3. California.**— *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73 (1880).

**Michigan.**— *Swift v. Applebone*, 23 Mich. 252 (1871).

**Illinois.**— *Chicago, etc., Ry. Co. v. Shenk*, 131 Ill. 283, 23 N. E. 436 (1890).

**Washington.**— *State v. Thompson*, 14 Wash. 285, 44 Pac. 533 (1896).

**United States.**— *Barber, etc., Co. v. Odasz*, 57 U. S. App. 129, 85 Fed. 454 (1898).

**1. Alabama.**— *Wyatt v. Magee*, 3 Ala. 94 (1841).

**Arizona.**— *Ex parte Brown*, 3 Ariz. 411, 77 Pac. 489 (1892).

**Connecticut.**— *William Rogers Mfg. Co. v. Rogers*, 38 Conn. 121 (1871).

**Georgia.**— *Wakefield v. Moore*, 65 Ga. 268 (1880); *Tucker v. Keen*, 60 Ga. 410 (1878).

**Illinois.**— *Clark v. People*, 1 Ill. 340, 12 Am. Dec. 177 (1830).

**Indiana.**— *Brown v. Brown*, 4 Ind. 627, 58 Am. Dec. 641 (1853).

**Iowa.**— *State v. Archer*, 48 Iowa 310 (1878).

**Michigan.**— *Bagley v. Scudder*, 66 Mich. 97, 33 N. W. 47 (1887); *Froman v. Froman*, 53 Mich. 581, 19 N. W. 193 (1884); *Haines v. Haines*, 35 Mich. 138 (1876).

**New York.**— *Watrous v. Kearney*, 79 N. Y. 496 (1880) [*affirming* (N.

Y.) 11 Hun 584]; *Cochrane v. Ingersoll*, 73 N. Y. 613 (1878).

**North Carolina.**— *Murray v. Berry*, 113 N. C. 46, 18 S. E. 78 (1893).

**Ohio.**— *Compare Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638 (1889).

**Texas.**— *Moon Bros., etc., Co. v. Waxahachie Grain, etc., Co.*, 13 Tex. Civ. App. 103, 35 S. W. 337 (1896).

**Wisconsin.**— *West v. State*, 1 Wis. 209 (1853).

**United States.**— *Heinze v. Butte & B. Consol. Min. Co.*, 63 C. C. A. 388, 129 Fed. 274 (1904).

**England.**— *Rex v. Clement*, 4 B. & Ald. 218, 23 Rev. Rep. 260, 25 Rev. Rep. 710, 6 E. C. L. 458 (1821); *In re Wray*, 36 L. R. Ch. D. 138, 56 L. J. Ch. 1106, 67 L. T. Rep. (N. S.) 605, 36 Wkly. Rep. 67 (1887). See also *Whitaker v. McBride*, (Neb. 1904) 98 N. W. 877.

**2. Otis v. Superior Court of Los Angeles County, (Cal. 1905) 82 Pac. 853; *Seastream v. New Jersey Exhibition Co.*, (N. J. Ch. 1905) 61 Atl. 1041 [*affirmed* in 65 Atl. 982]; *In re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790 [*affirmed* in 207 U. S. 541, 28 S. Ct. 178] (1907).**

**3. Fairfield v. U. S.**, 146 Fed. 508, 76 C. C. A. 590 (1906). A witness punished for contempt in refusing to

**§ 563. (Action of Appellate Courts; Executive Function of Trial Judge); All Intendments Made in Favor of Trial Judge.—**

No mere irregularities, not prejudicing the substantive rights of the person claiming relief against an order for contempt, will be permitted to affect the action of the trial judge.<sup>1</sup> For a reversal, the difficulty with prior proceedings must be so radical that they are, in whole or in part, void.<sup>2</sup> Every fact found by the trial judge will be assumed to be correct, all intendments being made in its favor.<sup>3</sup> In the same way it will be assumed that all steps were regularly and properly taken, and, unless it distinctly appears to the contrary on the record, that the party aggrieved was given a full opportunity to be heard.<sup>4</sup> It will be taken for granted that all his defenses were duly considered,<sup>5</sup> and existing rules of practice properly followed.<sup>6</sup> Such an assumption will include the existence of all facts grounding the jurisdiction of the trial judge.<sup>7</sup>

**§ 564. (Action of Appellate Courts; Executive Function of Trial Judge; All Intendments Made in Favor of Trial Judge); Error in Law Necessary for Reversal.—** Indeed, it might fairly be

answer questions cannot raise the point that the evidence sought from him was not material. *Nelson v. U. S.*, 201 U. S. 92, 26 S. Ct. 358, 50 L. ed. 673 (1906). But see *Hurley v. Com.*, 188 Mass. 443, 74 N. E. 677 (1905); *State ex rel. Chicago, B. & Q. R. Co. v. Bland*, 189 Mo. 197, 88 S. W. 28 (1905).

1. *California*.—*Ex p. Rowe*, 7 Cal. 181 (1857).

*Georgia*.—*Martin v. Burgwyn*, 88 Ga. 78, 13 S. E. 958 (1891); *Clement v. Bunn*, 60 Ga. 334 (1878).

*Indiana*.—*Hawkins v. State*, 126 Ind. 294, 26 N. E. 43 (1890).

*New York*.—*In re Copecutt*, 52 N. Y. St. Rep. 724, 23 N. Y. Suppl. 394, 69 Hun 110 (1893).

*South Carolina*.—*In re Stokes*, 5 S. C. 71 (1873).

*Wisconsin*.—*In re Perry*, 30 Wis. 268 (1872).

2. *Drady v. Dist. Court of Polk County*, (Iowa 1905) 102 N. W. 115; *Ex p. Keeler*, 45 S. C. 537, 23 S. E. 865, 55 Am. St. Rep. 785, 31 L. R. A. 678 (1895).

3. *Gunn v. Calhoun*, 51 Ga. 501 (1874); *Sudlow v. Knox*, (N. Y. 1869) 4 Abb. Dec. 326, 7 Abb. Pr. (N. S.) 411; *Park v. Park*, 80 N. Y. 156 (1880); *People v. Bergen*, 6 Hun 267 (1875); *Com. v. Newton*, (Pa. 1857) 1 Grant 453. See also *Beck v. State*, 72 Ind. 250 (1880). A statement, filed by a judge and entered of record, relating to an alleged contempt in the presence of the court, imports absolute verity. *Mahoney v. State*, (Ind. App. 1904) 72 N. E. 151.

4. *Papke v. Papke*, 30 Minn. 260, 15 N. W. 117 (1883).

5. *Seventy-six Land, etc., Co. v. Fresno County Super. Ct.*, 93 Cal. 139, 28 Pac. 813 (1892).

6. *Lewis v. Miller*, 13 Sm. & M. 110 (1849).

7. *Fenn v. Georgia Ry. & Electric Co.*, 122 Ga. 280, 50 S. E. 103 (1905); *Mahoney v. State*, (Ind. App. 1904) 72 N. E. 151 (accused present); *In re Cuddy*, 131 U. S. 289, 9 Sup. Ct. 703, 33 L. ed. 154 (1889).

said that questions of fact will not be deemed reviewable at all,<sup>1</sup> so long as the rules of reason are observed,<sup>2</sup> including, as seems proper, within the term "matter of law," any violation of the rule that in all judicial proceedings reason must be employed.<sup>3</sup> Revision properly extends merely to matters of law.<sup>4</sup>

*Where error in law* — including failure to use the reasoning faculty — is involved in the exercise of an executive power, a judgment may be set aside.<sup>5</sup> If no error in law has been committed, an appellate court will simply affirm the action of the trial judge.<sup>6</sup>

**§ 565. (Action of Appellate Courts; Executive Function of Trial Judge; All Intendments Made in Favor of Trial Judge); A Contrary View.**—A characteristic tenderness for those accused of attacking established authority has quite logically evolved a conflicting view, to the effect that every fact necessary to show the jurisdiction of the trial judge must be made affirmatively to appear.<sup>1</sup> No intendments or presumptions can be indulged against

1. *Georgia*.—*Smith v. Cook*, 39 Ga. 191 (1869).

*Kansas*.—*In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747 (1877).

*Kentucky*.—*Turner v. Com.*, 2 Metc. 619 (1859); *Bickley v. Com.*, 2 J. Marsh. 572 (1829).

*Louisiana*.—*State ex rel. Barthet v. Judge Div. B, etc.*, 40 La. Ann. 434, 4 So. 131 (1888).

*New York*.—*Holly Mfg. Co. v. Verner*, 143 N. Y. 639, 37 N. E. 648 (1894).

*North Carolina*.—*Green v. Green*, 130 N. C. 578, 41 S. E. 784 (1902). But see *In re Deaton*, 105 N. C. 59, 11 S. E. 244 (1890).

*Oklahoma*.—*Burke v. Territory*, 2 Okl. 499, 37 Pac. 829 (1894).

*Oregon*.—*State v. McKinnon*, 8 Or. 487 (1880).

*Canada*.—*Young v. Saylor*, 23 Ont. 513 (1893).

2. The facts found by the judge in contempt proceedings are not reviewable on appeal, except for the purpose of passing upon their sufficiency to warrant the judgment. *Green v.*

*Green*, 130 N. C. 578, 41 S. E. 784 (1902).

3. *Green v. Green*, 130 N. C. 578, 41 S. E. 784 (1902).

4. *Florida*.—*Ex p. Senior*, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133 (1896).

*Illinois*.—*Ex p. Thatcher*, 7 Ill. 167 (1845).

*Iowa*.—*State v. Seaton*, 61 Iowa 563, 16 N. W. 736 (1883).

*Kansas*.—*In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747 (1877).

*Maine*.—*Bradley v. Veazie*, 47 Me. 85 (1860).

*New York*.—*In re Blumenthal*, 22 Misc. 704, 50 N. Y. Suppl. 49 (1898) [*affirming* 22 Misc. 764, 48 N. Y. Suppl. 1101 (1897)].

*North Carolina*.—*Ex p. Summers*, 27 N. C. 149 (1844).

5. *State v. Denham*, 30 Wash. 643, 71 Pac. 196 (1903).

6. *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650 (1876); *In re Copcutt*, 52 N. Y. St. Rep. 742, 23 N. Y. Suppl. 394, 69 Hun 110 (1893).

1. *Otis v. Superior Court of Los Angeles County*, (Cal. 1905) 82 Pac.

the prisoner.<sup>2</sup> The order must be strictly construed in favor of his liberty.<sup>3</sup> Thus, an attorney, punished for contempt in continuing to address the court, though admonished not to do so, goes free because the record does not show that he was not rightfully and respectfully discharging his duty to the court and to his client.<sup>4</sup> It has even been held that a judgment on summary proceedings for contempt in the presence of the court, where no complaint is filed, no evidence taken and no trial had, may be reviewed without a motion for a new trial.<sup>5</sup> The change in view is not that of jurisprudence but of the legislature. Practically the effect of permitting one who has insulted a judge calmly to appeal as from a police court judgment is regrettable. Thus, while at common law a superior court of record was the sole judge of contempt committed against its authority and dignity, and its judgments inflicting punishments on contemnors were not reviewable, a person adjudged guilty of contempt by a circuit court may, under the express provisions of Bel. and C. Ann. Codes and St., § 676, appeal in like manner and with like effect as from a judgment in an action.<sup>6</sup>

**§ 566. (Action of Appellate Courts; Executive Function of the Trial Judge); Powers of an Appellate Court.**— In matters of contempt an appellate court has the same power as in other error in law.<sup>1</sup> Regarding questions of fact wherever reason has been followed by the trial judge there will be no reversal merely because the exercise of reason might have led the appellate court to a different conclusion.<sup>2</sup>

**§ 567. (Action of Appellate Courts; Executive Function of Trial Judge; Powers of an Appellate Court); Reversal of Action.**— It may reverse an order of the trial judge *in toto*<sup>1</sup> or annul

853; *State v. District Court of Taylor County*, (Iowa 1904) 99 N. W. 712; *Roncoroni v. Gross*, 86 N. Y. Suppl. 1113, 92 App. Div. 366 (1904).

2. *Kanter v. Clerk of Circuit Court*, 108 Ill. App. 287; *Crites v. State*, (Neb. 1905) 105 N. W. 469; *Ogden v. State*, (Neb. 1903) 93 N. W. 203.

3. *Crites v. State*, (Neb. 1905) 105 N. W. 469.

4. *Ex parte Shortridge*, (Cal. App. 1907) 90 Pac. 478.

5. *Crites v. State*, (Neb. 1905) 105 N. W. 469.

6. *State v. Gray*, 42 Or. 261, 70 Pac. 904 (1902) [*rehearing* denied, 71 Pac. 978 (1903)].

1. Questions finally determined by the appellate court are *res adjudicata*. *Ryan v. Kingsbery*, 89 Ga. 228, 15 S. E. 302 (1892).

2. *In re Chesseman*, 49 N. J. L. 115, 6 Atl. 513, 60 Am. Rep. 596 (1886).

1. *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650 (1876); *Patton v. Harris*, 15 B. Monr. 607 (1855).

any part of it. Naturally, if the order for the disobedience to which the administrative sanction of the trial judge is being applied is itself vacated or reversed, the order enforcing obedience to it fails in effect at the same time.<sup>2</sup>

**§ 568. (*Action of Appellate Courts; Executive Function of Trial Judge; Powers of an Appellate Court*); Modification of Action.**— Instead of reversing, the appellate court may modify the order of the trial judge,<sup>1</sup> as by reducing a fine imposed by him<sup>2</sup> to the statutory limit.<sup>3</sup> The appellate court may make any orders incidental to carrying out its decree; — e. g., provide for enforcing a modification.<sup>4</sup>

**§ 569. (*Action of Appellate Courts; Executive Function of Trial Judge; Powers of an Appellate Court*); Other Orders.**— The appellate tribunal may dismiss the matter altogether, when it would be impossible for it to take efficient action, as where a party aggrieved had at the time of hearing already served the full term of imprisonment.<sup>1</sup> The matter may be sent back to the trial court with directions as to the manner in which to proceed.<sup>2</sup> It may well, however, on the contrary, decline to undertake to make such an order as the trial judge should have made.<sup>3</sup> But it may direct the lower court to order a reference.<sup>4</sup>

2. *Smith v. McQuade*, 36 N. Y. St. Rep. 557, 13 N. Y. Suppl. 63 (1891).

1. *Turner v. Com.*, (Ky.) 2 Metc. 619 (1859); *Bickley v. Com.*, 2 J. J. Marsh. 572 (1829); *Fechter v. Hays*, 4 Ky. L. Rep. 217 (1882); *State ex rel. Barthet v. Judge Div. B.*, etc., 40 La. Ann. 434, 4 So. 131 (1888).

2. *Buffalo Loan, Trust, etc., Co. v. Medina Gas, etc., Co.*, 74 N. Y. Suppl. 486, 68 App. Div. 414 (1902).

3. *Luedeke v. Coursen*, 3 Misc. 559, 23 N. Y. Suppl. 314, 52 N. Y. St. Rep. 516 (1893).

As to costs in the appellate court, see *Tucker v. Gilman*, 37 N. Y. St. Rep. 958, 14 N. Y. Suppl. 392, 20 N. Y. Civ. Proc. 397 (1891).

4. *Gilman v. Byrnes*, 10 N. Y. Civ. Proc. 46 (1886).

1. *Loven v. People*, 46 Ill. App. 306 (1892).

2. *Russell v. Mohr-Weil Lumber Co.*, 102 Ga. 563, 29 S. E. 271 (1897); *Tolleson v. People's Sav. Bank*, 85 Ga. 171, 11 S. E. 599 (1890).

3. *Livingston v. Swift*, 23 How. Pr. 1 (1861).

4. *Ryan v. Kingsbery*, 89 Ga. 228, 15 S. E. 302 (1892). See also *Atlantic, etc., Tel. Co. v. Baltimore, etc., R. Co.*, 46 N. Y. Super. Ct. 377 (1880).

## KNOWLEDGE; JUDICIAL.

### CHAPTER VIII.

#### KNOWLEDGE. JUDICIAL.

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§ 570. **Knowledge.**—Certain of the more frequently employed terms with which the law of evidence deals having been defined<sup>1</sup> with sufficient fullness for practical convenience, the nature and allotment of function between court and jury having been considered in some detail, the intimate and essential relation of evidence to judicial administration being ascertained,<sup>2</sup> and the purposes for which and the general canons under which judicial administration operates through the law of evidence having been indicated,<sup>3</sup> the inquiry in hand is nearly prepared to enter into the principal subject with which the law of evidence as a working system must necessarily concern itself;—how facts submitted to judicial investigation may be proved. Advance into this field must, however, be for a time suspended in order that two preliminary inquiries of great importance to an adequate consideration of the subject be first undertaken. Before it can properly be determined how facts in issue may be proved, it must be pre-determined (1) to what facts the necessity of making proof

1. *Supra*, §§ 1 *et seq.*

3. *Supra*, §§ 332 *et seq.*

2. *Supra*, § 266.

attaches and (2) when a fact is to be proved which of the litigants is required to establish it. The first of these inquiries concerns itself with the matter of *knowledge*; — which is the subject of the present and two following chapters; the second involves the topic of the burden of proof, which will be considered in the chapter then next ensuing.<sup>4</sup>

Neither antecedent knowledge nor burden of proof will be found to have any exclusive relation to the law of evidence. Both are highly important in connection with any contest to be decided by the use of reason. Certain facts need not be proved because they are already known. Being thus outside the domain of proof, they are strictly speaking, also outside of the law of evidence. These facts, of which no proof need be offered because it would be a waste of time to prove to the tribunal facts which it already knows with sufficient certainty for forensic purposes, fall into two main divisions, not without a definite relation to the two branches of court and jury of which the tribunal is itself composed. These classes of facts as to which no proof need be offered, may be designated, respectively, as judicial knowledge and common knowledge. Judicial knowledge is that which the judge has, or is assumed to have by virtue of his office; — *virtute officii*. It covers, in main, propositions of law and, to a limited extent, facts established as the direct result of legal provisions. Common knowledge is the property of judge and jury alike, equally with any other well informed members of the community. It is confined to matters of fact.<sup>5</sup>

It has seemed expedient to divide common knowledge into (a) that which is general among the community — to which the

4. *Infra*, §§ 930 *et seq.*

5. **Common and judicial knowledge**, are, it may be conceded, most frequently united under the general term "judicial knowledge," "judicial notice," "judicial cognizance" or some similar expression. There seems little propriety, however, in classing as "judicial," knowledge which has no relation to the judicial functions, but is shared by every well-informed person; while the especial and appropriate knowledge of the judge which he acquires or at least, is assumed to have, by reason of his office,

justifies and, indeed, requires, the application to it of the term "judicial." It is true that these two species or classes of facts — rules of domestic law and facts generally known in the community — possess an important feature in common. Neither need be proved by evidence. But the juridical reasoning upon which the maintenance of this common incident is based is so diverse in the two cases as to furnish slight cause for joining things so dissimilar under a single term.

generic term "common" may be deemed appropriate, and (b) the technical knowledge which is general among members of a class, trade or profession. This class or species of knowledge may be designated as *special*, and will form the subject of a separate chapter.<sup>6</sup> Frequently knowledge of this class is indiscriminately grouped with judgment, conclusion or inference of skilled observers under the general head of "expert" or "opinion" evidence.<sup>7</sup> This special knowledge is, indeed, often part of the premise upon which the conclusion of the skilled observer<sup>8</sup> or the judgment of the expert<sup>9</sup> is predicated. But a clear distinction exists, in the nature of things, between an inference drawn by the reasoning faculty and the premises of fact upon which it is based. The knowledge of the witness, the *voyant* and *oyant*, the observer by sense perception, of facts in evidence, may well be spoken of as *particular*.

**§ 571. Knowledge of Law; In General.**—The court's knowledge of the law it is appointed to apply and enforce is not so much a fact as a function. In themselves considered, propositions of domestic law differ in no way from propositions of foreign. They are equally matters of fact.<sup>1</sup> To announce and enforce the provisions of a certain code of laws, substantive or procedural, is one of the judicial powers of the court,<sup>2</sup> and a very important object in the creation of the tribunal. Knowledge of that code is therefore an essential attribute of the office. Cognizance of these rules of law is not, like that of facts in general,<sup>3</sup> something which comes to the judge from without, i. e., *dehors* the judicial office. Knowledge of domestic law is intrinsic in the judge, whose action, in this respect, binds the jury and is, for the purposes of the case, final as to the rights of the parties.

**§ 572. Common and Judicial Knowledge.**—Essential differences exist between the knowledge which a judge has of the domestic law of the jurisdiction—more or less extensive—which he is set to enforce, and that general information which is fairly to be designated as common knowledge.<sup>1</sup> Knowledge of notorious facts, i. e., common knowledge, the judge may be *assumed* to share with other intelligent men. But he may decline to notice the existence

6. *Infra*, §§ 870 *et seq.*

7. *Infra*, §§ 1791 *et seq.*

8. *Infra*, §§ 1947 *et seq.*

9. *Infra*, §§ 2371 *et seq.*

1. *Supra*, §§ 40 *et seq.*

2. *Supra*, §§ 69, 165.

3. *Supra*, §§ 6, 7.

1. *Infra*, §§ 691 *et seq.*

of such facts and may require that they be proved. The jury share the same common knowledge. The parties may, in many cases, dispute the fact which is said to be commonly or "judicially" known. Common knowledge, moreover, covers as a rule the deliberative facts and those general propositions which are at the basis of all legal and logical reasoning, so far as relates to matter of fact, rather than those which are probative, *res gestæ* or constituent.<sup>2</sup> Knowledge of domestic law the judge *must* have. He has no option or discretion as to whether he will have it or not. It is his elementary duty to know the rules, to state them for the guidance of the jury and fully to determine, for the purposes of the trial, the legal rights of the parties. To decline to perform this duty would be an abdication, *pro tanto*, of his judicial office. For the discharge of this duty he is at all times during the trial responsible and he alone. He is not at liberty to decline to rule as to his judicial knowledge until the parties supply him with actual information,—as he might do in a matter of common knowledge. He must rule; and his ruling creates and formulates an essential and absolutely indispensable element in the task of judging as to the existence of the right or liability asserted; to wit, the "rule of law" which must be applied, for the purpose, to the constituent facts.

*The parties have not only the right to insist that the judge should act, but to insist that he shall act right.*<sup>3</sup> Should he fail to do so, it is error;—for which redress will be furnished on taking appropriate steps. Questions which present themselves for consideration are: (a) What propositions of law are embraced within the scope of this function? (b) How are its duties discharged? Consideration of the appropriate steps by which the rights of the party to correct rulings by the trial court are preserved and enforced falls outside the scope of this treatise.

§ 573. "Judicial Notice."—This common knowledge is variously spoken of as judicial cognizance or judicial notice. Neither of these terms seem especially felicitous. As is said elsewhere,<sup>1</sup> the term "judicial" is strictly inapplicable;—for common knowledge is by no means an appendage of the judge's function. The constant use of this knowledge is equally noticeable in case of the jury. The judge, indeed, will instruct the jury as

2. *Supra*, § 47.

1. *Supra*, § 570

3. *Supra*, §§ 385 *et seq.*

to knowledge of such facts.<sup>2</sup> But it is not necessary that he should do so. If "judicial" is objectionable, the word "notice" seems equally so. It tends to impart a sense of *surprise*, as if something unexpectedly had intruded itself into the judicial consciousness; not in the way of a known fact now remembered but rather as of something which forces itself upon the mind or which the person in question voluntarily consents to admit as part of the mental equipment. As usually employed, "judicial knowledge," "judicial cognizance" and "judicial notice" present scarcely recognizable differences of meaning. The phrases are used practically indiscriminately, to cover two very dissimilar set of facts — those which the judge knows *qua* judge and those facts which everyone knows. It has been deemed advisable to disassociate these two classes of fact from under the common designation of "judicial knowledge," — reserving the phrase exclusively for those which are part of the judicial office.

**§ 574. Judicial vs. Personal Knowledge; Judge.**—Judicial knowledge is not the personal knowledge of the judge.<sup>1</sup> To a certain extent, a presiding judge may use his knowledge of facts provided these are not part of the *res gestæ* of a case. He may properly cognize facts which are notorious in the community because arising out of celebrated or protracted litigation<sup>2</sup> or known to him, because established in judicial proceedings before him in the same<sup>3</sup> or another<sup>4</sup> case. He may even remember that he has done something now on record in his court.<sup>5</sup> In none of these

2. *Mobile, etc., R. Co. v. Ladd*, 92 Ala. 287, 9 So. 169 (1890); *Cash v. State*, 10 Humphr. (Tenn.) 111 (1849).

1. *Steenerson v. R. Co.*, 69 Minn. 353, 72 N. W. 713 (1897); *Marriot v. Pascal*, 1 Leon. 159, 161 (1588). *Infra*. § 575.

2. *Davies v. Hunt*, 37 Ark. 574 (1881).

3. *Robertson v. Meyers*, 7 U. C. Q. B. 423 (1850).

4. *California*.—*People v. Lon, Yeck*, 123 Cal. 246, 55 Pac. 984 (chinese perjury) (1899).

*Kentucky*.—*Bryan v. Beckley*, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276 (1809).

*Louisiana*.—*Graham v. Williams*,

21 La. Ann. 594 (1869) (foreign statute).

*Texas*.—*Hatch v. Dunn*, 11 Tex. 708 (1854) (colonization contract).

*United States*.—*U. S. v. Teschmaker*, 22 How. (U. S.) 392, 16 L. ed. 353 (foreign statute, land office procedure) (1859); *Consequa v. Willings*, 6 Fed. Cas. No. 3,128, Pet. C. C. 225. (usage) (1816).

5. *Secrist v. Petty*, 109 Ill. 188 (1883) (signed paper); *Robertson v. Meyers*, 7 U. C. Q. B. 423 (1850). This sort of knowledge the judge may use in connection with his administrative duty of expediting causes by throwing the burden of evidence as to that point on the party against whom he rules.

cases, is it, strictly speaking, the particular<sup>6</sup> knowledge of the judge, as an individual. As has been said, judicial knowledge is that which a judge has *as judge*; it does not include the personal or particular<sup>7</sup> knowledge which he acquires *while* judge or which becomes important in a judicial inquiry after he has become one. That a presiding justice cannot give judgment on his personal and private knowledge is a doctrine as old as Chief Justice Gascoigne,<sup>8</sup> and has at all times since been regarded as good law both in England,<sup>9</sup> Canada<sup>10</sup> and in the United States.<sup>11</sup> Where he possesses particular knowledge<sup>12</sup> which is important to the cause

6. *Supra*, § 570.

7. *Supra*, § 570.

8. Y. B. 7 H. IV, 41, pl. 5 (1406).

9. Marriot's Case, 1 And. 202, 1 Leon, 159, Moore 228, (1588); Partidge v. Strange, Plowd. 83 (1578). "The judge he ought not to carry himself according to his private knowledge which he hath of the said fact, *scil.* to acquit the prisoner, but all that he can do is to respite judgment." Marriot v. Pascal, 1 Leon. 159, 161 (1588); Thayer, Prelim. Treat., 291.

10. Canada.—Bank of British North America v. Sherwood, 6 U. C. Q. B. 213 (facts abating a writ) (1849).

11. Fox v. State, 9 Ga. 373, 376 (1851) (credibility).

Illinois.—Dines v. People, 39 Ill. App. 565 (1890).

Indiana.—Stephenson v. State, 28 Ind. 272 (age from inspection) (1867).

Mississippi.—Smith v. Moore, 3 How. 40 (person has *mania a potu*) (1838). State v. Edwards, 19 Mo. 675, 676 (1854) (previous conviction).

Nebraska.—State v. Chase County School Dist. No. 24, 38 Neb. 237, 56 N. W. 791 (1893) (false statements in pleadings).

New York.—Purdy v. Erie R. Co., 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669 (1900); Cassidy v. McFarland, 139 N. Y. 201, 34 N. E. 893 (1893) (case suitable for a refer-

ence); Matter of Van Nostrand, 3 Misc. (N. Y.) 396, 24 N. Y. Suppl. 850 (1893) (legal fees higher than customary).

North Dakota.—Amundson v. Wil-son, 11 N. D. 193, 91 N. W. 37 (1902) (witness cannot be excluded because he proposes to testify contrary to the court's knowledge).

Vermont.—State v. Horn, 43 Vt. 20, 23 (1870) (law of another State).

Wisconsin.—Halaska v. Cotzhansen, 52 Wis. 624, 9 N. W. 401 (1881) (judge's knowledge of legal services rendered in a cause tried before him, considered).

12. Brown v. Lincoln, 47 N. H. 468 (where a judge familiar with a signature admitted it as *prima facie* genuine) (1867); Wisconsin Central Ry. Co. v. Cornell, 49 Wis. 162, 164 (judge's personal knowledge of a portion of the state considered) (1880).

United States.—Griffing v. Gibb, 2 Black. 519, 17 L. ed. 353 (false statements in pleadings) (1862). "The justice cannot act from his own knowledge and call that knowledge proof." Rosekrans v. Antwerp, 4 Johns. 239 (1809) (sickness of witness); State v. Horn, 43 Vt. 20, 23 (1870) (law of sister state). For a magistrate to act precisely on his personal knowledge, as by excluding a witness because he proposes to testify to a fact which, as the judge says, Shafer v. Eau Claire, 105 Wis. 239, 81 N. W. 409 (1900) is "con-

of justice it is the duty of the judge to take the stand as a witness,<sup>13</sup> even when presiding at the trial.

*Foreign Law or Procedure.*—The administrative power of the judge may involve a certain limited personal knowledge regarding matters which did they relate to the jurisdiction of the forum, might properly be subjects of his judicial knowledge.<sup>14</sup> As this knowledge is not the *particular* knowledge of a witness, i. e., does not relate to the *res gestæ*,<sup>15</sup> the matter as to the judge's using or acquiring information on the subject may well be treated as an administrative one. Thus, for example, the modern tendency of decision is to assimilate in treatment, foreign and domestic law;<sup>16</sup> to deem matters of judicial procedure, foreign or domestic, matter of law,<sup>17</sup> and to extend cognizance of matters of law in such a manner as to cover its direct official results,<sup>18</sup> including matters generally known to the legal profession.<sup>19</sup> A judge, therefore, may judicially know the law<sup>20</sup> or procedure of an American state, the law<sup>21</sup> or procedure of a foreign country, or facts notorious in the limited professional community of which the judge is a member.<sup>22</sup> In a sense, this knowledge is *personal* to the judge. He cannot be required to know such facts, as would be the case were the law or procedure domestic. More properly, however, the knowledge is used, as a rule, to expedite the judicial business before the court,<sup>23</sup> and is a fair exercise of the function of administration.

**§ 575. (*Judicial vs. Personal Knowledge; Judge*); Judge as Witness; England.**—The early English practice seems clearly

trary to what I know to be the fact from my own personal knowledge," constitutes error.

Great familiarity on the part of a trial judge with the subject-matter of a case may properly be considered by an appellate court in deciding whether justice has probably been done. *Wisconsin Cent. R. Co. v. Cornell Univ.*, 49 Wis. 162, 164 (1880). See also *Halaska v. Cotzhausen*, 52 Wis. 624, 9 N. W. 401 (1881); *Conn. Gen. St.* 1887, § 689.

13. *Secrist v. Petty*, 109 Ill. 188 (1883); *Hoyt v. Russell*, 117 U. S. 401 (1886); *Brown v. Piper*, 91 U. S. 37, 42 (1875); *Fenwick's Trial*, 13 How. St. Tr. 663, 667 (1696).

14. *Supra*, § 571.

15. *Supra*, § 47.

16. *Infra*, § 587.

17. *Supra*, § 41.

18. *Infra*, §§ 637 *et seq.*

19. *Infra*, § 697.

20. *Herschfeld v. Dixel*, 12 Ga. 582 (1853); *Rush v. Landers*, 107 La. 549, 35 So. 95, 57 L. R. A. 353 (1901); *State v. Rood*, 12 Vt. 396 (1840).

21. *Arayo v. Currel*, 1 La. 528, 20 Am. Dec. (1830).

22. *People v. McQuaid*, 85 Mich. 123, 48 N. W. 161 (value of unofficial publications) (1891); *Day v. Decousse*, 12 L. C. Jur. 265 (1868) (lawyer out of practice).

23. *Supra*, §§ 544 *et seq.*

to have authorized a judge to testify as a witness even before a jury at a trial over which he was himself presiding or before a court of which he was a member.<sup>1</sup> The prevailing opinion seems to have been that stated by Sir John Hawkes, as solicitor-general:<sup>2</sup> "If a judge knows anything whereby the prisoner might be convicted or acquitted (not generally known), then I do say he ought to be called from the place where he sate and to go to the bar and give evidence of his knowledge; and so the judge in H. IV's time<sup>3</sup> ought to have done, and not to have suffered the prisoner to have been convicted and then get a pardon for him; for a pardon will not always do the business." The immediate reference of the learned solicitor-general is to criminal cases; the reason, however, applies even more strongly and directly in civil actions; and, in fact, the basis of Sir John Hawkes' argument is, that as the rule prevails in civil cases, no cause can be assigned why it should not obtain also in criminal ones.<sup>4</sup> Later, in England, doubts as to the propriety of such a course were expressed; — it being felt that exposing a judge to cross-examination and comment,<sup>5</sup> allowing him, in appearance, at least, to assume the role of a partisan, was but little calculated to enhance public respect for the judiciary.

1. Oate's Trial, 10 How. St. Tr. 1079, 1142 (1685); Regicides' Trials, Kel. 12 (1660). In this case, there being several judges, the witnesses did not return to the bench during the trial. "It seems agreed that it is no exception against a person's giving evidence either for or against a prisoner, that he is one of the judges or jurors who are to try him." Hawkins, Pleas of the Crown, b. 2, c. 46, § 80 (1716); Earl of Stafford's Trial, 7 How. St. Tr. 1293, 1413, 1442, 1487 (1680).

2. Fenwick's Trial, 13 How St. Tr. 537, 667 (1696), per Sir John Hawkes, Solicitor-General.

3. Y. B. 7 H. IV, 41, pl. 5 (1406).

4. "Every man knows that a judge in a civil matter tried before him, and a counsel even against his client, has been enforced to give evidence (provided it be not of a secret communicated to him by his client), for in that particular a judge ceases to be a judge, and is a witness; of

whose evidence the jury are the judges, though he after reassume his authority and is afterwards a judge of the jury's verdict. . . . If it be so in civil matters, let any man show me a reason why the law is not so in criminal matters." Fenwick's Trial, 13 How. St. Tr. 537, 667 (1696), per Sir John Hawkes, Solicitor-General.

5. "With respect to those who fill the office of judge, it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceedings before them; and, as everything which they can properly prove can be proved by others, the Courts of law discountenance, and I think I may say prevent, them from being examined." Duke of Buccleuch v. Metropolitan Board, L. R. 5 E. & I. App. 429, 433 (1872).



Especial insistence has been made to this effect where the judge who testifies is sole judge presiding at the trial.<sup>6</sup>

**§ 576. (*Judicial vs. Personal Knowledge; Judge as Witness; Judge*); American Practice.**— The courts of the United States receive the evidence of a judge, whether that of a single justice presiding at the trial,<sup>1</sup> or one of a number of judges before whom a trial is being held.<sup>2</sup> Grave doubts as to the propriety of the practice have, however, been entertained in very authoritative judicial quarters of the United States.<sup>3</sup>

**§ 577. (*Judicial vs. Personal Knowledge; Judge as Witness; Judge*); Sole Judge.**— These objections are based upon purely practical considerations. No incongruity is found in the mere fact that a judge should testify as a witness.<sup>1</sup> The inconsistency is

6. *R. v. Petrie*, 20 Ont. 317, 323 (1890).

1. "The law could not disqualify a judge, even if the judge were a material witness." *State v. Barnes*, 34 La. Ann. 395, 399 (1882), per Bermudez, C. J., obiter. "It is in no respect *infra dignitatem* for the judge to appear as a witness in this mode." 1 Sandf. Suppl. 701 (1848), per Re. Heyward.

*Contra*, *Shockley v. Morgan*, 103 Ga. 156, 29 S. E. 694 (1898); *Ross v. Buhler*, 2 Mart. N. S. 312 (1824); *People v. Miller*, 2 Park Cr. 197, 200 (1854). See also *Reno M. & L. Co. v. Westerfield*, 26 Nev. 332, 67 Pac. 961, 69 Pac. 899 (1902).

2. *State v. Duffy*, 57 Conn. 525, 18 Atl. 791 (1889) (justice of the peace); *U. S. v. Fries*, Wharton's State Trials, 482, 532 (1799). "The inclination of the Courts has been to hold that when it is necessary for the conduct of the trial that one should act as judge, he may not be called from the bench to be examined as a witness; but when his action as a judge is not required because there is a sufficient court without him, he may become a witness; though it is then decent that he do not return to the bench." *People v. Dohring*, 59 N. Y. 374, 379 (1874).

*California*.—"The judge himself or any juror, may be called as a witness by either party; but in such case it is in the discretion of the Court or judge to order the trial to be postponed or suspended and to take place before another judge or jury." C. C. P. (1872), § 1883.

*Idaho*.—Rev. St. (1887), § 5959.

*Illinois*.—Rev. St. (1874), c. 148, § 5.

*Iowa*.—Code (1897), § 4610.

*Kentucky*.—C. C. P. (1895), § 603.

*Louisiana*.—Rev. L. (1897), § 3192.

*Montana*.—C. C. P. 1895, § 3164.

*Nebraska*.—Comp. St. 1899, § 5922.

*Nevada*.—Gen. St. 1885, § 3408.

*North Dakota*.—Rev. C. 1895, § 5705.

*South Dakota*.—Stats. 1899, § 6546.

*Tennessee*.—Code 1896, § 5594.

*Texas*.—C. Cr. P. 1895, § 778.

*Utah*.—Rev. St. 1898, § 3415.

3. *Dabney v. Mitchell*, 66 Ala. 495, 503 (1880) (a judge may exclude his own affidavit); *Morss v. Morss*, 11 Barb. 510, 515 (1851).

felt to be in endeavoring to reconcile, at the same time, the capacities of witness and *presiding* judge. This has been deemed calculated to bring the judicial office into disrepute and to lose for it a measure of the popular respect which is essential to its highest social usefulness. A judge undergoing cross-examination in his own court, before a jury whom, a few moments later, he will instruct as their presiding magistrate, in part at least, on his own testimony, trying to hold the scales even while adding weight to one of them, is scarcely an impressive spectacle. That the presiding justice will give undue weight to his own evidence if in conflict with that of others is almost inevitable.<sup>2</sup> It is difficult to separate the office and its incumbent to an extent which makes the comments of counsel on the judge's motives, veracity, power of observation, memory and the like, fail to lower the dignity of the office itself. And yet, unless this right of cross-examination and comment is frankly conceded and freely exercised, the party against whom the judge's evidence bears may well have suffered a serious injury. Where the fact established by the judge's testimony is of a formal nature, this danger is reduced to a minimum; — though even here proof has been rejected.<sup>3</sup> But, in any case, a litigant may well complain of having the power and dignity of a great office thrown, like the sword of Brennus, into the scale against him.<sup>4</sup> In civil actions the evidence of a sole judge has been rejected, in courts which have no clerk, on account of the practical difficulty of the judge swearing himself.<sup>5</sup> The evidence

1. *State v. Duffy*, 57 Conn. 525, 528, 18 Atl. 791 (1889).

2. "If the judge, when he tries the facts, must weigh the evidence, he must do so impartially; this, perhaps, he cannot be easily supposed to do when he is to weigh his testimony against that of another." *Ross v. Buhler*, 2 Mart. (N. S.) 312 (1824), per Martin, J.

3. *Randall v. Wadsworth*, 130 Ala. 633, 31 So. 555 (1902) (absence of paper from files).

4. *Estes v. Bridgforth*, 114 Ala. 221, 21 So. 512 (1897).

5. *Baker v. Thompson*, 89 Ga. 486, 15 S. E. 644 (1892); *McMillen v. Andrews*, 10 Ohio St. 112 (1859). "When, however, not he but a jury

is to try an issue of facts, it would seem the reason in some degree fails. Yet cogent ones present themselves: in a Court composed of one judge only, who is to administer the oath? It cannot be done by any but a member of the Court, and he is the only one. . . . It seems to us some legislative provision is necessary in a case like this. Otherwise, the party cannot attain his right." *Ross v. Buhler*, 2 Mart. (N. S.) 312 (1824), per Martin, J. Where a statute prescribes that the oaths of witnesses shall be administered by the presiding judge, the latter, if sole judge, cannot testify on being sworn by another judge. *Perry v. Weyman*, 1 Johns. 520 (1806).

of a sole judge has, therefore, been excluded in criminal cases;<sup>6</sup>—but it has also been accepted.<sup>7</sup>

**§ 578. (*Judicial vs. Personal Knowledge; Judge as Witness; Judge*); One of Several Judges.**—Nor do the administrative infelicities disappear when a plurality of judges is present. “In examining this question upon principle, there seems to be the same difficulty, whether the court consists of one judge or of three, all of them being necessary to constitute the court. In the latter case, if one of the judges be called as a witness, there are but two judges left to administer the oath, to decide upon his competency if he be objected to, and to settle questions as to the relevancy of his testimony. If he refuses to answer, there are but two judges to commit him for contempt.”<sup>1</sup> Certain troubles may, indeed, disappear. The witness no longer is forced to rule on objections to his own testimony or engage in unseemly wranglings with counsel over his rulings. But other difficulties arise. Propriety would obviously suggest that a judge who has acted as a witness retire from further participation in the case. Where the witness, however, is one of a number of judges necessary to the constitution of the court, embarrassing questions may well arise as to whether proceedings would be valid upon his retirement, or even as to the effect of his leaving the bench at all.<sup>2</sup> In other words, while “the objection to a juror’s being a witness rests mainly on a question of public policy, and that the objection to a judge being sworn depends on an additional and different ground, viz., that of want of power to discharge the duties of a court while acting as a witness.”<sup>3</sup>

**§ 579. (*Judicial vs. Personal Knowledge; Judge as Witness; Judge*); Conclusions.**—On the whole, while some force must be conceded to these objections, they seem rather chimerical than sound. The evidence to be given by a trial judge is either material or formal. If it be formal, the necessity for requiring the actual

6. *Rogers v. State*, 60 Ark. 76, 84, 29 S. W. 894 (1894). The judge cannot be required to give his testimony. *State v. De Maio*, N. J. L. (1903) 55 Atl. 644.

7. *U. S. v. Lyon*, Wharton’s State Trials, 333, 335 (1798).

1. *Morss v. Morss*, 11 Barb. 510, 511 (1851), per Parker, J.

2. *Rogers v. State*, 60 Ark. 76, 86, 29 S. W. 894 (1894), per Riddick, J.; *Morss v. Morss*, 11 Barb. 510, 511 (1851), per Parker, J.

3. *Morss v. Morss*, 11 Barb. 510, 515 (1851), per Parker, J.

evidence of the judge will readily be obviated, in most cases, by agreement of counsel, on a mere statement by the judge as to what his testimony would be. In no event, will any considerable warmth, forensic or actual, be developed on the part of opposing counsel. Greater forensic friction between court and counsel might well be feared where the fact covered by the judge's testimony is material. Still greater would be the danger were the fact controlling, as in the case put by Gascoigne, C.J.,<sup>1</sup> where the judge witnesses the commission of a murder. But it scarcely could happen that so important a circumstance should escape notice until the time of trial. Usually, if foreseen, the dilemma could be prevented.<sup>2</sup> But, whatever the difficulties, the right of a party to prove his case is paramount, and to protect a litigant in its enjoyment constitutes a primary object of administration.<sup>3</sup> To it may properly yield, in case of conflict, either the personal preferences of the judge, or even the orderly and seemly administration of justice. It is better, if either is to be sacrificed, that substance be preferred to appearance and procedure. An inharmonious and inelegant administration may well be deemed a venial fault as compared with the absolute denial of all justice involved in refusing a party the right to use the only available means of proving his case.

§ 580. (*Judicial vs. Personal Knowledge*); Jury.—Common knowledge is not the personal knowledge of the jury or any member of the panel. The old practice of allowing or requiring a jurymen to use facts of personal knowledge<sup>1</sup> has been universally abandoned; and the law is now settled that a jurymen is not at liberty to use his individual knowledge;<sup>2</sup>—even though there be no attempt to supply, in this way, facts in the *res gestæ*.<sup>3</sup> In other words, a jurymen is not permitted to act on his own knowledge—

1. Y. B. 7 H. IV, 41 pl. 5 (1406).

2. Maitland v. Zanga, 14 Wash. 92, 44 Pac. 117 (1896), per Dunbar, J.

3. *Supra*, §§ 334 et seq.

1. Schmidt v. New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529, 535 (1854).

2. Georgia.—Chattanooga, etc., R. Co. v. Owen, 90 Ga. 265, 15 S. E. 853 (1892).

Kansas.—Craver v. Hornburg, 26 Kan. 94 (1881).

Massachusetts.—Schmidt v. New

York Union Mut. F. Ins. Co., 1 Gray 529 (1854).

Texas.—Wharton v. State, 45 Tex. 2 (1876).

Wisconsin.—Johnson v. Superior Rapid Transit R. Co., 91 Wis. 233, 64 N. W. 753 (1895).

United States.—Head v. Hargrave, 105 U. S. 45, 26 L. ed. 1028 (1881).

England.—R. v. Rosser, 7 C. & P. 648 (1836) (value of a watch).

3. *Supra*, § 47.

not shared by the general community — as to probative or deliberative facts; — e. g., facts of a historical nature<sup>4</sup> or with regard to the character of a witness.<sup>5</sup> The particular knowledge of a jurymen, in like manner, cannot be classed as “judicial.” Such facts should be given in evidence by the jurymen as a witness. He must testify to the fact on the stand, in the ordinary way.<sup>6</sup>

**§ 581. (*Judicial vs. Personal Knowledge; Jury*); Juror as Witness.**—The right of a party litigant to require the evidence of a member of the panel which is trying his case where the evidence is reasonably necessary to proof of the proponent’s contention, may be regarded as undoubted, either in England<sup>1</sup> or in the United States;<sup>2</sup> — although it has been held that a jurymen may refuse to testify if so minded.<sup>3</sup> After testifying, the witness may return to his place on the panel.<sup>4</sup>

4. *Gregory v. Baugh*, 4 Rand. (Va.) 611 (1827).

5. *Collins v. State*, 94 Ga. 394, 19 S. E. 243 (1894); *Chattanooga, etc., R. Co. v. Owen*, 90 Ga. 265, 15 S. E. 853 (1892) [*overruling* earlier cases]; *Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray (Mass.) 529 (1854); *Wharton v. State*, 45 Tex. 2, 4 (1876); *Johnson v. Superior Rapid Transit R. Co.*, 91 Wis. 233, 64 N. W. 753 (1895).

In South Carolina personal knowledge of credibility has been permitted a certain weight, such being among the precise objects of selecting jurors from the neighborhood. *McKain v. Love*, 2 Hill (S. C.) 506 (1834).

6. *Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray (Mass.) 529 (infamous character of a witness) (1854); *Rex v. Sutton*, 4 M. & S. 532 (1816); *Partridge v. Strange*, Plowd. 77 (1553). See also *Parks v. Ross*, 11 How. (U. S.) 362, 13 L. ed. 730 (1850).

1. *Heath’s Trial*, 18 How. St. Tr. 1, 123, (1744); *Reading’s Trial*, 7 How. St. Tr. 259, 267 (1679); *Fitzjames v. Moys*, 1 Sid. 133 (1663).

2. *Arkansas*.—A. Stats. 1894, § 2965.

*California*.—Cal. C. P. 1872, § 1883.

*Georgia*.—*Savigny F. & W. R. Co. v. Quo*, 103 Ga. 125, 29 S. E. 607 (1897).

*Idaho*.—Rev. St. 1887, § 5959.

*Iowa*.—*State v. Cavanaugh*, 98 Ia. 688, 691, 68 N. W. 452 (1896).

*Kentucky*.—C. C. P. 1895, § 603.

*Montana*.—C. C. P. 1895, § 3164.

*Nebraska*.—*Chicago, R. I. & P. R. Co. v. Collier*, 95 N. W. 472 (1903). 472 (1903).

*Nevada*.—Gen. St. 1885, § 3408.

*New York*.—*People v. Dohring*, 59 N. Y. 374, 378 (1874).

*North Dakota*.—Rev. C. 1895, § 5705.

*Pennsylvania*.—*Howser v. Com.*, 51 Pa. 332, 337 (1865), per Woodward, C. J.; *Plank Road Co. v. Thomas*, 20 Pa. 9195 (1852).

*South Dakota*.—Stats. 1899, § 6546.

*Utah*.—*People v. Thiede*, 11 Utah 241, 39 Pac. 837 (1895); Rev. St. 1898, § 3415.

*Vermont*.—*Dunbar v. Parks*, 5 Vt. 217 (1802).

*Washington*.—C. & Stats. 1897, § 5001. But see also *R. v. Petrie*, 20 Ont. 317, 319 (1890).

3. *Manley v. Shaw*, Car. & M. 361 (1840), per Tindal, C. J.

4. *Fitzjames v. Moys*, 1 Sid. 133 (1663).

**§ 582. (*Judicial vs. Personal Knowledge; Jury; Juror as Witness*); Objections to the Evidence.**—The grounds on which the widely prevalent criticism adverse to using, as a witness, a member of the jury which is trying the case, are clearly and very concisely stated in the following portion of an opinion by Judge Parker, supreme court of New York:<sup>1</sup> “The objection to his competency rests on public policy. In all cases he has to pass upon his own credibility; and this difficulty would be greatly increased in case of his impeachment. He may refuse to answer, in which case his commitment would delay the trial. The party against whom he is called is subjected to a great disadvantage, for the juror may be expected to maintain unyieldingly in the jury box the opinions he has expressed on the witness-stand. It may plausibly be objected, therefore, that respect for the feeling of the juror and regard for justice to the parties should exclude the juror as a witness and require the objection to be made on the calling of the jury, that the party need not suffer for the want of his testimony.” In other words, the thought is that a party may be prejudiced by the intervention of the juror as a witness in that effective sifting of his testimony by cross-examination and comment would be impossible and because the juror, settled in his view, might be resolute against the party and carry the jury with him. It must be obvious, however, that all that is necessary to preserve every right is for the juror to be left off the panel and another substituted in his place;—while the right of the party to prove his case is entirely too important to be in the least controlled by any such speculative injury to his adversary as is here suggested. As in case of the judge as a witness,<sup>2</sup> the evidence of the juror is either formal or material. If formal, no prejudice is apt to arise to the opposing party. If the evidence is material, any mischief can be prevented by the simple expedient of challenging the juror,<sup>3</sup> as, indeed, has repeatedly been held or provided by statute.

**§ 583. Scope of Judicial Knowledge of Law.**—The extent of judicial knowledge of domestic law is conditioned by the general principle that a court knows the law it is legally called upon to

1. *Morss v. Morss*, 11 Barb. 510, 6 (1877); *Atkins v. State*, 60 Ala. 511 (1851). 45, 49 (1877). The right of chal-

2. *Supra*, § 575.

3. *Commander v. State*, 60 Ala. 1, 45, 49 (1877). The right of challenge may be expressly conferred by statute. Mo. Rev. St. 1899, § 2615.

apply or enforce. Tribunals of general jurisdiction enforce and apply, and, therefore, judicially know, not only the general body of statutes enacted by the law-making body of the forum, but also any laws constitutionally promulgated and adopted by the paramount national authority under which the court exists. Tribunals of limited or local jurisdiction, as county, circuit, police or city courts are required to know the local regulations, municipal ordinances, town by-laws and the like which it is their duty to administer. This is the extent or extension<sup>1</sup> of the court's knowledge of law. The intention of such knowledge, or the attributes to which it applies, or which are covered by it, are (1) the existence of the law, (2) the results immediately accomplished by it. This judicial knowledge, does not, properly speaking cover secondary results, i. e., those which flow from the immediate effects of the law itself. When the latter are said to be "judicially known," the cognizance is one of fact and exists by virtue of a different principle of administration, e. g., that which employs "common" knowledge. This frequently happens, as in case of the judge's knowledge of governmental functions established by law.<sup>2</sup> For convenience of treatment, courts may be roughly classified, in this connection, as (a) national, (b) state or provincial, (c) local; and the laws as to which knowledge is predicated, into unwritten and written.

#### § 584. Judicial Knowledge of Common Law; National Courts.—

Courts of any national jurisdiction using the English system of jurisprudence judicially know the unwritten common law of England. This rule applies not only to the courts of England<sup>1</sup> but to those of the United States, as the common law existed prior to the independence of the American States, legal doctrines adopted in England since that date<sup>2</sup> not being judicially known. The common law rule of judicial knowledge is a broad and general one, so far, at least, as courts of common law jurisdiction are con-

1. "The intension of a term is synonymous with its comprehension, or connotation, or depth; while the extension is synonymous with the denotation or breadth." Jevons, *Elements of Logic*, Ch. I, § III.

2. *Infra*, § 637.

1. *Cooper v. Cooper*, 13 App. Cas.

88, 59 L. T. Rep. (N. S.) 1 (1888); *Reg. v. Nesbitt*, 2 D. & L. 529 (1844).

2. *Untermeyer v. Freund*, 50 Fed. 77 (1892); *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788 (1888).

cerned. Such a court knows the rules and principles of equity,<sup>3</sup> while courts sitting in equity know the propositions of civil<sup>4</sup> and criminal<sup>5</sup> law administered by the common law courts.

**§ 585. (*Judicial Knowledge of Common Law; National Courts*); Judicial Knowledge on Appeal.**—National courts know the laws of states, colonies or provinces over which they exercise appellate jurisdiction. Thus, in England the house of lords judicially knows the unwritten law of Scotland and Ireland;<sup>1</sup>—while courts of inferior jurisdiction do not,<sup>2</sup> except where the fact is so notorious as would justify taking cognizance of any other fact generally known.<sup>3</sup> In like manner, the supreme court of the United States, exercising appellate jurisdiction from the highest court of a state, knows the law of that state;<sup>4</sup> but judicially knows as to the law of states other than that whose action is under review, merely to the same extent that the court appealed from would have had such knowledge.<sup>5</sup> Every federal court, however,

3. *Nimmo v. Davis*, 7 Tex. 26 (1851); *Westboy v. Day*, 2 E. & B. 605, 18 Jur. 10, 22 L. J. Q. B. 418, 1 Wkly. Rep. 431, 75 E. C. L. 605 (1853); *Sims v. Marryat*, 17 Q. B. 281, 79 E. C. L. 281 (1851); *Neeves v. Burrage*, 14 Q. B. 504, 19 L. J. Q. B. 68, 68 E. C. L. 504 (1849); *Elliot v. Edwards*, 3 B. & P. 181 (1892). See also *Maberly v. Robins*, 1 Marsh. 258, 5 Taunt. 625 (1814). Judicial notice is taken by the federal supreme court that the distinctions between law and equity, in a technical sense, do not obtain in the local law of Porto Rico. *Garzot v. Rios De Rubio*, (Porto Rico 1908) 28 S. Ct. 548, 209 U. S. 283, 52 L. ed. 794; *Burset v. Rios De Rubio*, (Porto Rico 1908) 28 S. Ct. 548, 209 U. S. 283, 52 L. ed. 794.

4. *Southgate v. Montgomery*, 1 Paige (N. Y.) 41 (1828).

5. *Scott v. Brown*, (1892) 2 Q. B. 724, 57 J. P. 213, 61 L. J. Q. B. 738, 67 L. T. Rep. (N. S.) 782, 4 Rep. 42, 41 Wkly. Rep. 116.

1. *Cooper v. Cooper*, 13 App. Cas. 88, 59 L. T. Rep. (N. S.) 1 (1888).

2. *Cooper v. Cooper*, 13 App. Cas. 88, 107, 59 L. T. Rep. (N. S.) 1

(1888). See also *Reg. v. Povey*, 6 Cox C. C. 83, Dears. C. C. 32, 17 Jur. 120, 22 L. J. M. C. 19, 1 Wkly. Rep. 40, 14 Eng. L. & Eq. 549 (1852).

The law of Canada stands in the same position. *Cartwright v. Cartwright*, 26 Wkly. Rep. 684 (1878).

3. *Reg. v. Nesbitt*, 2 D. & L. 529, 533 (1844) (common law of England extends to Ireland).

4. *Hanley v. Donoghue*, 116 U. S. 1, 6 S. Ct. 242, 29 L. ed. 535 (1885).

5. *Lloyd v. Matthews*, 155 U. S. 222, 15 S. Ct. 70, 39 L. ed. 128 (1894); *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788 (1888); *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 7 S. Ct. 398, 30 L. ed. 519 (1886); *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. ed. 535 (1885).

Where the court rendering the judgment under review is required by statute to know judicially the laws of other states, the Supreme Court of the United States has precisely the same powers as to judicial knowledge. *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. ed. 535 (1885).



in its original jurisdiction knows the laws,<sup>6</sup> written<sup>7</sup> or unwritten, of any state,<sup>8</sup> or territory, including the District of Columbia, which it is called upon to administer,<sup>9</sup> either as a matter of original jurisdiction or of jurisdiction acquired by removal from a state court.<sup>10</sup> And it necessarily follows from this rule that the Supreme Court of the United States when reviewing the judgment rendered in a federal court judicially knows the law of all the states and territories of the Union.<sup>11</sup>

**§ 586. (*Judicial Knowledge of Common Law*); State and Provincial Courts.**—The state courts of the American Union know the common law of England,<sup>1</sup> including early English general statutes applicable to their condition, and the principles of equity jurisprudence,<sup>2</sup> which was in force at the time of the separation from the mother country. Rules of law adopted in England since that time are not judicially known by the American courts.<sup>3</sup> Com-

6. Laws of a country formerly sovereign over the jurisdiction in question, or part thereof, will be judicially known under this rule. *U. S. v. Chaves*, 159 U. S. 452, 16 Sup. Ct. 57, 40 L. ed. 215 (1895); *U. S. v. Perot*, 98 U. S. 428, 25 L. ed. 251 (1878); *Fremont v. U. S.*, 17 How. (U. S.) 542, 15 L. ed. 241 (1854); *U. S. v. Turner*, 11 How. (U. S.) 663, 13 L. ed. 857 (1850).

7. *Lamar v. Micou*, 114 U. S. 218, 5 Sup. Ct. 857, 29 L. ed. 94 (1884).

8. *Liverpool & G. W. S. Co. v. Ins. Co.*, 129 U. S. 397, 445, 9 Suppl. 469 (1888); *Lamar v. Micou*, 114 U. S. 218, 5 Sup. Ct. 857, 29 L. ed. 94 (1884); *Owings v. Hall*, 9 Pet. (U. S.) 607, 624 (1835); *Barry v. Snowden*, 106 Fed. 571 (1901); *Western & A. R. Co. v. Roberson*, 9 C. C. A. 646, 61 Fed. 592 (1894) (Georgia and Tennessee); *Merchants Exch. Bank v. McGraw*, 8 C. C. A. 420, 59 Fed. 972 (1894) (Wisconsin); *Loree v. Abner*, 6 C. C. A. 302, 57 Fed. 159 (1893) (Pennsylvania prior to 1788); *Miller v. McQuerry*, 17 Fed. Cas. No. 9,583, 5 McLean 469 (1853).

9. The laws of an Indian tribe or nation, though occupying certain territory within the State are not ad-

ministered by the court and consequently are not judicially noticed. *Wilson v. Owens*, 30 C. C. A. 257, 86 Fed. 571 (1898) (Chicasaw Nation).

10. 18 U. S. St. at L. 472, § 6 [U. S. Comp. St. (1901) p. 512].

11. *Lamar v. Micou*, 114 U. S. 218, 5 Sup. Ct. 857, 29 L. ed. 94 (1884); *Owings v. Hall*, 9 Pet. (U. S.) 607, 9 L. ed. 246 (1835).

1. *Arkansas*.—*Eureka Springs R. Co. v. Timmons*, 51 Ark. 459, 11 S. W. 459 (1888); *Cox v. Morrow*, 14 Ark. 603 (1854).

*Kentucky*.—*Davis v. Curry*, 2 Bibb. 238 (1810).

*Louisiana*.—*Rush v. Landers*, 107 La. 549, 32 So. 95, 57 L. R. A. 353 (1902).

*New York*.—*Stokes v. Macken*, 62 Barb. 145 (1861).

*Texas*.—*Wallace v. Burden*, 17 Tex. 467 (1856).

2. *Nimmo v. Davis*, 7 Tex. 26 (1851).

3. *Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118 (1894); *Watson v. Walker*, 23 N. H. 471 (1851).

The unwritten law of Canada, is not judicially known to the state

mon law courts know, when sitting at law, the rules and principles of equity jurisprudence<sup>4</sup> and know, when sitting in equity, the rules of ordinary civil and criminal law;<sup>5</sup> but common law courts do not know, in either capacity, the rules of the ecclesiastical law.<sup>6</sup> A state court notices the unwritten law of the forum,<sup>7</sup> including the unwritten laws of any country, as France,<sup>8</sup> Spain<sup>9</sup> or Mexico,<sup>10</sup> state<sup>11</sup> or territory,<sup>12</sup> which have been operative in any portions of the domain which now constitutes the jurisdiction of the forum.

**§ 587. (*Judicial Knowledge of Common Law; State and Provincial Courts*); Foreign Unwritten Law; Sister State.—**

Unless required to do so by statute,<sup>1</sup> the courts of an American state do not judicially know the unwritten or non-statutory law of a sister state.<sup>2</sup> State courts, where it may be anticipated that

courts of the United States. *Charlotte v. Chouteau*, 25 Mo. 465 (1857); *Pickard v. Bailey*, 26 N. H. 152 (1852).

4. *Nimmo v. Davis*, 7 Tex. 26 (1851).

5. *Southgate v. Montgomery*, 1 Paige (N. Y.) 41 (1828).

6. *De Grandmont v. La. Société des Artisans, etc.*, 16 Quebec Super. Ct. 532 (1899).

7. *Gaylod's Appeal*, 43 Conn. 82 (1875); *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176 (1886).

8. *Chouteau v. Pierre*, 9 Mo. 3 (1845).

9. *Doe v. Eslava*, 11 Ala. 1028 (1847); *Berluchaux v. Berluchaux*, 7 La. 539 (1835); *Malpica v. McKown*, 1 La. 248, 20 Am. Dec. 279 (1830); *Ott v. Soulard*, 9 Mo. 581 (1845); *Chouteau v. Pierre*, 9 Mo. 3 (1845); *Matter of Hall*, 61 N. Y. App. Div. 266, 70 N. Y. Suppl. 406 (1901).

10. *Wells v. Stout*, 9 Cal. 480 (1858).

11. *Arkansas*.—*Cox v. Morrow*, 14 Ark. 603 (1854).

*Indiana*.—*Henthorn v. Doe*, 1 Blackf. 157 (1822).

*Kentucky*.—*Delano v. Jopling*, 1 Litt. 417 (1822).

*Texas*.—*State v. Sais*, 47 Tex. 307 (1877).

*West Virginia*.—*Northwestern Bank v. Machir*, 18 W. Va. 271 (1881).

12. *Crandall v. Sterling Gold Min. Co.*, 1 Colo. 106 (1868). The rule is the same in territorial courts. *Porter v. United States*, (Ind. T. 1907) 104 S. W. 855.

1. *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398 (1843); *Anderson v. May*, 10 Heisk. (Tenn.) 84 (1872). See also *Lockwood v. Crawford*, 18 Conn. 361 (1847); *Hendryx v. Evans*, 120 Iowa 310, 94 N. W. 853 (1903).

2. *Alabama*.—*Cubbedge v. Napier*, 62 Ala. 518 (1878).

*Arkansas*.—*Cox v. Morrow*, 14 Ark. 603 (1854).

*Connecticut*.—*Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398 (1843).

*Florida*.—*Tuten v. Gazan*, 18 Fla. 751 (1882).

*Indiana*.—*Robords v. Marley*, 80 Ind. 185 (1881).

*Iowa*.—*Hendryx v. Evans*, 120 Iowa 310, 94 N. W. 853 (1903).

*Kansas*.—*Ferd. Heim Brewing Co. v. Gimber*, 67 Kan. 834, 72 Pac. 859 (1903).

a federal question may arise, e. g., as to the effect of the judgment of another state,<sup>3</sup> and in certain other connections,<sup>4</sup> take judicial knowledge of the law of such other state.

Where a state recognizes acts done in pursuance of the laws of another state, its courts will take judicial cognizance of those laws, so far as may be necessary to determine the validity of the acts alleged to have been done in conformity with them.<sup>5</sup> When the courts of one state have taken judicial cognizance of the laws of another they will, "until it is proved that the law has been changed . . . presume it still exists."<sup>6</sup>

**§ 588. (Judicial Knowledge of Common Law; State and Provincial Courts; Foreign Unwritten Law; Sister State); Law of Former Sovereignities.**—The laws of a state<sup>1</sup> or country,<sup>2</sup> which at any time exercised jurisdiction over the forum, are regarded as domestic so far as in force during the time of such exercise of jurisdiction. It by no means follows that the judge, in

*Kentucky.*—Muhling v. Sattler, 3 Mete. 285, 77 Am. Dec. 172 (1860).

*Maryland.*—Baltimore, etc., R. Co. v. Glenn, 28 Md. 287, 92 Am. Dec. 688 (1867).

*Massachusetts.*—Hazelton v. Valentine, 113 Mass. 472, 478 (1873).

*Michigan.*—Kermott v. Ayer, 11 Mich. 181 (1863).

*Minnesota.*—Crandall v. Great Northern R. Co., 83 Minn. 190, 86 N. W. 10, 85 Am. St. Rep. 458 (1901).

*Nebraska.*—Barber v. Hildebrand, 42 Neb. 400, 60 N. W. 594 (1894).

*New Jersey.*—Condit v. Blackwell, 19 N. J. Eq. 193 (1868).

*New York.*—Phenix Ins. Co. v. Church, 59 How. Pr. 293 (1880).

*North Carolina.*—Hooper v. Moore, 50 N. C. 130 (1857).

*Ohio.*—Smith v. Bartram, 11 Ohio St. 690 (1860).

*Pennsylvania.*—Bollinger v. Gallagher, 170 Pa. St. 84, 32 Atl. 569 (1895).

*Rhode Island.*—Horton v. Reed, 13 R. I. 366 (1881).

*South Dakota.*—Meuer v. Chicago, etc., R. Co., 5 S. D. 568, 59 N. W. 945, 49 Am. St. Rep. 898, 25 L. R. A. 81 (1894).

*Tennessee.*—Hobbs v. Memphis, etc., R. Co., 9 Heisk. 873 (1872).

*Texas.*—Tryon v. Rankin, 9 Tex. 595 (1853).

*Vermont.*—Ward v. Morrison, 25 Vt. 593 (1853).

3. *Butcher v. Bank of Bronsville*, 2 Kan. 70 (1863) (Pennsylvania judgment); *Ohio v. Hinchman*, 27 Pa. 479, 482 (1856) (Ohio judgment); *Paine v. Schenectady Ins. Co.*, 11 R. I. 411, 415 (1877) (New York judgment); *Jarvis v. Robinson*, 21 Wis. 523 (1867) (Michigan judgment).

4. *Shotwell v. Harrison*, 22 Mich. 410, 414 (1871) (certified copy of a Massachusetts deed); *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 124 (1900) (jurisdiction of St. Louis, Mo. City Court).

5. *Carpenter v. Dexter*, 8 Wall. 513, 531 (1869).

6. *Graham v. Williams*, 21 La. Ann. 594 (1869).

1. *Henthorn v. Doe*, 1 Blackf. (Ind.) 157, 161, 163 (1822) (Virginia).

2. *U. S. v. Chaves*, 159 U. S. 452, 16 Suppl. 57 (1895) (Mexico).

all cases, requires that the fact of the unwritten law of a foreign state or country, should be proved to the court by the use of evidence. In many instances, especially where the fact is not a material one, the judge informs himself, by a resort to the usual sources of information as to the foreign law,<sup>3</sup>—its printed volumes of reports, etc.<sup>4</sup> This is not only to ascertain what the foreign law is, where he is practically making a finding of fact, but that he may learn what is the law of his own jurisdiction.

**§ 589. (*Judicial Knowledge of Common Law; State and Provincial Courts; Foreign Unwritten Law*); Other Countries**

— Neither the courts of England,<sup>1</sup> nor those of the United States,<sup>2</sup> judicially know the laws of Austria,<sup>3</sup> China,<sup>4</sup> France,<sup>5</sup> Germany,<sup>6</sup> Holland,<sup>7</sup> Mexico,<sup>8</sup> Norway,<sup>9</sup> Portugal,<sup>10</sup> Russia,<sup>11</sup> Spain,<sup>12</sup> Switzerland,<sup>13</sup> or any foreign country.<sup>14</sup>

3. *Barranger v. Baum*, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113 (1897); *Herschfield v. Dixel*, 12 Ga. 582 (1853); *Farmers' Mfg. Co. v. Spruks Mfg. Co.*, 119 Fed. 594 (1902).

4. *Infra*, § 636.

1. *Godard v. Gray*, L. R. 6 Q. B. 139, 40 L. J. Q. B. 62, 24 L. T. Rep. N. S. 89, 19 Wkly. Rep. 348 (1870); *Di Sora v. Phillipps*, 10 H. L. Cas. 624, 33 L. J. Ch. 129, 2 New Rep. 553, 11 Eng. Reprint 1168 (1863); *Bremer v. Freeman*, 10 Moore P. C. 306, 14 Eng. Reprint 508 (1857); *Reg. v. Povey*, 6 Cox C. C. 83, Dears. C. C. 32, 17 Jur. 120, 22 L. J. M. C. 19, 1 Wkly. Rep. 40, 14 Eng. L. & Eq. 549 (1852); *Bristow v. Sequeville*, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289 (1850); *Vander Douckt v. Thellusson*, 8 C. B. 812, 19 L. J. C. P. 12, 65 E. C. L. 812 (1849); *Nelson v. Bridport*, 8 Beav. 527, 10 Jur. 871 (1845); *In re Sussex Peerage*, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844); *Millar v. Heinrick*, 4 Campb. 155 (1815); *Mostyn v. Fabrigas*, 1 Cowp. 161 (1774).

2. *Dianese v. Hale*, 91 U. S. 13, 18 (1875); *The Pawashick*, 2 Low. 142 (1872); *Strother v. Lucas*, 6 Pet. (U. S.) 763, 768 (1832).

3. *Bowditch v. Soltyk*, 99 Mass. 136 (1868).

4. *State v. Moy Looke*, 7 Or. 54 (1879).

5. *Bowditch v. Soltyk*, 99 Mass. 136 (1868).

6. *American L. Ins., etc., Co. v. Rosenagle*, 77 Pa. St. 507 (1875) (Grand Duchy of Baden).

7. *Fremoult v. Dedire*, 1 P. Wms. 429 (1718).

8. *McFadden v. Mitchell*, 61 Cal. 148 (1882); *Banco de Sonora v. Bankers' Mut. Casualty Co.*, (Iowa 1903) 95 N. W. 232; *Isabella v. Pecot*, 2 La. Ann. 387 (1847).

9. *Pierce v. Indseth*, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. ed. 254 (1882).

10. *Board v. Estrella*, 5 Haw. 211, 214 (1884).

11. *State v. Behrman*, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449 (1894).

12. *Roberts' Will*, 8 Paige 446 (1840).

13. *Bowditch v. Soltyk*, 99 Mass. 136 (1868) (Geneva).

14. *Bowditch v. Soltyk*, 99 Mass. 136 (1868); *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207 (1868); *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788 (1888); *Wil-*

§ 590. (*Judicial Knowledge of Common Law; State and Provincial Courts; Foreign Unwritten Law*); **Matters of Common Knowledge.**—Matters of notoriety among the legal profession may be treated by the courts as matters of *common* knowledge. That the unwritten law of France is not identical with the common law of England is known.<sup>1</sup> The courts of the state of Louisiana, in which a modified form of the civil law prevails, judicially notice that the law of adjoining states is the common law<sup>2</sup> and, therefore, that this law differs from their own in certain particulars.<sup>3</sup> The common law of England extends to Ireland.<sup>4</sup> The ancient civil law is the basis of the jurisprudence of Mexico.<sup>5</sup> But such knowledge is only of the broad outline, the fact which is common knowledge. Facts of a secondary nature, as, e. g., the particular rules of law in a foreign state or country,<sup>6</sup> must be proved.

§ 591. **Judicial Knowledge of International Law.**—While the position of a nation toward the rest of the world is determined by the executive branch of the government,<sup>1</sup> the courts of a country know the principles of international law to which the executive department of the forum has assented.<sup>2</sup>

*Prize and admiralty courts*, whose international jurisdiction,<sup>3</sup> but not whose practice,<sup>4</sup> is judicially known by the common law

cocks *v.* Phillips, 29 Fed. Cas. No. 17,639, 1 Wall. Jr. (1843). *See also* Electric Welding Co. *v.* Prince, 200 Mass. 386, 86 N. E. 947 (1909).

1. *Matter of Hall*, 61 N. Y. App. Div. 266, 70 N. Y. Suppl. 406 (1901).

2. *Rush v. Landers*, 107 La. 549, 32 So. 95, 57 L. R. A. 353 (1902); *Sandidge v. Hunt*, 40 La. Ann. 766, 5 So. 55 (1888).

3. *Farwell v. Harris*, 12 La. Ann. 50 (1857) (slaves are personal property); *McIlvaine v. Legare*, 34 La. Ann. 923 (1882) (vendor's privilege on moveables is not recognized).

4. *Reg. v. Nesbitt*, 2 D. & L. 529, 533 (1844).

5. *Banco de Sonora v. Bankers Mut. Casualty Co.*, (Iowa 1903) 95 N. W. 232.

6. *Banco de Sonora v. Bankers' Mut. Casualty Co.*, (Iowa 1903) 95

N. W. 232 (whether in Mexico a boy is an adult at 14).

1. *Infra*, § 645.

2. *Ocean Ins. Co. v. Francis*, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549 (1828); *Strother v. Lucas*, 12 Pet. (U. S.) 410, 436, 9 L. ed. 1137 (1838); *U. S. v. Percheman*, 7 Pet. (U. S.) 51, 8 L. ed. 604 (1833). "Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations." *The Scotia*, 14 Wall. 171 (1871). *See also* *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. ed. 320 (1899); *U. S. v. Repentigny*, 5 Wall. (U. S.) 211, 18 L. ed. 627 (1866); *Soulard v. U. S.*, 4 Pet. (U. S.) 511, 7 L. ed. 938 (1830).

3. *Chandler v. Grieves*, 2 H. Bl. 605, note, 3 Rev. Rep. 525 (1796).

4. *Place v. Potts*, 8 Exch. 705, 17 Jur. 1168, 22 L. J. Exch. 269 (1853).

tribunals, have occasion with especial frequency to apply and enforce the international law, so far as the latter relates to the affairs of the sea. They, therefore, judicially know such laws.<sup>5</sup> Such a court will recognize the right of capture as prize of war and the limitations on this right of seizure imposed by the law of nations.<sup>6</sup> They know the maritime regulations adopted by the commercial nations as the law of the sea.<sup>7</sup>

A *notary public*, as being an officer recognized and sanctioned by international law, which also controls his office, and determines his customary functions,<sup>8</sup> is judicially known by the courts as existing under the law of nations.<sup>9</sup> Courts will accordingly give effect to his seal,<sup>10</sup> or jurat taken before him without a seal,<sup>11</sup> when attached to an official act shown to have been valid according to the law of the domicile of the notary.<sup>12</sup> The same effect will be given his act whether he is acting in a colony, foreign or domestic;<sup>13</sup> or in a foreign country<sup>14</sup> or in another state of the

5. *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. ed. 126 (1899) (Canadian statute adopting Revised International Navigation Regulations); *The Scotia*, 14 Wall. 170, 188 (1871); *Place v. Potts*, 8 Exch. 705, 17 Jur. 1168, 22 L. J. Exch. 269 (1853); *Chandler v. Grieves*, 2 H. Bl. 606, note, 3 Rev. Rep. 525 (1796). See, however, *semble, contra*, *The Pawashick*, 2 Low. 142 (1872).

6. *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. ed. 320 (1899) (fishing vessels exempted); *Talbot v. Seeman*, 1 Cr. 1, 37 (1801) (French marine decrees as to neutral commerce).

7. *The New York*, 175 U. S. 187, 20 S. Ct. 67, 44 L. ed. 126 [*reversing* 96 Fed. 314, 30 C. C. A. 628, 82 Fed. 819, 27 C. C. A. 154 (1899)]. See also *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788 (1888); *Sears v. The Scotia*, 14 Wall. (U. S.) 170, 20 L. ed. 822 (1871).

8. *Brooke v. Brooke*, 50 L. J. Ch. 528, 17 Ch. D. 833, 44 L. T. Rep. (N. S.) 512, 30 Wkly. Rep. 45 (1881).

9. Recognition does not extend to

the power to attest deeds. *Neese v. Farmers' Ins. Co.*, 55 Iowa 604 (1881); *Nye v. McDonald*, 2 Low. Can. Jurist 109 (1857).

10. *Cole v. Sherard*, 11 Exch. 482 (1855); *Anon*, 12 Mod. 345 (1796). Stamping paper with a seal carrying ink has been deemed valid. *Pierce v. Indseth*, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. ed. 254 (1882).

11. *Thielmann v. Burg*, 73 Ill. 293 (1874).

12. *Neese v. Farmers' Ins. Co.*, 55 Iowa 604, 8 N. W. 450 (1881); *Orr v. Lacy*, 18 Fed. Cas. No. 10,589, 4 McLean 243 (1847).

13. *Brooke v. Brooke*, 17 Ch. D. 833, 50 L. J. Ch. 528, 44 L. T. Rep. (N. S.) 512, 30 Wkly. Rep. 45 (1881); *Hutcheon v. Mannington*, 6 Ves. Jr. 823, 2 Rev. Rep. 115, 31 Eng. Reprint 1327 (1802).

14. *Pierce v. Indseth*, 106 U. S. 546, 1 S. Ct. 418, 27 L. ed. 254 (1882); *Cole v. Sherard*, 11 Exch. 482, 25 L. J. Exch. 59 (1855); *Orr v. Lacy*, 18 Fed. Cas. No. 10,589, 4 McLean 243 (1847); *Yeaton v. Fry*, 5 Cranch. 335, 3 L. ed. 117 (1809).

Union,<sup>15</sup> or within the jurisdiction of the court itself.<sup>16</sup> Special powers conferred by domestic law, such as right to administer affidavits,<sup>17</sup> must be proved in the ordinary way.

*Foreign officials* discharging functions somewhat similar to those of a notary public, are of national rather than international creation and importance. The validity of their acts must be established by evidence.<sup>18</sup>

**§ 592. Judicial Knowledge of Law Merchant.**—The law merchant is part of the common law and, as such, is judicially known.<sup>1</sup> This knowledge differs in no essential feature from knowledge of other branches of the common law, except that the cosmopolitan nature of commerce carries with it an approximation to international law which shows itself, in practice, principally by a more ready assumption on the part of the judge that the law of a foreign state or country is the same as that of the forum and, consequently, that he knows it. The force of these considerations is increased by the fact that the basis of the law merchant is the civil law, prevalent on the Continent of Europe, and that a general uniformity, not observable in other particulars, exists with regard to mercantile affairs, between the common and the civil systems of law. Of this nature are laws relating to partnership,<sup>2</sup>

15. *Denmead v. Maack*, 2 MacArthur (D. C.) 475 (1876); *Carter v. Burley*, 9 N. H. 558 (1838); *Halliday v. McDougall*, 20 Wend. (N. Y.) 81 (1838); *Orr v. Lacy*, 18 Fed. Cas. No. 10,589, 4 McLean 243 (1847).

16. *Porter v. Judson*, 1 Gray (Mass.) 175 (1854); *Browne v. Philadelphia Bank*, 6 Serg. & R. (Pa.) 484, 9 Am. Dec. 463 (1821).

17. *Teutonia Loan, etc., Bldg. Co. v. Turrell*, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419 (1897).

18. *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173 (1829) ("hussier;" a kind of bailiff); *Church v. Hubbard*, 2 Cranch 186 (1804) (certificate by a consul).

1. *Alabama*.—*Jewell v. Center*, 25 Ala. 498 (1854).

*Arkansas*.—*Davis v. Hanly*, 12 Ark. 645 (1852).

*Illinois*.—*Hunn v. Burch*, 25 Ill. 35, 38 (1860).

*New Jersey*.—*Reed v. Wilson*, 41 N. J. L. 29 (1879).

*England*.—*Edie v. East India Co.*, 1 W. Bl. 295, 2 Burr. 1216, 1228 (1761) (special custom of merchants).

"The principles of the law merchant . . . have become a part of the common law." *Munn v. Burch*, 25 Ill. 35, 38 (1860). "The court must take judicial notice not only of the law merchant, which is a part of the common law, but also of the almanac, from which it appears that the 15th day of December, 1872, fell on Sunday." *Reed v. Wilson*, 41 N. J. L. 29 (1879).

2. *Cameron v. Orleans, etc., R. Co.*, 108 La. 83, 32 So. 208 (1902) (status and liabilities).

negotiable instruments<sup>3</sup> or banking.<sup>4</sup> As in case of all laws which he is called upon to administer, a judge is not required to hear evidence bearing on the law merchant to an effect contrary to his judicial knowledge.<sup>5</sup>

**§ 593. Judicial Knowledge of Written Law; Extension and Intension.**—The general principle that a court knows the rules of law which it is organized to apply and enforce controls the judge's action as to dealing with the written law. Such laws may be conveniently divided, for purposes of examination in this particular of judicial knowledge, into (a) constitutions, (b) public statutes, (c) private statutes and (d) municipal regulations.

*Extension.*—Judicial knowledge of these written laws does not, however, extend equally to all courts. The more limited the jurisdiction of the court, the wider, or perhaps, more properly, the more microscopic, is the range of its judicial knowledge of written law. All tribunals in a jurisdiction, regardless of grade, judicially know the organic law, or constitution, through which the ultimate sovereign of the jurisdiction has established the particular form of government of which courts constitute a part. Courts of national, provincial or state jurisdiction judicially know, in addition to the constitution, such statutes as legislation in the forum has directed them to know. Usually these are only public statutes. Occasionally knowledge is required also of private statutes. Judicial knowledge of local or municipal regulations is confined to the local tribunals of limited jurisdiction whose distinctive duty it is to enforce such minor enactments; but who are, at the same time, charged with judicial knowledge of the more general statutes known to the superior courts. Such is

3. *Huie v. Brazeale*, 19 La. 457 (1841); *Sasscer v. Farmers' Bank*, 4 Md. 409 (1853); *Reed v. Wilson*, 41 N. J. L. 29 (1879); *Brandao v. Barnett*, 3 C. B. 519, 54 E. C. L. 519, 12 Cl. & F. 787, 8 Eng. Reprint 1622 (1846) (negotiability of bill of exchange); *Edelstein v. Schuler*, 2 K. B. 144, 155 (1902) (negotiable character of certain bonds).

4. *Brandao v. Barnett*, 3 C. B. 519, 54 E. C. L. 519, 12 Cl. & F. 787, 8 Eng. Reprint 1622 (1846) (lien of bankers on a customer's deposit). "The general lien of bankers is part

of the law merchant, and is to be judicially noticed, like the negotiability of bills of exchange, or the days of grace allowed for their payment. When a general usage has been judicially ascertained and established, it becomes part of the law merchant, which courts of justice are bound to know and recognize. Such has been the invariable understanding and practice in Westminster Hall for a great many years." *Brandao v. Barnett*, 3 C. B. 519, 530 (1846).

5. *Jewell v. Center*, 25 Ala. 498 (1854).



the judicial knowledge of written law in extension; — the breadth of its application.

**§ 594. (*Judicial Knowledge of Written Law*); Intension; Existence of the Law.**— In intension, or depth, this judicial knowledge of written law covers the following particulars: (a) The existence of the law in question, including the date at which it went into effect,<sup>1</sup> was suspended<sup>2</sup> or repealed;<sup>3</sup>— so far as these facts are ascertainable from the legislative records themselves or by a resort to customary sources of information regarding official proceedings. Judicial knowledge on these and similar details is not demanded when it can be acquired only by ascertaining a fact *in pais*,<sup>4</sup> as adoption at a popular municipal election of the provisions of a general permissive act relating to various public purposes,<sup>5</sup> including municipal incorporation,<sup>6</sup> or local option in the

1. *California*.— *Fowler v. Pierce*, 2 Cal. 165 (1852).

*Illinois*.— *Young v. Thompson*, 14 Ill. 380 (1853).

*Indiana*.— *Moss v. Sugar Ridge Tp.*, 161 Ind. 417, 68 N. E. 896 (1903).

*Iowa*.— *Pierson v. Baird*, 2 Greene 235 (1849).

*Louisiana*.— *L'Eglise v. Brenton*, 3 La. 435 (1832) (date of promulgation in the parishes).

*Minnesota*.— *State v. Stearns*, 72 Minn. 200, 75 N. W. 210 (1898).

*New York*.— *Ottman v. Hoffman*, 7 Misc. 714, 28 N. Y. Suppl. 28 (1894).

*Pennsylvania*.— *Speer v. Plank-Road Co.*, 22 Pa. St. 376 (1853).

*Utah*.— *People v. Hopt*, 3 Utah 396, 4 Pac. 250 (1884).

*Vermont*.— *Matter of Wellman*, 20 Vt. 653, 29 Fed. Cas. No. 17,407 (1844).

*Wisconsin*.— *Berliner v. Waterloo*, 14 Wis. 378 (1861).

*United States*.— *Walnut v. Wade*, 103 U. S. 683, 26 L. ed. 526 (1880); *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154 (1876); *Gardner v. The Collector*, 6 Wall. 499, 572, 18 L. ed. 890 (1867).

The side or marginal note of a statute in a printed copy forms no part of the statute itself and cannot

be used to explain or construe a section. *Claydon v. Greene*, L. R. 3 C. P. 511 (1868). The punctuation of a statute is not part of it. *Claydon v. Greene*, L. R. 3 C. P. 522 (1868). Nor can the title of an act be judicially noticed as part of it. *R. v. Williams*, 1 W. Bl. 93 (1758).

2. *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52 (1877); *Buckingham v. Walker*, 48 Miss. 609 (1873); *East Tennessee Iron Mfg. Co. v. Gaskell*, 2 Lea (Tenn.) 742 (1879).

3. *State v. O'Conner*, 13 La. Ann. 486 (1858); *Springfield v. Worcester*, 2 Cush. (Mass.) 52 (1848).

4. *Stein v. Morrison*, (Idaho 1904) 75 Pac. 246.

5. *State v. Burkett*, 83 Miss. 301, 35 So. 689 (1904) (working public roads); *Foster v. Swope*, 41 Mo. App. 137 (1890) (restraining hogs). See also *House v. Greensburg*, 93 Ind. 533 (1883); *Stultz v. State*, 65 Ind. 492, (1879); *Sipe v. Holliday*, 62 Ind. 4 (1878); *Johnson v. Indianapolis*, 16 Ind. 227 (1861); *Shaw v. New York Cent., etc., R. Co.*, 83 N. Y. Suppl. 91, 85 App. Div. 137 (1903).

The adoption by the voters of an amendment to a municipal charter has, however, been assumed upon the

sale of intoxicating liquors.<sup>7</sup> This, unless required to do so by statute,<sup>8</sup> the court will not do. The burden of establishing facts *in pais*, not to be gathered by the judge from the act itself or from any official source, but which are necessary to the going into effect of a statute duly enacted, or to its continued application to a particular state of facts, cannot be placed on the presiding justice but rests on the party claiming their existence.<sup>9</sup>

**§ 595. (Judicial Knowledge of Written Law; Intension); Results Directly Accomplished.**—(b) A knowledge as to the direct results accomplished by the statute. So where a statute determines the character of certain buildings as public houses under the gambling law,<sup>1</sup> founds a public institution,<sup>2</sup> or establishes a probate court in a certain county,<sup>3</sup> the judge is bound to recognize the fact. Indeed, it may be fairly said that such knowledge often is barely distinguishable from knowledge of the very existence of the law.

**§ 596. (Judicial Knowledge of Written Law; Intension); Facts Recited.**—(c) Knowledge of facts recited or recognized in the written law will be judicially known to any court whose knowledge, in extension, covers the written law itself.<sup>1</sup>

judge's knowledge. *Davey v. Janesville*, 111 Wis. 628, 87 N. W. 813 (1901). See also *Bragg v. Rush County*, 34 Ind. 405 (1870); *Harvey v. Wayne*, 72 Me. 430 (1881); *Ives v. Kimball*, 1 Mich. 308 (1849).

6. *Doyle v. Village of Bradford*, 90 Ill. 416 (1878) (villages); *Hard v. Decorah*, 43 Iowa 313 (1876); *Shively v. Langford*, 174 Mo. 535, 74 S. W. 835 (1903) (township organization); *Hopkins v. Kansas City, etc., R. Co.*, 79 Mo. 98 (1883); *Temple v. State*, 15 Tex. App. 304, 49 Am. Rep. 200 (1883).

7. *Ex p. Reynolds*, 87 Ala. 138, 6 So. 335 (1888); *Gifford v. Falmouth*, 4 Ky. L. Rep. 903 (1883); *Whitman v. State*, 80 Md. 410, 31 Atl. 325 (1895); *State v. Mackin*, 41 Mo. App. 99 (1890).

To the contrary see *Woodward v. State*, 103 Ga. 496, 30 S. E. 522 (1897).

8. *Jones v. Lake View*, 151 Ill. 663, 38 N. E. 688 (1894).

9. *Miller v. Com.*, 13 Bush (Ky.) 731 (1878); *People v. State Land Office*, 23 Mich. 270 (1871).

1. *Grant v. State*, (Tex. 1894) 27 S. W. 127.

2. *Calloway v. Cossart*, 45 Ark. 81 (1885); *Shaw v. State*, 3 Sneed (Tenn.) 86 (1855); *Oxford Poor Rate*, 8 El. & Bl. 184, 92 E. C. L. 185 (1857). See also *United States v. Harries*, 2 Bond (U. S. C. C.) 311 (1869).

3. *La Salle Co. v. Milligan*, 143 Ill. 321 (1892).

1. *Georgia*.—*Lane v. Harris*, 16 Ga. 217 (1854).

*Michigan*.—*Boyd v. Conklin*, 54 Mich. 583, 20 N. W. 595, 52 Am. Rep. 831 (1884).

*Texas*.—*Grant v. State*, 33 Tex. Cr. 527, 27 S. W. 127 (1894).

**§ 597. (*Judicial Knowledge of Written Law*); Treaties.—**

By constitutional provision, treaties legally made by the national executive are declared to be the supreme law of the land. The judges of all American courts, state<sup>1</sup> or federal,<sup>2</sup> will, therefore, know of the existence and provisions<sup>3</sup> of treaties with foreign nations or Indian tribes.<sup>4</sup> Protocols and schedules attached to a treaty,<sup>5</sup> its date,<sup>6</sup> the date of its ratification<sup>7</sup> and all other facts necessary to its legal validity have been deemed part of the treaty itself.

*Treaties.*—*Acts done under a treaty*,<sup>8</sup> foreign laws, usages,<sup>9</sup> or other facts referred to therein, unless cognizable as matters of

*Wisconsin.*—*Swain v. Comstock*, 18 Wis. 463 (1864).

*United States.*—*Wetkins v. Holman*, 16 Pet. 25, 55, 56, 10 L. ed. 873 (1842).

*England.*—*Alcinous v. Nigreu*, 4 E. & B. 217, 1 Jur. N. S. 16, 24 L. J. Q. B. 19, 3 Wkly. Rep. 25, 82 E. C. L. 217 (1854); *Rex v. Sutton*, 4 M. & S. 532 (1816); *Withers v. Warner*, 1 Str. 309 (1733).

For example, that the isle of Ely is a franchise in the nature of a riding, will be judicially known where such is said to be the fact in a public act of Parliament. *R. v. Ely*, 15 Q. B. 827 (1850). But allegations of fact in a public statute may be disproved. *R. v. Greene*, 6 Ad. & E. 548 (1837). In the same way, recitals, whether of fact or law, may, it is said, be controverted. *R. v. Haughton*, 1 E. & B. 501 (1853). The preamble of a general act of Parliament is judicially known as part of the statute. Every subject is, in judgment of law, privy to the making of it. *R. v. Sutton*, 4 M. & S. 532 (1834).

1. *La Rue v. Kansas Mut. L. Ins. Co.*, (Kan. Sup. 1904) 75 Pac. 494; *Montgomery v. Deeley*, 3 Wis. 709 (1854) (*Ashburton treaty*).

2. *Callsen v. Hope*, 75 Fed. 758 (1896) (*cession of Alaska*); *Knight v. United Land Assoc.*, 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974 (1891); *Lacroix v. Sarrazin*, 15 Fed. 489, 4 Woods 174 (1883); *U. S. v. Reynes*,

9 How. (U. S.) 127, 13 L. ed. 74 (1850) (*Louisiana treaty of cession*); *U. S. v. Reyner*, 9 How. 127 (1850) (*treaty of Paris*); *Fisher v. Harnaden*, 9 Fed. Cas. No. 4,819, 1 Paine (U. S.) 55 (1812); *U. S. v. The Peggy*, 1 Cranch (U. S.) 103, 2 L. ed. 49 (1801).

3. *La Rue v. Kansas Mut. L. Ins. Co.*, (Kan. Sup. 1904) 75 Pac. 794 (*treaty of Paris conveyed the Philippines to the United States*). The court judicially knows that under the treaty of Paris, the Philippine Islands became part of the territory of the United States. *La Rue v. Kansas Mutual Life Ins. Co.*, (Kan. 1904) 75 Pac. 494.

4. *U. S. v. Beebe*, 2 Dak. 292, 11 N. W. 505 (1880); *Myers v. Mathis*, 2 Indian Terr. 3, 46 S. W. 178 (1898); *Dole v. Wilson*, 16 Minn. 525 (1871); *Carson v. Smith*, 5 Minn. 78 (1860); *Kreuger v. Schultz*, 6 N. D. 310, 70 N. W. 269 (1896). See also *Gay v. Thomas*, 5 Okl. 1, 46 Pac. 578 (1896); *U. S. v. De Coursey*, 1 Pinn. (Wis.) 508 (1845).

5. *Callsen v. Hope*, 75 Fed. 758 (1896).

6. *Kreuger v. Schultz*, 6 N. D. 310, 70 N. W. 269 (1896).

7. *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539 (1860).

8. *Dole v. Wilson*, 16 Minn. 525 (1871).

9. *Dainese v. Hale*, 91 U. S. 13, 23 L. ed. 190 (1875).

notoriety, i. e., of common knowledge,<sup>10</sup> are secondary effects of law which will not be judicially known.

*The rule requiring judicial knowledge of treaties ceases with the disappearance of the reason for it.* A superseded<sup>11</sup> treaty, being no longer law, is not judicially known.

**§ 598. (Judicial Knowledge of Written Law); National Courts; Constitutions.**—Tribunals of national jurisdiction know judicially the written constitution, if any, which formulates the fundamental law of the sovereignty under which they are acting, and the constitution, if any, of each province or state within its jurisdiction. In America, for example, the federal courts judicially know the Constitution of the United States and its amendments.<sup>1</sup>

**§ 599. (Judicial Knowledge of Written Law; National Courts); Public Statutes.**—National tribunals know judicially the public statutes passed by the national legislature. As English courts know the public acts of Parliament, so the federal courts of the United States judicially know the public statutes enacted by Congress.<sup>1</sup> A national court will also know judicially the public statutes of every province or state, whose jurisprudence it administers by virtue of an appellate jurisdiction. This includes the then existing statutes of prior governments which at any time exercised sovereignty over the territory in question;—whether the control were colonial,<sup>2</sup> provincial, or in some other form.

10. *Infra*, § 699; U. S. v. Beebe, 2 Dak. 292, 11 N. W. 505 (1880) (proclamation establishing Indian reservations).

11. *Ryan v. Knorr*, 19 Hun (N. Y.) 540 (1880).

1. *Young v. Montgomery, etc.*, R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606 (1875); *Furman v. Nichol*, 8 Wall. (U. S.) 44, 19 L. ed. 370 (1868); *Riggs v. Johnson County*, 6 Wall. 166, 181, 199, 18 L. ed. 768 (1867); *Central Bank v. Tayloe*, 5 Fed. Cas. No. 2,548, 2 Cranch C. C. 427 (1823); *Marbury v. Madison*, 1 Cranch (U. S.) 137, 2 L. ed. 60 (1803).

1. *Pennsylvania R. Co. v. Baltimore, etc.*, R. Co., 37 Fed. 129 (1888);

*U. S. v. Johnson*, 26 Fed. Cas. No. 15,488, 2 Sawy. 482 (1873); *U. S. v. Williams*, 28 Fed. Cas. No. 16,706, 4 Biss. 302 (1869); *In re Muller*, 17 Fed. Cas. No. 9,912, Deady 513 (1869); *Gardner v. The Collector*, 6 Wall. 499, 18 L. ed. 890 (1867); *Central Bank v. Tayloe*, 5 Fed. Cas. No. 2,548, 2 Cranch C. C. 427 (1823). See also *Beck v. Johnson*, (Ky. 1909) 169 Fed. 154.

2. *Loree v. Abner*, 6 C. C. A. 302, 57 Fed. 159 (1893) (Pennsylvania when a colony of England or under the articles of confederation). Thus the federal supreme court will take judicial notice of the Spanish law, as far as it affects the insular possessions of the United States. *Municipi-*

Thus, the United States Supreme Court, in reviewing the judgment or decree of the highest court of a state of the American Union, has such judicial knowledge of the written law of the state as the court whose action is under review would have had,<sup>3</sup> including any judicial knowledge such a state court would have of the written laws of other jurisdictions. In exercising original jurisdiction the Supreme Court of the United States, and all inferior federal courts, know the written law not only of the state for which they are sitting, for the time being,<sup>4</sup> but that of every other state<sup>5</sup> or territory<sup>6</sup> in the American Union. In reviewing the action of an inferior federal tribunal the Supreme Court of the United States has

pality of *Ponce v. Roman Cath. A. Church, etc.*, (Porto Rico 1908) 28 S. Ct. 737, 210 U. S. 296, 52 L. ed. 1068.

3. *Pennie v. Reis*, 132 U. S. 464, 10 S. Ct. 149, 33 L. ed. 426 (1889); *Hanley v. Donoghue*, 116 U. S. 1, 6 S. Ct. 242, 29 L. ed. 535 (1885); *Beaty v. Knowler*, 4 Pet. (U. S.) 152, 7 L. ed. 813 (1830).

4. *Gerling v. Baltimore, etc.*, R. Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311 (1893); *Smith v. Tallapoosa County*, 22 Fed. Cas. No. 13,113, 2 Woods 574 (1874).

5. *Barry v. Snowden*, 106 Fed. 571 (1901); *Hathaway v. New York Mut. L. Ins. Co.* 99 Fed. 534 (1900); *New York Mut. L. Ins. Co. v. Hill*, 97 Fed. 263, 38 C. C. A. 159, 49 L. R. A. 127 (1899); *Andruss v. People Bldg., etc., Assoc.*, 94 Fed. 575, 36 C. C. A. 336 (1899); *L'Engle v. Gates*, 74 Fed. 513 (1896); *Noonan v. Delaware, etc.*, R. Co., 68 Fed. 1 (1895); *Western, etc., R. Co. v. Roberson*, 61 Fed. 592, 9 C. C. A. 646 (1894); *Toppa v. Cleveland, etc.*, R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74 (1862); *Neison v. Foster*, 17 Fed. Cas. No. 10,105, 5 Biss. 44 (1857); *Milner v. McQuerry*, 17 Fed. Cas. No. 9,583, 5 McLean 469 (1853); *Merrill v. Dawson*, 17 Fed. Cas. No. 9,469, *Hempst.* 563 (1846); *Gordon v. Hobart*, 10 Fed. Cas. No. 5,609, 2 Sumn. 401 (1836); *Jaffray v. Dennis*, 13 Fed. Cas. No. 7,171, 2 Wash. 253

(1808). See also *Bohlender v. Heikes*, (Ala. 1909) 168 Fed. 886, 94 C. C. A. 298; *Moore v. Pywell*, 29 App. D. C. 312, 9 L. R. A. (U. S.) 1078 (1907); *In re Dunn*, 212 U. S. 374, 29 S. Ct. 299 (1909) (incorporated mercantile corporations); *Denver & R. G. R. Co. v. Wagner*, 167 Fed. 75, 92 C. C. A. 527 (1909). "The circuit courts of the United States are created by Congress, not for the purpose of administering the local law of a single state alone, but to administer the laws of all the States in the Union, in cases to which they respectively apply. The judicial power conferred on the general government by the Constitution, extends to many cases arising under the laws of the different States. That jurisprudence is, then, in no just sense, a foreign jurisprudence, to be proved, in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts." *Owings v. Hull*, 9 Pet. (U. S.) 607, 625, 9 L. ed. 246 (1835).

6. *Breed v. Northern Pac. R. Co.*, 35 Fed. 642 (1888). The rule applies equally to territories of the United States. *Denver & R. G. R. Co. v. Wagner*, 167 Fed. 75, 92 C. C. A. 527 (1909). Amendments are noticed in the same way. *Denver & R. G.*

the same judicial knowledge.<sup>7</sup> In exercising, however, its appellate jurisdiction to state courts, the United States Supreme Court takes merely such judicial knowledge of the laws of a state other than the one whose action is under review as the judges of that court could have taken under the law of that state.

**§ 600. (*Judicial Knowledge of Written Law; National Courts*); Private Statutes.**—A court of national jurisdiction does not judicially know the private acts of the national legislature, nor the private acts of the state whose public statutes it knows.<sup>1</sup> Where the national legislature has required that national tribunals shall judicially know a private act, the courts so required to know the statute will do so. Where a federal court exercises its jurisdiction in a state whose statute or constitution has required knowledge on the part of the state courts of all or certain classes of private acts, or where a state statute is expressly "declared to be a public act,"<sup>2</sup> the national tribunal possesses the same judicial knowledge.<sup>3</sup>

**§ 601. (*Judicial Knowledge of Written Law; National Courts*); Foreign Statutes.**—The national courts of a country do not judicially know the public laws of another country,<sup>1</sup> except

R. Co. v. Wagner, 167 Fed. 75, 92 C. C. A. 527 (1909). Courts of the United States, being required to take judicial notice of the laws of the various states, whether depending on statutes or judicial opinion, such courts may look to the whole of a statute which it is required to apply, though merely a portion thereof is pleaded. Bond v. John V. Farwell Co., (Tenn. 1909) 172 Fed. 58, 96 C. C. A. 546.

7. Mills v. Green, 159 U. S. 651, 16 S. Ct. 132, 40 L. ed. 293 (1895); Gerling v. Baltimore, etc., R. Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311 (1893); Gormley v. Bunyan, 138 U. S. 623, 11 S. Ct. 453, 34 L. ed. 1086 (1890).

1. Leland v. Wilkinson, 6 Pet. (U. S.) 317, 8 L. ed. 412 (1832). See also South Carolina v. Coosaw Min. Co., 45 Fed. 804 (1891).

2. Case v. Kelly, 133 U. S. 21, 10 S. Ct. 216, 33 L. ed. 513 (1889).

3. Junction Ry. Co. v. Ashland Bank, 12 Wall. (U. S.) 226, 230, 20 L. ed. 385 (1870); Beaty v. Knowler, 4 Pet. 152, 7 L. ed. 813 (1830).

1. Coghlan v. South Carolina R. Co., 142 U. S. 101, 12 S. Ct. 150, 35 L. ed. 951 [*affirming* 32 Fed. 316] (1891); Liverpool, etc., Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788 (1888); Dainese v. Hale, 91 U. S. 13, 23 L. ed. 190 (1875); De Bode's Case, 8 Q. B. 208, 55 E. C. L. 208 (1845); Nelson v. Bridport, 8 Beav. 527, 10 Jur. 871 (1845); Bristow v. Sequeville, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289 (1850); Fyson v. Kemp, 6 C. & P. 71, 25 E. C. L. 326 (1833); Millar v. Heinrick, 4 Campb. 155 (1815); McNeil v. Perchard, 1 Esp. 263 (1795). A federal court does not judicially know the laws of the Chickasaw Nation. Elliott v. Garvin, (Ind. T. 1907) 104 S. W. 878.

such as may be known by them as part of general international law.<sup>2</sup>

**§ 602. (*Judicial Knowledge of Written Law*); State and Provincial Courts; Constitutions.**—All courts of a state judicially know the written Constitution of the United States<sup>1</sup> and amendments to it subsequently adopted.<sup>2</sup> They also know the direct results accomplished by the instrument, as the division of the powers of the national government among the three great departments, the legislative, executive and judicial.<sup>3</sup> State courts know the state constitutions and the adoption of amendments to it.<sup>4</sup> State courts know judicially the effect of a state constitution not only as to its direct enactments, but as to any results in repealing statutes.<sup>5</sup> Subordinate facts not directly resulting from the constitution as the subdivision of departments, as to who are the officials whose election or appointment is authorized by the constitution, these, and similar facts cannot, with entire propriety, be regarded as facts which are “matter of law.” They may be made so by legislative requirement,<sup>6</sup> knowledge of which, on the part of the judge, is imperative. They are matters strictly of fact, the cognizance of which is voluntary, and best explainable upon other ground.<sup>7</sup>

**§ 603. (*Judicial Knowledge of Written Law; State and Provincial Courts; Constitutions*); Constitutional Requirements for Statutory Enactments.**—To know a statute, it is necessary that the judge should ascertain that the facts essential to its validity

2. *Supra*, § 591; The New York, 175 U. S. 187, 20 S. Ct. 67, 44 L. ed. 126 [*reversing* 82 Fed. 819, 27 C. C. A. 154, 86 Fed. 814, 30 C. C. A. 628] (1899) (Canadian Navigation Act of 1886).

1. St. Louis, etc., R. Co. v. Brown, 67 Ark. 295, 54 S. W. 865 (1899); Graves v. Keaton, 3 Coldw. (Tenn.) 8 (1866); State v. Bates, 22 Utah 65, 61 Pac. 905, 83 Am. St. Rep. 768 (1900).

2 Graves v. Keaton, 3 Coldw. (Tenn.) 8 (1866).

3. U. S. v. Williams, 6 Mont. 379, 387, 12 Pac. 851 (1887).

4. Carmody v. St. Louis Transit

Co., 188 Mo. 572, 87 S. W. 913 (1905). States will take judicial notice of the record of the state constitutional convention. Schwartz v. People, 46 Colo. 239, 104 Pac. 92 (1909). Constitutional limitations upon the business powers of religious corporations will be noticed. Lunsford v. Wren, 64 W. Va. 458, 63 S. E. 308 (1908).

5. Campbell v. Shelby County, (Ala. 1906) 41 So. 407, 408.

6. U. S. v. Williams, 6 Mont. 379, 12 Pac. 851 (1887).

7. *Infra*, § 637; Prince v. Skillin, 71 Me. 361, 367, 36 Am. Rep. 325 (1880) (“public notoriety or interest”).

actually exist. In many jurisdictions constitutional provisions have prescribed compliance with certain formalities, intended, as a rule, to prevent hasty or ill-considered legislation, or have deemed it advisable to require that the legislature should assume, in certain instances, individual responsibility for its acts by being publicly recorded, by name, upon the legislative journals. It is the duty of the judge to ascertain the fact of compliance with such provisions. In doing so, he may resort to any source of information deemed by him helpful.<sup>1</sup> The question whether the official authentication of a statute, by the legislative branch of the government, is final or may be reviewed by the judges, presents a subject involving the fundamental scope of the judicial power,<sup>2</sup> with which the law of evidence has no direct concern.

**§ 604. (*Judicial Knowledge of Written Law; State and Provincial Courts*); National Statutes.**—The courts of a province or state know the public statutes passed by the national legislature. The domestic tribunals of the states of the American Union judicially know the public acts of Congress,<sup>1</sup> including

1. *Gardner v. Collector*, 6 Wall. 499, 511 (1867).

2. *McCormick v. Hayes*, 159 U. S. 332 (1895); *Field v. Clark*, 143 U. S. 649 (1891); *Ottawa v. Perkins*, 94 U. S. 260 (1876); *French v. Fyan*, 93 U. S. 169 (1876).

1. *Alabama*.—*Jordan v. McDonnell*, (Ala. 1907) 44 So. 101; *Kansas City, M. & B. R. Co. v. Flipppo*, 138 Ala. 487, 35 So. 457 (1903).

*Arkansas*.—*St. Louis, etc., R. Co. v. Brown*, 67 Ark. 295, 54 S. W. 865 (1899).

*California*.—*Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448 (1895); *Semple v. Hagar*, 27 Cal. 163 (1865).

*Georgia*.—*Morris v. Davidson*, 49 Ga. 361 (1873); *Morris v. Davidson*, 49 Ga. 361 (1873).

*Illinois*.—*Gooding v. Morgan*, 70 Ill. 275 (1873).

*Iowa*.—*Coughran v. Gilman*, 81 Iowa 442, 46 N. W. 1005 (1890).

*Kentucky*.—*Laidley v. Cummings*, 83 Ky. 606 (1886). See also *Louis-*

*ville & N. R. Co. v. Scott*, (Ky. 1909) 118 S. W. 990.

*Louisiana*.—*Pollard v. Cook*, 4 Rob. 199 (1843).

*Maryland*.—*Eastwood v. Kennedy*, 44 Md. 563 (1876); *Chesapeake & O. Canal Co. v. B. & O. R. Co.*, 4 G. & J. 1, 63 (1832).

*Missouri*.—*Papin v. Ryan*, 32 Mo. 21 (1862).

*New Mexico*.—*U. S. v. Fuller*, 4 N. M. 358, 20 Pac. 175 (1889).

*New York*.—*Wheelock v. Lee*, 15 Abb. Pr. (N. S.) 24 (1873); *Kessel v. Albetis*, 56 Barb. 362 (1870) (internal revenue law).

*Oklahoma*.—*Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okl. 353, 60 Pac. 249 (1900).

*Pennsylvania*.—*Flanigen v. Washington Ins. Co.*, 7 Pa. St. 306 (1847).

*South Dakota*.—*In re Kirby*, 10 S. D. 338, 73 N. W. 95 (1897).

*Texas*.—*Overton v. McCabe & Steen*, (Tex. Civ. App. 1904) 79 S. W. 861; *Davenport v. State*, (Tex. Cr. App. 1905) 89 S. W. 1077, 1078



those which relate to the District of Columbia,<sup>2</sup> though relating exclusively to concerns of the District,<sup>3</sup> and also the laws of sister states which are referred to in such an act.<sup>4</sup> But this indirect judicial knowledge of the laws of a sister state is limited to matters specially stated in or which can be directly gathered from the federal statute itself. This knowledge does not affect the judges of state courts with knowledge of the *corpus* of the state laws referred to or impose any obligation to acquire such knowledge. Thus, when Congress promulgates the laws of a given state, over a portion of the public domain, by an act which refers to these laws without incorporating them, the courts of the other states, while taking notice of all facts which may be gleaned from an examination of the act of Congress, do not judicially know what provisions of law are actually embraced in the code referred

(extending laws of Arkansas into Indian Territory); *Mims v. Swartz*, 37 Tex. 13 (1866). See also *San Antonio Light Pub. Co. v. Lewy*, (Tex. Civ. App. 1908) 113 S. W. 574.

*Vermont*.—*Metropolitan Stock Exch. v. Lyndonville Nat. Bank*, (1904) 57 Atl. 101.

*Virginia*.—*Bird v. Com.*, 21 Gratt. 900 (1871). A state court of the American Union judicially knows an act of Congress extending the laws of another state as construed by its supreme court over a particular territory. *Missouri, K. & T. Ry. Co. v. Wise*, (Tex. Civ. App. 1908) 106 S. W. 465 [judgment *affirmed* (Tex. Sup. 1901) 109 S. W. 112]; *Red River Nat. Bank v. De Berry*, (Tex. Civ. App. 1907) 105 S. W. 998. But it does not judicially know the construction given to the law extended by the supreme court of the state of its origin. *Missouri, K. & T. Ry. Co. v. Wise*, (Tex. Civ. App. 1908) 106 S. W. 465 [judgment *affirmed* (Tex. Sup. 1908) 109 S. W. 112]. A state court knows the tariff laws of the United States and that certain goods are dutiable under it. *Marrash v. U. S.*, 168 Fed. 225 (1909). The court must take notice of Act Cong. May 2,

1890, c. 182, § 31, 26 Stat. 94, which puts in force in Indian Territory statutes of Arkansas, including the one which in general terms adopts the common law, and since the act adopts for the territory certain chapters of the statutes of Arkansas, the court must take notice of such statutory provisions precisely as if they were provisions of the act of Congress. *Missouri, K. & T. Ry. Co. of Texas v. Wise*, (Tex. 1908) 109 S. W. 112 [*affirmed* (Civ. App.) 106 S. W. 465 (1908)].

2. *Milliken v. Dotson*, 102 N. Y. Suppl. 564, 117 App. Div. 527 (1907). Bankruptcy acts are within the rule. *Morris v. Davidson*, 49 Ga. 361 (1873); *Mims v. Swartz*, 37 Tex. 13 (1872).

3. *Chesapeake Ohio Canal Co. v. Baltimore & Ohio Railroad Company*, 4 Gill & J. 1, 63 (1832); *Bird's Case*, 21 Gratt. 800 (1871); *Bayly's Adm. c. Chubb*, 16 Gratt. 284 (1862).

4. *Flanigen v. Washington Ins. Co.*, 7 Pa. St. 306 (1847); *Belt v. Gulf, etc., R. Co.*, 4 Tex. Civ. App. 231, 22 S. W. 1062 (1893); *Apollos v. Staniforth*, 3 Tex. Civ. App. 502, 22 S. W. 1060 (1893).

to; but, if relied on, the provisions of the latter must be pleaded and proved.<sup>5</sup>

**§ 605. (Judicial Knowledge of Written Law; State and Provincial Courts); State Statutes.**—State courts know, as a matter of course, and as will be more fully treated in subsequent sections, the public statutes of the state legislature, and any other statutes which the legislature or the constitution directs that they shall know.<sup>1</sup>

5. *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okl. 353, 60 Pac. 249 (1900).

**Territorial courts.**—Territorial courts in the United States take judicial notice of the acts of Congress applying to the territory. *Perry v. Morris*, (Ind. T. 1907) 104 S. W. 571 (clerk's fees).

1. *Alabama*.—*Arndt v. Cullman*, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922 (1901). See also *Cox v. Board of Trustees of University of Alabama* (Ala. 1909) 49 South. 814.

*Arkansas*.—*Pritchard v. Woodruff*, 36 Ark. 196 (1880).

*California*.—*Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448 (1895). See also *Ex parte Avdalas*, (Cal. App. 1909) 102 Pac. 674.

*Connecticut*.—*Willimantic School Soc. v. Windham First School Soc.*, 14 Conn. 457 (1841).

*Georgia*.—*Mayson v. Atlanta*, 77 Ga. 662 (1886).

*Illinois*.—*Pittsburgh, Ft. W. & C. R. Co. v. Moore*, 110 Ill. App. 304 (1903); *Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807 [reversing 95 Ill. App. 562] (1902).

*Indiana*.—*Moss v. Sugar Ridge Tp.*, 161 Ind. 417, 68 N. E. 896 (1903). See also *State v. Wheeler*, 172 Ind. 578, 89 N. E. 1 (1909).

*Iowa*.—*State v. Olinger*, 72 N. W. 441 (1897).

*Kansas*.—*In re Howard County*, 15 Kan. 194 (1875).

*Kentucky*.—*Lackey v. Richmond, etc., Turnpike Road Co.*, 17 B. Monr. 43 (1856).

*Louisiana*.—*Doss v. Board of Com'rs of Mermentau Levee Dist.*, (La. 1906) 41 So. 720.

*Maine*.—*State v. Webb's River Imp. Co.*, 97 Me. 559, 55 Atl. 495 (1903).

*Maryland*.—*Miller v. Matthews*, 87 Md. 464, 40 Atl. 176 (1898).

*Massachusetts*.—*Barnes v. Squier*, 193 Mass. 21, 78 N. E. 731 (1906); *Harris v. Quincy*, 171 Mass. 472, 50 N. E. 1042 (1898).

*Michigan*.—*Holdridge v. Farmers', etc., Bank*, 16 Mich. 66 (1867).

*Minnesota*.—*Peterson v. Cokato*, 84 Minn. 205, 87 N. W. 615 (1901).

*Mississippi*.—*Green v. Weller*, 32 Miss. 650, 685 (1856).

*Missouri*.—*Bowen v. Missouri Pac. R. Co.*, 118 Mo. 541, 24 S. W. 436 (1893).

*Nebraska*.—*North Platte Water Works Co. v. North Platte*, 50 Neb. 853, 70 N. W. 393 (1897).

*New Hampshire*.—*Winnipiseogee Lake Co. v. Young*, 40 N. H. 420 (1860).

*New Jersey*.—*Rader v. Union Tp. Committee*, 43 N. J. L. 518 (1881).

*New York*.—*Warner v. Beers*, 23 Wend. 103 (1840).

*North Carolina*.—*Wikel v. Jackson County*, 120 N. C. 451, 27 S. E. 117 (1897).

*Oregon*.—*State v. Banfield*, 43 Or. 237, 72 Pac. 1093 (1903). See also *Gay v. City of Eugene*, (Or. 1909) 100 Pac. 306.

*South Carolina*.—*State v. Sartor*, 2 Strobb. 60 (1847).

*Tennessee*.—*State v. Murfreesboro*, 11 Humphr. 217 (1850).

*Provincial Courts.*—It is familiar law that the courts of a province know the public statutes enacted by the legislative branch of the sovereignty of the forum under which they are constituted.<sup>2</sup>

**§ 606. (*Judicial Knowledge of Written Law; State and Provincial Courts; State Statutes*); Statutes of Former Sovereignities.**—Equally domestic are the public statutes of a state<sup>1</sup> or nation which exercised sovereignty over the territory in question, and which were in force at the time such sovereignty was exercised.

**§ 607. (*Judicial Knowledge of Written Law; State and Provincial Courts*); Legislative Resolutions.**—Legislative resolutions of a public character are classed with public acts and are accordingly judicially known to the state courts.<sup>1</sup>

**§ 608. (*Judicial Knowledge of Written Law; State and Provincial Courts*); Special Acts.**—Statutes specially limited by the legislature, though of a public nature, e. g., a statute forbidding the sale of intoxicating liquor in a particular county,<sup>1</sup> are judicially known.

**§ 609. (*Judicial Knowledge of Written Law; State and Provincial Courts*); Private Statutes.**—In the absence of consti-

*Texas.*—*Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666 (1896).

*Vermont.*—*Briggs v. Whipple*, 7 Vt. 15 (1835).

*West Virginia.*—*Hart v. Baltimore, etc., Co.*, 6 W. Va. 336 (1873).

*Wisconsin.*—*Smith v. Janesville*, 52 Wis. 680, 9 N. W. 789 (1881).

2. *Darling v. Hitchcock*, 25 U. C. Q. B. 463 (1866); *Girdlestone v. O'Reilly*, 21 U. C. Q. B. 409 (1862). Canadian Admiralty courts are "bound to take judicial notice of an order in council from which the court derives its jurisdiction." *Reg. v. The Minnie*, 4 Can. Exch. 151 (1894).

1. *Henthorne v. Doe*, 1 Blackf. (Ind.) 157, 161, 163 (1822) (*Virginia*).

1. *McCarver v. Herzberg*, 120 Ala. 523, 25 So. 3 (1898); *State v. Del-*

*esdenier*, 7 Tex. 76 (1851). See also *Inhabitants of Kingman v. Penobscot County Com'rs*, 105 Me. 184, 73 Atl. 1038 (1909).

1. *Ball v. Com.*, 99 S. W. 326, 30 Ky. L. Rep. 600 (1907); *Combs v. Com.*, 31 Ky. L. Rep. 822, 104 S. W. 270 (1907); *Irby v. State*, (Miss. 1907) 44 So. 801. The act making a portion of the Mohawk river part of the Erie canal will be judicially noticed. *In re Mohawk River Bridge Connecting Towns of Rotterdam and Glenville*, 112 N. Y. Suppl. 428, 128 App. Div. 54 (1908). The courts are bound to take judicial notice of every public act of the Provincial Legislature, though its operation may be locally limited. *Darling v. Hitchcock*, 25 U. C. R. 463, 28 U. C. R. 439 (1866).

tutional<sup>1</sup> or statutory<sup>2</sup> requirement to other effect, courts do not judicially know private statutes of a state,<sup>3</sup> provincial or national<sup>4</sup> legislature, or legislative resolutions, affecting private interests.<sup>5</sup> This is the uniform rule though the purpose is, in a sense, public; — as where a private act incorporates an association for business purposes,<sup>6</sup> or affects a municipal corporation.<sup>7</sup>

1. A federal court exercising jurisdiction in a state where the constitution requires the state courts to know private acts, will assume the same knowledge. *Junction R. Co. v. Ashland Bank*, 12 Wall. (U. S.) 226, 230, 20 L. ed. 385 (1870).

2. *Mullan v. State*, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262 (1896).

A general mandate to know judicially the laws of another state will not be construed to include private statutes. *Miller v. Johnston*, 71 Ark. 174, 72 S. W. 371 (1903).

3. *Alabama*.—*Mobile v. Louisville, etc.*, R. Co., 124 Ala. 132, 26 So. 902 (1899).

*California*.—*Ellis v. Eastman*, 32 Cal. 448 (1867).

*Illinois*.—*Minck v. People*, 6 Ill. App. 127 (1880).

*Indiana*.—*Toledo, etc., R. Co. v. Nordyke*, 27 Ind. 95 (1866).

*Kansas*.—*Atchison, etc., R. Co. v. Blackshire*, 10 Kan. 477 (1872).

*Kentucky*.—*Rudd v. Owensboro Deposit Bank*, 105 Ky. 443, 49 S. W. 207, 971, 20 Ky. L. Rep. 1276, 1497 (1899).

*Louisiana*.—*Mower v. Kemp*, 42 La. Ann. 1007, 8 So. 830 (1890).

*Missouri*.—*Bailey v. Lincoln Academy*, 12 Mo. 174 (1848).

*New Hampshire*.—*Hall v. Brown*, 58 N. H. 93 (1877).

*New Jersey*.—*State v. Haddonfield, etc.*, Turnpike Co., 65 N. J. L. 97, 46 Atl. 700 (1900).

*North Carolina*.—*Carrow v. Washington Toll-Bridge Co.*, 61 N. C. 118 (1867).

*Ohio*.—*Pittsburgh, etc., R. Co. v. Moore*, 33 Ohio St. 384, 31 Am. Rep. 543 (1878).

*Pennsylvania*.—*Timlow v. Philadelphia, etc.*, R. Co., 99 Pa. St. 284 (1882).

*Texas*.—*Holmes v. Anderson*, 59 Tex. 481 (1883).

*Vermont*.—*Pearl v. Allen*, 2 Tyler 311 (1803).

*Virginia*.—*Legrand v. Hampden Sidney College*, 5 Munf. 324 (1817).

*West Virginia*.—*Hart v. Baltimore, etc.*, R. Co., 6 W. Va. 336 (1873).

*Wisconsin*.—*Horn v. Chicago, etc.*, R. Co., 38 Wis. 463 (1875).

4. *Denver, etc., R. Co. v. U. S.*, 9 N. M. 389, 54 Pac. 336 (1898); *Wright v. Paton*, 10 Johns. (N. Y.) 300 (1813).

5. *Simmons v. Jacobs*, 52 Me. 147 (1862).

6. *Alabama*.—*Mobile v. Louisville, etc.*, R. Co., 124 Ala. 132, 26 So. 902 (1899).

*Louisiana*.—*Mandere v. Bonsignore*, 28 La. Ann. 415 (1876).

*Maine*.—*Fryeburg Canal v. Frye*, 5 Me. 38 (1827).

*Missouri*.—*Butler v. Robinson*, 75 Mo. 192 (1881).

*New Hampshire*.—*Haven v. New Hampshire Insane Asylum*, 13 N. H. 532, 38 Am. Dec. 512 (1843).

*New Jersey*.—*State v. Haddonfield, etc.*, Turnpike Co., 65 N. J. L. 97, 46 Atl. 700 (1900).

*New York*.—*Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482 (1859).

*North Carolina*.—*Carrow v. Washington Toll-Bridge Co.*, 61 N. C. 118 (1867).

*Pennsylvania*.—*Timlow v. Philadelphia, etc.*, R. Co., 99 Pa. St. 284 (1882).

*A fortiori* a private statute not known to the courts of the state by authority of which it is enacted will not be known to the courts of other states.<sup>8</sup>

*An exception is presented* in cases where the court has been made judicially acquainted with a private statute in the course of previous litigation, in which it was construed by the highest court.<sup>9</sup>

**§ 610. (Judicial Knowledge of Written Law; State and Provincial Courts; Private Statutes);** **Judicial Knowledge of Private Statutes.**—As intimated in the preceding section, the constitution or the legislature may require, either by general provision or by a specific provision of the act itself, that certain private statutes shall be deemed public, i. e., shall be judicially known to the court as would be the case with public statutes. The same result may be reached in other ways. The private act may be recognized in the state constitution,<sup>1</sup> or in a public statute;<sup>2</sup> it may be amended by a public act.<sup>3</sup> Under any of these conditions the courts judicially know the private act to the same extent as if it were public,<sup>4</sup> and also know judicially any subsequent amendment to a private act of which they possess judicial knowledge.<sup>5</sup>

**§ 611. (Judicial Knowledge of Written Law; State and Provincial Courts);** **Local Regulations.**—The power of passing ordinances or by-laws conferred on municipalities by a general act of incorporation or granted by special charter known to the court

*Texas.*—Conley v. Columbus Tap R. Co., 44 Tex. 579 (1876).

7. Loper v. St. Louis, 1 Mo. 681 (1826); Apitz v. Missouri Pac. R. Co., 17 Mo. App. 419 (1885).

8. Miller v. Johnston, 71 Ark. 174, 72 S. W. 371 (1903).

9. Mower v. Kemp, 42 La. Ann. 1007, 8 So. 830 (1890).

1. Vance v. Farmers', etc., Bank, 1 Blackf. (Ind.) 80 (1820).

2. Webb v. Bidwell, 15 Minn. 479 (1870).

3. Lavalie v. People, 6 Ill. App. 157 (1880).

4. *Illinois.*—Nimmo v. Jackman, 21 Ill. App. 607 (1886).

*Indiana.*—White Water Valley Canal Co. v. Boden, 8 Blackf. 130 (1846).

*Iowa.*—State v. Olinger, 72 N. W. 441 (1897).

*Maine.*—State v. McAllister, 24 Me. 139 (1844).

*Michigan.*—People v. River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64 (1864).

*Missouri.*—Bowie v. Kansas, 51 Mo. 454 (1873).

*Nebraska.*—Hornberger v. State, 47 Neb. 40, 66 N. W. 23 (1896).

*New Jersey.*—Hawthorne v. Hoboken, 32 N. J. L. 172 (1867).

*Texas.*—Storrie v. Cortes, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666 (1896).

5. Stephens, etc., Transp. Co. v. New Jersey Cent. R. Co., 33 N. J. L. 229 (1869)

as a public act<sup>1</sup> is a direct result of the public statute; and is, therefore, judicially known to the court.<sup>2</sup> The ordinances or other regulations passed in pursuance of the powers so conferred are themselves secondary results of the public statute and are, in effect, so far as regards state or provincial courts, matter *in pais*. Such a court, therefore, will not judicially know their enactment.<sup>3</sup> Within

1. Aliter, where the charter conferring the power of legislating ordinances, etc., is not deemed a public act. *Butler v. Robinson*, 75 Mo. 192 (1881).

2. *Case v. Mobile*, 30 Ala. 538 (1857); *Green v. Indianapolis*, 22 Ind. 192 (1864); *Akerman v. Lima*, 8 Ohio S. & C. Pl. Dec. 430, 7 Ohio N. P. 92 (1898).

3. *Alabama*.—*Furhman v. Huntsville*, 54 Ala. 263 (1875); *Case v. Mayor, etc.*, 30 Ala. 538 (1857).

*Arkansas*.—*Gardner v. State*, 80 Ark. 264, 97 S. W. 48 (1906); *Strickland v. Little Rock*, 68 Ark. 483, 60 S. W. 26 (1900).

*Colorado*.—*City of Greeley v. Hamman*, 12 Colo. 94, 20 Pac. 1 (1888); *Garland v. Denver*, 11 Colo. 534, 19 Pac. 460 (1888).

*Florida*.—*Logan v. Childs*, (Fla. 1906) 41 So. 197; *Freeman v. State*, 19 Fla. 552 (1892).

*Georgia*.—*Hill v. Atlanta*, 123 Ga. 697, 54 S. E. 354 (1906); *Moore v. Jonesboro*, 107 Ga. 704, 33 S. E. 435 (1899); *Western, etc., R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. 320 (1888).

*Idaho*.—*People v. Buchanan*, 1 Idaho 681 (1878).

*Illinois*.—*Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521 (1898); *Weaver v. Snow*, 60 Ill. App. 624 (1895). See also *People v. Heidelberg Garden Co.*, 223 Ill. 290, 84 N. E. 230 (1908) [*affirmed* *Heidelberg Garden Co. v. People*, 124 Ill. App. 331 (1906)]; *Cordatos v. City of Chicago*, 129 Ill. App. 471 (1906).

*Indiana*.—*City of Huntington v. Pease*, 56 Ind. 305 (1877); *Whitson v. City of Franklin*, 34 Ind. 392 (1870).

*Iowa*.—*Wolf v. Keokuk*, 48 Iowa 129 (1878); *Garvin v. Wells*, 8 Iowa 286 (1859).

*Kansas*.—*Watt v. Jones*, 60 Kan. 201, 56 Pac. 16 (1899); *City of McPherson v. Nichols*, 48 Kan. 430, 29 Pac. 679 (1892).

*Kentucky*.—*Horne v. Mehler*, (Ky.) 64 S. W. 918 (1901); *Lucker v. Com.*, 4 Bush. 440 (1868).

*Louisiana*.—*State v. Judge Criminal Dist. Ct.*, 105 La. 758, 30 So. 105 (1901); *State v. Marmouget*, 104 La. Ann. 1, 28 So. 920 (1900).

*Maryland*.—*Field v. Malster*, 88 Md. 691, 41 Atl. 1087 (1898); *Shanfelder v. Baltimore*, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648 (1895).

*Massachusetts*.—*O'Brien v. Woburn*, 184 Mass. 598, 69 N. E. 350 (1904).

*Minnesota*.—*Winona v. Burke*, 23 Minn. 254 (1876); *City of Winona v. Burke*, 23 Minn. 254 (1876).

*Missouri*.—*Town of Canton v. Madden*, 120 Mo. App. 404, 96 S. W. 699 (1906); *City of St. Louis v. Leissing*, 190 Mo. 464, 1 L. R. A. (N. S.) 918, 89 S. W. 611 (1905); *City of Tarkio v. Loyd*, 179 Mo. 600, 78 S. W. 797 (1904); *Tarkio v. Loyd*, 179 Mo. 600, 78 S. W. 797 (1903); *City of St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915 (1895).

*New York*.—*City of New York v. Knickerbocker Trust Co.*, 93 N. Y. Suppl. 937, 104 App. Div. 223 (1905); *Boston v. Abraham*, 86 N. Y. Suppl. 863, 91 App. Div. 417 (1904); *Porter v. Waring*, 69 N. Y. 250 (1877); *Sachs v. Lyons*, 53 Misc. (N. Y.) 640, 103 N. Y. Suppl. 149 (1907). See also *Tucker v. O'Brien*, 117 N. Y. Suppl. 1010 (1909); *Milton Schnaier & Co. v.*

the scope of this rule fall the ordinances of a city,<sup>4</sup> or of a municipal department;<sup>5</sup> the regulations of county<sup>6</sup> or administrative boards,

Grigsby, 117 N. Y. Suppl. 455, 132 App. Div. 854 (1909) [judgment affirmed, 113 N. Y. Suppl. 548, 61 Misc. Rep. 325 (1908) which reversed Milton M. Schnaier & Co. v. Grigsby, (City Ct.) 117 N. Y. Suppl. 455, 132 App. Div. 854] (building code); Daly v. O'Brien, 112 N. Y. Suppl. 304, 60 Misc. Rep. 423 (1908) (city ordinances and resolutions of the board of aldermen); People v. Ahearn, 109 N. Y. Suppl. 249, 124 App. Div. 840 (1908).

*Ohio*.—Esch v. City of Elyria, 27 Ohio Cir. Ct. R. 446 (1905); Chittenden v. City of Columbus, 26 Ohio Cir. Ct. R. 531 (1904); Toledo v. Libbie, 19 Ohio Cir. Ct. 704, 8 Ohio Cir. Dec. 589 (1900); Pittsburg, etc., R. Co. v. Moore, 33 Ohio St. 384 (1878).

*Oregon*.—Pomeroy v. Lappeus, 9 Or. 363 (1881).

*Pennsylvania*.—City v. Cohen, 13 Wkly. Notes Cas. 468 (1883).

*South Carolina*.—Charleston v. Ashley Phosphate Co., 34 S. C. 541, 13 S. E. 845 (1890).

*Tennessee*.—Tilford v. Woodbury, 7 Humphr. 190 (1846).

*Texas*.—Hall v. International & G. N. Ry. Co., (Tex. 1904) 81 S. W. 520; Austin v. Walton, 68 Tex. 507, 5 S. W. 70 (1887).

*Vermont*.—State v. Soragan, 40 Vt. 450 (1868).

*Wisconsin*.—Stittgen v. Rundle, 99 Wis. 78, 74 N. W. 536 (1898). But see Lake Erie, etc., R. Co. v. Hancock, 15 Ind. App. 104, 43 N. E. 659 (1895); Winter v. Central Iowa R. Co., 80 Iowa 443, 45 N. W. 737 (1890). See also State v. Koch, 138 Wis. 27, 119 N. W. 839 (1909).

*United States*.—Robinson v. Denver City Tramway Co., 164 Fed. 174 (1908). The adoption of town regulations is not a matter of judicial knowledge, even where the fact implies exemption from the operation

of a public statute. Badgett v. State, (Ala. 1908) 48 So. 54.

Special customs, such as that of the city of London, cannot be judicially noticed but must be proved. Argyle v. Hunt, 1 Stra. 187 (1795). A certificate of the recorder may constitute sufficient proof. Piper v. Chappel, 14 M. & W. 624 (1845); Blacquiére v. Hawkins, 1 Doug. 378 (1780). It has been said, however, that it is the duty of the courts to take judicial notice of the law and privilege of the stannaries. Gaved v. Martyn, 19 C. B. (N. S.) 732, 757, 34 L. J. C. P. 353, 362 (1865), per Erle, C. J. As to judicial notice of the customs of Gavelkind or borough English, see *In re* Chenoweth, 2 Ch. 488 (1902); Rider v. Wood, 1 Kay & J. 644, 24 L. J. Ch. 737 (1855).

4. *Alabama*.—Case v. Mobile, 30 Ala. 538 (1857).

*Georgia*.—Moore v. Jonesboro, 107 Ga. 704, 33 S. E. 435 (1899).

*Iowa*.—Garvin v. Wells, 8 Iowa 286 (1859).

*Kansas*.—Watt v. Jones, 60 Kan. 201, 56 Pac. 16 (1899).

*Kentucky*.—Horne v. Mehler, (Ky. 1901) 64 S. W. 918 (1901).

*Louisiana*.—Hassard v. Municipality, 7 La. Ann. 495 (1852).

*Maryland*.—Field v. Malster, 88 Md. 691, 41 Atl. 1087 (1898).

*Minnesota*.—Winona v. Burke, 23 Minn. 254 (1876).

*Missouri*.—Mooney v. Kennett, 19 Mo. 551, 555 (1854).

*New York*.—Porter v. Waring, 69 N. Y. 250, 254 (1877).

5. State v. Inhabitants of Trenton, 51 N. J. L. 495, 17 Atl. 1083 (1889); Department of Health of City of New York v. City Real Property Investigating Co., 86 N. Y. Suppl. 18 (1904) (Health Department); Wright v. Trenton, 51 N. J. L. 497, 17 Atl. 1103 (1889).

6. Indianapolis & C. R. Co. v. Caldwell, 9 Ind. 397 (1857).

such as county commissioners;<sup>7</sup> the by-laws of a corporation, public or private.<sup>8</sup> The repeal of any such regulations or ordinances<sup>9</sup> stands in the same position. Such knowledge may be required by statute.<sup>10</sup>

*Statutory authority for using printed official copies* of these local regulations as evidence, without further proof, does not have the effect of requiring judicial knowledge of the regulations themselves.<sup>11</sup>

*Operation of Ordinance.*—Whether an ordinance is in force in a city is a question of law for the court.<sup>12</sup>

**§ 612. (Judicial Knowledge of Written Law; State and Provincial Courts; Local Regulations);** **Judicial Knowledge on Appeal or Review.**—In this connection, a question of some difficulty and considerable diversity of ruling is presented when an action, civil or criminal, which has been decided in a local court is brought under review in a court of general jurisdiction, either on appeal or review of the record. The court of original instance judicially knows the local regulations involved in the proceeding.<sup>1</sup> The appellate court would not have this knowledge in a case originally before it.<sup>2</sup> What shall be the attitude of the higher court toward the municipal or other local regulation which the lower court knows? As a matter of principle, it would seem, in the absence of statutory regulation, that the answer should vary, according to whether the superior court is acting (a) on appeal or (b) on review of the record of the lower court.

7. *Atkinson v. Mott*, 102 Ind. 431, 26 N. E. 217 (1885).

8. *Portage, etc., Benev. Society v. Phillips*, 36 Mich. 22 (1877); *Simpson v. S. Car., etc., Ins. Co.*, 59 S. C. 195, 37 S. E. 18, 225 (1900); *Piper v. Chappell*, 14 M. & W. 624 (1845); *Gerhard v. Bates*, 2 E. & B. 476, 75 E. C. L. 476 (1853).

9. *Field v. Malster*, 88 Md. 691, 41 Atl. 1087 (1898).

10. *Moore v. Jonesboro*, 107 Ga. 704, 33 S. E. 435 (1899); *Wooley v. Louisville*, 71 S. W. 893, 24 Ky. L. Rep. 1357 (1903).

11. *Maryland*.—*Central Sav. Bank v. Baltimore*, 71 Md. 515, 18 Atl. 809, 20 Atl. 283 (1889).

*Minnesota*.—*Winona v. Burke*, 23 Minn. 254 (1876).

*Missouri*.—*Cox v. St. Louis*, 11 Mo. 431 (1848).

*New York*.—*Harker v. New York*, 17 Wend. 199 (1837).

*Ohio*.—*Toledo v. Libbie*, 19 Ohio Cir. Ct. 704, 8 Ohio Cir. Dec. 589 (1900). See also *Porter v. Waring*, 69 N. Y. 250 (1877).

12. *Ghio v. Metropolitan St. Ry. Co.*, 125 Mo. App. 710, 103 S. W. 142 (1907). When local ordinances are proved, they stand on the same footing as statutes. *Norfolk & P. Traction Co. v. Forrest's Adm'x*, 109 Va. 658, 64 S. E. 1034 (1909).

1. *Infra*, § 617.

2. *Supra*, § 611.



(a) *Where the hearing in the superior court is upon appeal*, the trial being of fact and *de novo* as to all issues, little reason exists why the parties should not comply with the established rules of the court merely because they have had a former trial elsewhere; or why the court should depart from its usual course of proceeding. Such is the view adopted in Colorado.<sup>3</sup> The weight of authority is, however, to the effect that the local regulation will be judicially known by the appellate court.<sup>4</sup>

*In Kansas* the rule prevails that on appeal, judicial knowledge is taken of the ordinance in criminal cases.<sup>5</sup>

(b) *Where the appellate court has before it, for review, only the record of the lower court*, it would seem that there is great propriety in suggesting that the upper court assume the same knowledge of local regulations which the lower court had. The court below cannot well certify as part of the evidence a fact which was not made the subject of evidence on the trial.<sup>6</sup> No provision is made, as a rule, for certifying upon the record the existence of a fact unless it is one which was admitted or proved.<sup>7</sup> To prevent surprise and miscarriage of justice, the upper court should judicially know the local ordinance;— and such is the law

3. *McIntosh v. City of Pueblo*, 9 Colo. App. 460, 48 Pac. 969 (1897); *McIntosh v. Pueblo*, Colo. App. 460, 48 Pac. 969 (1897); *Greely v. Hamman*, 12 Colo. 94, 20 Pac. 1 (1888); *Garland v. Denver*, 11 Colo. 534, 19 Pac. 460 (1888). See also *City of Frankfort v. Aughe*, 114 Ind. 77, 15 N. E. 802 (1887).

4. *Iowa*.—*Incorporated Town of Scranton v. Danenbaum*, 109 Iowa 95, 80 N. W. 221 (1899).

*Kansas*.—*Downing v. City of Miltonvale*, 36 Kan. 740, 14 Pac. 281 (1887); *Solomon v. Hughes*, 24 Kan. 211 (1880).

*Nebraska*.—*Steiner v. State*, (Neb. 1907) 110 N. W. 723; *Foley v. State*, 42 Neb. 233, 60 N. W. 574 (1894).

*Oregon*.—*Portland v. Yick*, 44 Or. 439, 75 Pac. 706 (1904).

*West Virginia*.—*Moundville v. Velton*, 35 W. Va. 217, 13 S. E. 373 (1891). See also *Clapp v. Hartford*, 35 Conn. 66 (1868); *Delawter v.*

*Sand Creek Ditching Co.*, 26 Ind. 407 (1866); *Steenerson v. Great Northern R. Co.*, 69 Minn. 353, 72 N. W. 713 (1897).

5. *Watt v. Jones*, 60 Kan. 201, 56 Pac. 16 (1899). In civil cases, the knowledge is not taken. *McPherson v. Nichols*, 48 Kan. 430, 29 Pac. 679 (1892).

6. *Where the trial judge makes a statement on the point*, it will be accepted in an appellate court as correct, in the absence of actual knowledge to the contrary. *People v. Mayes*, 113 Cal. 618, 45 Pac. 860, 862 (1896).

7. See also *State v. Leiber*, 11 Iowa 407 (1860); *Downing v. City of Miltonvale*, 36 Kan. 740, 14 Pac. 281 (1887); *Foley v. State*, 42 Neb. 233, 60 N. W. 574 (1894); *Keck v. City of Cincinnati*, 4 Ohio Dec. 324, 3 Ohio N. P. 253 (1896); *Town of Moundville v. Velton*, 35 W. Va. 217, 13 S. E. 373 (1891).

of certain jurisdictions.<sup>8</sup> The rule should be the same in cases where an appellate tribunal is undertaking to review the action of an executive or other board of special skill and technical experience, e. g., a railroad commission.<sup>9</sup> The prevailing opinion, however, is to the contrary;—that judicial notice will not be taken. The effect of this refusal to take judicial knowledge of the local regulation known to the inferior tribunal has varied with different courts, according to the view which these courts chance to take as to the position of the burden of proof—meaning burden of establishing—in such cases. The existence of the local regulation being eliminated from the record, it has seemed to certain tribunals that the action of the lower court should be reversed;—its accuracy not being shown.<sup>10</sup> Other courts have sustained the action of the lower court because the appealing party has not shown it to be erroneous.<sup>11</sup>

**§ 613. (Judicial Knowledge of Written Law; State and Provincial Courts); Regulations of Voluntary Associations.—**

*A fortiori* judges do not judicially know the laws by which members of voluntary associations, e. g., labor unions,<sup>1</sup> are bound. A state or provincial court does not take judicial notice of the by-laws of a private corporation; but will require proof on the subject.<sup>2</sup>

8. *March v. Com.*, 12 B. Mon. (Ky.) 25 (1851) (ordinance affecting jurisdiction); *Strauss v. Conneaut*, 23 Ohio Cir. Ct. 320 (1902). See also *Galen Hall Co. v. Atlantic City*, (N. J. Supp. 1908) 68 Atl. 1092. While if the local option law had been adopted in a county by ordinance of a city council, so that the recorder's court must have taken cognizance thereof in a prosecution for violating a prohibition ordinance, on writ of review to the circuit court, to review the recorder's decision, the circuit court might have been bound by knowledge of, its adoption, yet, where the law was adopted by majority vote and promulgated by order of the county court, proof of adoption in compliance with statute was necessary, and the circuit court could not take judicial notice of it. *Gay v.*

*City of Eugene*, (Or. 1909) 100 Pac. 306.

9. *Steenerson v. Ry. Co.*, 69 Minn. 353, 72 N. W. 713 (1897).

10. *Green v. Indianapolis*, 22 Ind. 192 (1864); *Shanfelter v. Baltimore*, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648 (1895); *Central Sav. Bank v. Baltimore*, 71 Md. 515, 18 Atl. 809, 20 Atl. 283 (1889); *Allen v. State*, (Tex. Cr. App. 1906) 98 S. W. 869.

11. *State v. Judge Criminal Dist. Ct.*, 105 La. 758, 30 So. 105 (1901).

In Georgia, on *certiorari*, the rule is the same. *Benson v. Carrollton*, 96 Ga. 761, 22 S. E. 303 (1895).

1. *Birmingham Paint & Roofing Co. v. Crampton & Tharpe*, (Ala. 1905) 39 So. 1020.

2. *Elkhart Hydraulic Co. v. Turner*, 170 Ind. 455, 64 N. E. 812 (1908).

**§ 614. (*Judicial Knowledge of Written Law; State and Provincial Courts*); Statutes of Sister State.**—The courts of one state, or province, do not judicially know, that is, without proof,<sup>1</sup> the

1. *Alabama*.—Southern Express Co. v. Owens, (Ala. 1906) 41 So. 752; Johnson v. State, 88 Ala. 176, 7 So. 253 (1889); Insurance Co. v. Forcheimer, 86 Ala. 541, 5 So. 870 (1888).

*Arkansas*.—McNeill v. Arnold, 17 Ark. 154 (1856). See also Louisiana & N. W. R. Co. v. Phelps, 70 Ark. 17, 65 S. W. 709 (1901).

*California*.—Norman v. Norman, 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343 (1898).

*Colorado*.—Polk v. Butterfield, 9 Colo. 325, 12 Pac. 216 (1886).

*Connecticut*.—Hale v. S. N. Co., 15 Conn. 539, 549 (1843); Hempstead v. Reed, 6 Conn. 480 (1827).

*Delaware*.—Kinney v. Hosea, 3 Harr. 77 (1839).

*Florida*.—Equitable Building & Loan Ass'n v. King, (Fla. 1904) 37 So. 181; Duke v. Taylor, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484 (1896).

*Georgia*.—Simms v. Express Co., 38 Ga. 129 (1868).

*Illinois*.—Crane v. Blackman, 126 Ill. App. 631 (1906); Leathe v. Thomas, 218 Ill. 246, 75 N. E. 810 (1905); Clarke v. Assets Realization Co., 115 Ill. App. 150 (1904); Baltimore & O. S. W. R. Co. v. McDonald, 112 Ill. App. 391 (1904); Leathe v. Thomas, 109 Ill. App. 434 (1903); Ferris v. Bank, 158 Ill. 237, 41 N. E. 1118 (1895) (authority of notary public); Bonnell v. Holt, 89 Ill. 71 (1878). See also Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178 (1908) [*affirming* judgment, 134 Ill. App. 75 (1907)]; Coats v. Chicago, R. I. & P. Ry. Co., 134 Ill. App. 217 (1907).

*Indian Territory*.—Hockett v. Alston, 58 S. W. 675 (1900).

*Indiana*.—Old Wayne Mut. Life Ass'n v. Flynn, 31 Ind. App. 473, 68

N. E. 327 (1903); Robards v. Marley, 80 Ind. 185 (1881).

*Iowa*.—Hendryx v. Evans, 120 Iowa 310, 94 N. W. 853 (1903).

*Kansas*.—Loyal Mystic Legion of America v. Brewer, 75 Kan. 729, 90 Pac. 247 (1907); Ferd. Heim Brewing Co. v. Gimber, 67 Kan. 834, 72 Pac. 859 (1903); Alexandria, A. & F. S. R. Co. v. Johnson, 61 Kan. 417, 59 Pac. 1063 (1900). See also Beshears v. Nelson Distilling Co., 80 Kan. 194, 101 Pac. 1011 (1909) (Arkansas).

*Kentucky*.—McDaniel v. Wright, 7 J. J. Marsh. 475 (1832). See also Union Cent. Life Ins. Co. of Cincinnati v. Dukes, (Ky. 1908) 113 S. W. 454.

*Louisiana*.—Rush v. Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353 (1902).

*Maine*.—Owen v. Boyle, 15 Me. 147, 32 Am. Dec. 608 (1838).

*Maryland*.—Jackson v. Jackson, 80 Md. 176, 30 Atl. 752 (1894); Baltimore & O. R. Co. v. Glenn, 28 Md. 287, 323 (1867). See also Mandru v. Ashby, (Md. 1908) 7 Atl. 312.

*Massachusetts*.—Washburn Crosby Co. v. Boston, etc., R. Co., 180 Mass. 252, 62 N. E. 590 (1902); Chipman v. Peabody, 159 Mass. 420, 423, 34 N. E. 563 (1893).

*Michigan*.—Phelps v. American Sav., etc., Assoc., 121 Mich. 343, 80 N. W. 120 (1899).

*Minnesota*.—Crandall v. R. Co., 83 Minn. 190, 86 N. W. 10 (1901); Myers v. Chicago, etc., R. Co., 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 572 (1897).

*Mississippi*.—Hemphill v. Alabama Bank, 6 Sm. & M. 44 (1846).

*Missouri*.—Smith v. Aultman, 120 Mo. App. 462, 96 S. W. 1034 (1906); Southern Illinois, etc., Bridge Co. v. Stone, 174 Mo. 1, 73 S. W. 453, 63

written law of another state, or of an Indian tribe.<sup>2</sup> If the foreign law is essential to a case, it must be pleaded,<sup>3</sup> proved<sup>4</sup> and found<sup>5</sup>

L. R. A. 301 (1903); *Charlotte v. Chouteau*, 25 Mo. 465, 473 (1857).

*Nebraska*.—*People's Bldg., etc., Assoc. v. Backus*, 89 N. W. 315 (1902).

*New Hampshire*.—*Pickard v. Bailey*, 26 N. H. 152 (1852).

*New Jersey*.—*Uhler v. Semple*, 20 N. J. Eq. 288 (1869); *Condit v. Blackwell*, 19 N. J. Eq. 193, 196 (1868).

*New York*.—*Harris v. White*, 81 N. Y. 532 (1880).

*North Carolina*.—*Hilliard v. Outlaw*, 92 N. C. 266 (1885); *Hooper v. Moore*, 5 Jones L. 130, 132 (1857). See also *Hall v. Southern Ry. Co.*, (N. C. 1907) 59 S. E. 879.

*Ohio*.—*Smith v. Bartram*, 11 Ohio St. 690 (1860).

*Oklahoma*.—*Greensville N. Bank v. Evans, S. B. Co.*, 9 Okl. 353, 60 Pac. 249 (1900).

*Oregon*.—*Cressy v. Tatom*, 9 Or. 541 (1881). See also *Scott v. Ford*, (Or. 1908) 97 Pac. 99.

*Pennsylvania*.—*Spellier Electric Time Co. v. Geiger*, 147 Pa. St. 399, 23 Atl. 547 (1892).

*Rhode Island*.—*Taylor v. Slater*, 21 R. I. 104, 41 Atl. 1001 (1898).

*South Carolina*.—*Bridger v. Asheville, etc., R. Co.*, 25 S. C. 24 (1885).

*Tennessee*.—*Templeton v. Brown*, 86 Tenn. 50, 5 S. W. 441 (1887).

*Texas*.—*White v. Richeson*, (Tex. Civ. App. 1906) 94 S. W. 202; *Anderson v. Anderson*, 23 Tex. 639 (1859); *Trigg v. Moore*, 10 Tex. 197 (1853).

*Vermont*.—*Murtey v. Allen*, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779 (1899).

*Virginia*.—*App v. App*, 106 Va. 253, 55 S. E. 672 (1906); *Union Central L. Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271 (1896); *Warner v. Com.*, 2 Va. Cas. 95, 98 (1817).

*Washington*.—*McDaniel v. Presler*, 3 Wash. 636, 29 Pac. 209 (1892).

*West Virginia*.—*Klinck v. Price*, 4 W. Va. 4, 6 Am. Rep. 268 (1870).

*Wisconsin*.—*Osborn v. Blackburn*, 78 Wis. 209, 47 N. W. 175, 23 Am. St. Rep. 400, 10 L. R. A. 367 (1890).

Code or statutory provisions regulating procedure which undertake to enumerate the subjects of which the courts are to take "judicial notice" reinforce the general rule, should they fail to enumerate the statutes of a sister state. *McKnight v. Oregon Short Line R. Co.*, (Mont. 1905) 82 Pac. 661.

Foreign law or that of a sister state must be averred and proved as facts. *Clark v. Assets Realization Co.*, 115 Ill. App. 150 (1904).

2. *Rowe v. Henderson*, (Ind. T. 1903) 76 S. W. 250 (Chickasaw law); *Sass v. Thomas*, (1902 Ind. Terr.) 69 S. W. 893 (Chickasaw Indians); *Hockett v. Allston*, (Ind. Terr. 1900) 58 S. W. 675 (Cherokee Indians).

3. *Louisville & N. R. Co. v. Sullivan's Adm'r*, 76 S. W. 525, 25 Ky. Law Rep. 854 (1903); *Nenno v. St. Louis & S. F. R. Co.*, (Mo. App. 1904) 80 S. W. 24; *Columbian Building & Loan Ass'n v. Rice*, 68 S. C. 236, 47 S. E. 63 (1904). See also *Leigh v. Nat. Hollow Brake Beam Co.*, 131 Ill. App. 106 (1907) (powers of foreign corporation); *Varner v. Interstate Exch.*, (Iowa 1908) 115 N. W. 1111; *Mathieson v. St. Louis & S. F. Ry. Co.*, 219 Mo. 542, 118 S. W. 9 (1909); *Electro-Tint Engraving Co. v. American Handkerchief Co.*, 115 N. Y. Suppl. 34, 130 App. Div. 561 (1909). The rule is not altered where a party incorporates in his pleading a court decision in the sister state in which the foreign law is declared. *Missouri, K. & T. Ry. Co. v. Lealy*, (Kan. 1908) 99 Pac. 230.

like any other fact. The foreign law has, however, been judicially noticed where the existence of the statute has been established in the courts of the forum by previous litigation therein.<sup>6</sup> There is even authority to the effect that a general judicial recognition may be extended to the statutes and unwritten laws of other states.<sup>7</sup> Whether it be permissible, from the procedural point of view to make the law of a sister state a subject of judicial knowledge, it cannot reasonably be questioned but that, from that of administration, there is much force in the suggestion that it is at least safer to require that the law be proved.<sup>8</sup>

**§ 615. (*Judicial Knowledge of Written Law; State and Provincial Courts; Statutes of Sister State*); "Full Faith and Credit."**—A cause of considerable, though diminishing, conflict of opinion among the states of the American Union has been found in that clause of the Federal Constitution<sup>1</sup> requiring the courts of each state to give "full faith and credit" to the judgment of any other state of the Union. The supreme court of the United States was supposed to have announced<sup>2</sup> the doctrine that in reviewing the action of a state court alleged to be in violation of this constitutional provision, it would judicially know the laws of the state to whose judgment "full faith and credit" was said to have been refused. The state courts of several jurisdictions in the Union, in order that the case in the Supreme Court of the

Virginia adopts a broad rule to the effect that no judicial cognizance will be taken of the laws of a sister state which are at variance with the common law. *Mountain Lake Land Co. v. Blair*, (Va. 1909) 63 S. E. 751.

4. *Baltimore & O. R. Co. v. Ryan*, 31 Ind. App. 597, 68 N. E. 923 (1903); *The Matterhorn*, (U. S. 1904) 63 C. C. A. 331, 128 Fed. 863. Judicial notice cannot be taken of the construction placed by the courts of another state on its statutes, but such construction must be proved. *Loyal Am. of Rep. v. McClanahan*, (Tex. Civ. App. 1908) 109 S. W. 973. The court will take judicial notice of an act of Congress organizing a territory, but not of the laws passed by the territory's legislature, nor of the construction placed by its

supreme court on the common law. *El Paso & S. W. Ry. Co. v. Smith*, (Tex. Civ. App. 1908) 108 S. W. 988.

5. *Cumberland Tel. & Tel. Co. v. St. Louis, etc., Ry. Co.*, (La. 1906) 41 So. 492; *Snuffer v. Karr*, 197 Mo. 182, 94 S. W. 983 (1906); *Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 89, 48 S. E. 642 (1904).

6. *Graham v. Williams*, 21 La. Ann. 594 (1869); *U. S. v. Teschmaker*, 22 How. (U. S.) 392, 16 L. ed. 353 (1859).

7. *Missouri State Life Ins. Co. v. Lovelace*, 1 Ga. App. 446, 58 S. E. 93 (1907).

8. *Hunt v. Monroe*, (Utah 1907) 91 Pac. 269.

1. U. S. Const., Art. IV, § 1.

2. *Carpenter v. Dexter*, 8 Wall. 513 (1869).

United States might be the same as that in the court appealed from, deemed it incumbent upon themselves to take the same judicial knowledge of the written laws of the state whose judgment was before them;—so far, at least, as to enable the court to determine whether the judgment was valid under the laws of the state in which it was rendered.<sup>3</sup> The Supreme Court of the United States, however, later produced the same uniformity between itself and the state courts for which these state tribunals were striving by deciding that on review of the judgment of a state court, it would take only such knowledge of the law of a state other than the one under review as that court itself would have taken.<sup>4</sup> The majority of the state courts, in consequence, in part, of this decision, take no additional judicial knowledge of the laws of a sister state when they are asked to give “full faith and credit” to its judgments.<sup>5</sup> A judge may properly examine the decisions of the court of last resort in a sister state construing the statutes of that state.<sup>6</sup>

**§ 616. (*Judicial Knowledge of Written Law; State and Provincial Courts*); Statutes of Foreign Country.—**Courts of a

3. *Illinois*.—*Rae v. Hulbert*, 17 Ill. 572 (1856).

*Indiana*.—*Draggoot v. Graham*, 9 Ind. 212 (1857).

*Kansas*.—*Dodge v. Coffin*, 15 Kan. 277 (1875).

*Missouri*.—*Wilson v. Jackson*, 10 Mo. 329 (1847).

*New Jersey*.—*Curtis v. Martin*, 2 N. J. L. 377 (1805).

*Pennsylvania*.—*Jones v. Quaker City Mut. F. Ins. Co.*, 9 Pa. Dist. 213 (1900); *State v. Hinchman*, 27 Pa. St. 479 (1856).

*Rhode Island*.—*Paine v. Schenectady Ins. Co.*, 11 R. I. 411 (1876).

*Tennessee*.—*Coffee v. Neely*, 2 Heisk. 304 (1871).

*Washington*.—*Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204 (1900).

4. *Lloyd v. Matthews*, 155 U. S. 222, 15 S. Ct. 70, 39 L. ed. 128 (1894); *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 7 S.

Ct. 398, 30 L. ed. 519 (1886); *Renaud v. Abbott*, 116 U. S. 277, 6 S. Ct. 1194, 29 L. ed. 629 (1885); *Hanley v. Donoghue*, 116 U. S. 1, 6 S. Ct. 242, 29 L. ed. 535 (1885).

5. *Florida*.—*Sammis v. Wightman*, 31 Fla. 10, 12 So. 526 (1893).

*Iowa*.—*Taylor v. Runyan*, 9 Iowa 522 (1859).

*Massachusetts*.—*Knapp v. Abell*, 10 Allen 485 (1865).

*Texas*.—*Gill v. Everman*, 94 Tex. 209, 59 S. W. 531 (1900).

*Wisconsin*.—*Osborn v. Blackburn*, 78 Wis. 209, 47 N. W. 175, 23 Am. St. Rep. 460, 10 L. R. A. 367 (1890).

*United States*.—*Lloyd v. Matthews*, 155 U. S. 222, 15 S. Ct. 70, 39 L. ed. 128 (1894); *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 7 S. Ct. 398, 30 L. ed. 519 (1886).

6. *Hendryx v. Evans*, 120 Iowa 310, 94 N. W. 853 (1903); *Pacific Express Co. v. Pitman*, 30 Tex. Civ. App. 626, 71 S. W. 312 (1902).

state<sup>1</sup> or province<sup>2</sup> do not know the corporation<sup>3</sup> or other written laws, of a foreign country. The law of the foreign country must be pleaded and proved.<sup>4</sup>

1. *Alabama*.—*Doe v. Eslava*, 11 Ala. 1028 (1847).

*Arkansas*.—*Cox v. Morrow*, 14 Ark. 603 (1854).

*California*.—*Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118 (1894).

*Connecticut*.—*Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179 (1823).

*Delaware*.—*Thomas v. Grand Trunk R. Co.*, 1 Pennw. 593, 42 Atl. 987 (1899).

*Illinois*.—*McCurdy v. Alaska, etc.*, Commercial Co., 102 Ill. App. 120 (1902).

*Indiana*.—*Coplinger v. The David Gibson*, 14 Ind. 480 (1860).

*Iowa*.—*Banco de Sonora v. Bankers' Mut. Casualty Co.*, 95 N. W. 232 (1903).

*Louisiana*.—*Kohn v. The Renaissance*, 5 La. Ann. 25, 52 Am. Dec. 577 (1850).

*Maryland*.—*Baptiste v. De Volunbrun*, 5 Harr. & J. 86 (1820).

*Massachusetts*.—*Aslanian v. Dostumian*, 174 Mass. 328, 54 N. E. 845, 75 Am. St. Rep. 348, 47 L. R. A. 495 (1899).

*Michigan*.—*Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74 (1881).

*Minnesota*.—*Brimhall v. Van Campen*, 8 Minn. 13, 82 Am. Dec. 118 (1862).

*Mississippi*.—*Sessions v. Doe*, 7 Sm. & M. 130 (1846).

*Missouri*.—*Charlotte v. Chouteau*, 25 Mo. 465 (1857).

*Nebraska*.—*Moses v. Comstock*, 4 Neb. 516 (1876).

*New Jersey*.—*Campion v. Kille*, 14 N. J. Eq. 229 [affirmed in 15 N. J. Eq. 476] (1862).

*New York*.—*Monroe v. Douglass*, 5 N. Y. 447 (1851).

*Oregon*.—*State v. Moy Looke*, 7 Or. 54 (1879).

*South Carolina*.—*McFee v. South Carolina Ins. Co.*, 2 McCord 503, 13 Am. Dec. 757 (1823).

*Texas*.—*Trigg v. Moore*, 10 Tex. 197 (1853).

*Vermont*.—*McLeod v. Connecticut, etc.*, R. Co., 58 Vt. 727, 6 Atl. 648 (1886).

2. *Giles v. Gariepy*, 29 L. C. Jur. 207 (1885).

3. *Alabama*.—*Savage v. Russell*, 84 Ala. 103, 4 So. 235 (1887).

*Florida*.—*Duke v. Taylor*, 37 Fla. 64, 19 So. 172 (1896).

*Maryland*.—*Agnew v. Gettysburg Bank*, 2 Harr. & G. 478 (1828).

*Massachusetts*.—*Portmouth Livery Co. v. Watson*, 10 Mass. 91 (1813).

*Missouri*.—*Southern Illinois, etc., Bridge Co. v. Stone*, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301 (1903).

*Ohio*.—*Lewis v. Kentucky Bank*, 12 Ohio 132, 40 Am. Dec. 469 (1843).

*Oregon*.—*Law Trust Soc. v. Hogue*, 37 Or. 544, 62 Pac. 380, 63 Pac. 690 (1900).

*Tennessee*.—*Nashville Trust Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763 (1899).

*England*.—*St. Charles Nat. Bank v. De Bernales*, 1 C. & P. 569, R. & M. 193, 12 E. C. L. 325 (1825).

4. *Ryan v. North Alaska Salmon Co.*, (Cal. 1908) 95 Pac. 862 (Alaska); *Gordon v. Knott*, 199 Mass. 173, 85 N. E. 184 (1908) (England); *Crosby v. Cuba R. Co.*, (N. J. 1908) 158 Fed. 144. The same rule has been applied to the island of Cuba during the military occupation of the United States. *Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co.*, 164 Fed. 869 (1908).

The question of the foreign law is purely one of fact in Massachusetts; and the reasoning of the courts of the foreign country can no more be used

*Examination by Judge.*—While a proposition of foreign law is unquestionably a matter of fact as, indeed, upon principle,<sup>5</sup> and apart from administrative considerations, a rule of domestic law would be, it yet remains so closely analogous to provisions of domestic law, that a presiding judge, even when required to hear the foreign law proved to him as a fact, may yet, with great administrative propriety, conduct a search for himself.<sup>6</sup> In such a connection he may dispense with assistance or suggestion from the parties. He is acting in the exercise of his administrative power to further justice and expedite the course of the trial.

**§ 617. (Judicial Knowledge of Written Law); Local Courts.**

—The judicial knowledge of unwritten law by the local or inferior courts is equally extensive with that of courts of general jurisdiction. The judicial knowledge of tribunals of local or limited jurisdiction is the same, in relation to the constitution and public statutes of the state, province or nation, as that of state or provincial courts.<sup>1</sup> Local courts have occasion to administer these laws. They therefore know them judicially. Upon the same fundamental principle, a local court being distinctively charged with the duty of enforcing these municipal regulations, judicially knows them.<sup>2</sup> The function of administra-

on argument before the supreme judicial court to show the foreign law than a foreign decision, not introduced in evidence at the trial could be used for the same purpose. *Gordon v. Knott*, 199 Mass. 85 N. E. 184 (1908).

5. *Supra*, § 41.

6. *Wells v. Gress*, (Ga. 1903) 45 S. E. 418 (foreign law); *Barranger v. Baum*, 103 Ga. 465, 30 S. E. 524 (1898) (extradition).

1. *Supra*, §§ 602, 604, 605.

2. *California*.—*Ew p. Davis*, 115 Cal. 445, 47 Pac. 258 (1896).

*Georgia*.—*Fears v. State*, 125 Ga. 740, 54 S. E. 661 (1906); *Taylor v. Sandersville*, 118 Ga. 63, 44 S. E. 845 (1903).

*Iowa*.—*Scranton v. Danenbaum*, 109 Iowa 95, 80 N. W. 221 (1899); *Town of La Porte City v. Goodfellow*, 47 Iowa 572 (1877).

*Kansas*.—*City of Solomon v. Hughes*, 24 Kan. 211 (1880); *West v. Columbus*, 20 Kan. 633 (1878).

*Louisiana*.—*State v. Judge Criminal Dist. Ct.*, 105 La. 758, 30 So. 105 (1901).

*New Jersey*.—*Byer v. Harris*, (Supp. 1909) 72 Atl. 136 (ordinance creating excise commission); *Galen Hall Co. v. Atlantic City*, (Supp. 1908) 68 Atl. 1092.

*Ohio*.—*Keck v. Cincinnati*, 4 Ohio S. & C. Pl. Dec. 324, 3 Ohio N. P. 253 (1896).

*South Carolina*.—*Anderson v. O'Donnell*, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632 (1888).

*West Virginia*.—*Moundsville v. Velton*, 35 W. Va. 217, 13 S. E. 373 (1891).



tion entails the requirement of this knowledge. The mere fact that the court has a limited jurisdiction does not, however, necessarily carry with it the requirement of such judicial knowledge of local regulations. To attain this result, any jurisdiction should include the administration of the local laws in question.<sup>3</sup> The written laws of Indian tribes are known only to local courts charged with their enforcement.<sup>4</sup> In other courts, they must be established by proof.<sup>5</sup>

**§ 618. (*Judicial Knowledge of Written Law*); Amendment and Repeal.**—Any amendment of a public act is itself entitled to judicial knowledge;<sup>1</sup> and the same is true of an act repealing a public statute.<sup>2</sup>

**§ 619. (*Judicial Knowledge of Written Law*); What Statutes Are Public.**—Public statutes, in connection with the law of judicial notice may be defined as being those which affect, directly and equally, the inhabitants of a nation, state or province; or apply, in the same way, to the dwellers in any municipality or other territorial division of such nation, state or province. If the purpose be public, the act is not made private by the circumstance that the legislature has limited its operation to a particular territory.<sup>1</sup> Where special laws apply to different sections of the

3. *Winona v. Burke*, 23 Minn. 254 (1876) (justice of the peace appointed for city and county does not know judicially a city ordinance). See also *Harker v. New York*, 17 Wend. (N. Y.) 199 (1837). Judicial notice of local regulations may be imposed by statute. *Houren v. Chicago, M. & St. P. Ry. Co.*, 236 Ill. 620, 86 N. E. 611 (1908) [judgment affirmed *Chicago, M. & St. P. Ry. Co. v. Houren*, 139 Ill. App. 116]. The courts of the city of London will take judicial notice of the city customs. *Wiltshire v. Lloyd*, 1 Doug. 380, n. (1780); Com. Dig. London (N 1), (N. 7).

4. *Sass v. Thomas*, (Indian Terr. 1902) 69 S. W. 893; *Kelly v. Churchill*, (Indian Terr. 1902) 69 S. W. 817;

*Hockett v. Alston*, 110 Fed. 910, 49 C. C. A. 180 (1901).

5. In *Missouri* a contrary doctrine seems to have been laid down. *St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915 (1895).

1. *Jemison v. Planters and Merchants' Bank*, 17 Ala. 754 (1850); *Parent v. Wamsly's Adm'rs*, 20 Ind. 82, 86 (1863); *Belmont v. Morrill*, 69 Me. 314, 317 (1879); *City of Houston v. Dooley*, (Tex. Civ. App. 1905) 89 S. W. 777 (charter of city of Houston); *Supra*, § 594.

2. *State v. O'Conner*, 13 La. Ann. 487 (1858).

1. *Alabama*.—*Davis v. State*, (Ala. 1904) 37 So. 454 (restrain cattle from running at large).

*Indiana*.—*Levy v. State*, 6 Ind. 281

state, a court will know the public laws locally limited which apply to each section.<sup>2</sup> Thus, for example, the "local option" laws, so-called, regulating the sale of intoxicating liquors in limited areas, according to the wishes of the voters in that section, will be judicially noticed;<sup>3</sup>—and also the time when it goes into effect.<sup>4</sup> In general, statutes allowing certain governmental agencies, counties, cities or the like, to *adopt* laws relating to given subjects at their option are themselves public statutes; but whether the necessary action, *in pais*, has in fact been taken in a given case must usually be established by evidence.<sup>5</sup>

**§ 620. (*Judicial Knowledge of Written Law; What Statutes Are Public*); Administration of Government.**—Administration of government being a public purpose, statutes prescribing in what manner it shall be conducted are public though dealing with details. Within this class, fall statutes creating a public

(1855) (selling liquor in three towns of a given county).

*Maine*.—*Pierce v. Kimball*, 9 Greenl. 54, 56 (1832) (regulating lumber trade).

*Maryland*.—*Hammond's Lessees v. Inloes*, 4 Md. 138, 172 (1853) (regulating navigation and fishery in a particular river).

*Massachusetts*.—*Burnham v. Webster*, 5 Mass. 266, 269 (1809) (right of fishing).

*New York*.—*Bretz v. Mayor, etc., of New York*, 6 Robertson, 325 (1868) (giving jurisdiction to the supreme court of actions against New York City).

*North Carolina*.—*State v. Piner*, (N. C. 1906) 53 S. E. 305; *State v. Cooper*, 101 N. C. 684, 8 S. E. 134 (1888) (sales of liquor). "It is a public act if it extends to all persons within the territorial limits described in the statute." *Levy v. State*, 6 Ind. 281 (1855). "It is true that public acts are usually general in their character and operation, and equally applicable to all parts of the state. There are other acts which are considered as public acts, of which all

persons are bound to take notice upon their peril, and yet they are local, because the violation of them is and must be local. . . . Nothing appears which indicates that the law was not intended as a public benefit, of which all the citizens of the state, as well as others, might equally participate." *Pierce v. Kimball*, 9 Greenl. 54 (1832). "We are of opinion that the statute referred to [relating to catching bass in a particular river] is a public statute. It is obligatory on all the citizens, and they must notice it at their peril. We must, therefore, *ex officio*, take notice of it. Indeed, all the laws regulating the taking of fish are made for the public benefit, to preserve the fish, and are public statutes." *Burnham v. Webster*, 5 Mass. 266 (1809).

2. *Lewis v. Rasp*, (Okl. 1904) 76 Pac. 142 (stock running at large).

3. *Crigler v. Comm.*, (Ky. 1905) 87 S. W. 281.

4. *State v. Scampini*, 77 Vt. 92, 59 Atl. 201 (1904).

5. *Johnson v. Scott*, 133 Mo. App. 689, 114 S. W. 45 (1908) (road law).

office,<sup>1</sup> determining the duties incumbent upon the individual holding it,<sup>2</sup> or establishing courts.<sup>3</sup>

**§ 621. (*Judicial Knowledge of Written Law; What Statutes Are Public*); Local Option Laws; Result of Voting not Judicially Known.**—Considerable difficulty has been apparently experienced by the courts in drawing a satisfactory line of division between the primary and the secondary results of legislation involved in a matter where an act *in pais*, the action of the qualified voters of a given district, intervenes, to establish in a particular locality, the prohibitions provided by the general law. The "local option law," as passed by the legislature, is undoubtedly a public one. All courts, therefore, judicially know it. But tribunals in certain states have been unable to see their way clear to taking judicial notice that the general law had, by popular action, been made operative in a certain section of the state.<sup>1</sup> In view of the fact that the application of the general law to the *locus* of the offense is a *constituent* fact or one of the *res gestæ*,<sup>2</sup> it would seem that such an administrative course was sound in point of principle. For similar reasons, popular action regarding an option conferred by a general law, e. g., that of using the contract system of building, repairing or maintaining highways,<sup>3</sup> will not be made the subject of judicial notice.

**§ 622. (*Judicial Knowledge of Written Law; What Statutes Are Public; Local Option Laws*); Result of Voting Judicially Known.**—In other states, courts judicially know the result of local option elections;<sup>1</sup>—whether held under the general law

1. *State v. Jarrett*, 17 Md. 309 (1861).

2. *Alabama*.—*Cary v. State*, 76 Ala. 78 (1884).

*Illinois*.—*Lynn v. People*, 170 Ill. 527, 48 N. E. 964 (1897).

*Iowa*.—*Rowland v. Brown*, 75 Iowa 679, 37 N. W. 403 (1888).

*Minnesota*.—*State v. Gut*, 13 Minn. 341 (1868).

*Pennsylvania*.—*Fox v. Com.*, 81½ Pa. St. 511 (1875).

*Texas*.—*Burnett v. Henderson*, 21 Tex. 588 (1858); *State v. Delesdenier*, 7 Tex. 76 (1851).

*Utah*.—*People v. Lyman*, 2 Utah 30 (1877).

3. *La Salle Co. v. Milligan*, 143 Ill.

321 (1892) (probate court in a particular county).

1. *Craddick v. State*, (Tex. Cr. App. 1905) 88 S. W. 347; *State v. Scampini*, 77 Vt. 9, 59 Atl. 201 (1904). See also *Bills v. State*, (Tex. Cr. App. 1909) 117 S. W. 835.

2. *Supra*, § 47.

3. *State v. Burkett*, (Miss. 1904) 35 So. 689.

1. *Oglesby v. State*, 121 Ga. 602, 49 S. E. 706 (1905). See also *Gue v. City of Eugene*, (Or. 1909) 100 Pac. 254. When a local option law went into effect is a matter of judicial knowledge. *Badgett v. State*, (Ala. 1908) 48 So. 54.

or a local statute. The length of time after its adoption during which a local option law persists is also within the judicial knowledge of the court.<sup>2</sup> Where it is unlawful to manufacture or sell intoxicants anywhere within a county, the supreme court will take notice of that fact.<sup>3</sup>

**§ 623. (*Judicial Knowledge of Written Law; What Statutes Are Public*); Municipal Corporations.**—The creation of municipalities through which the sovereign may exercise the functions of government over portions, more or less extended, of the jurisdiction are pre-eminently public statutes;<sup>1</sup> whether the incorporation be by general act,<sup>2</sup> or by special charter,<sup>3</sup> particularly

2. *State v. Hall*, 130 Mo. App. 170, 108 S. W. 1077 (1908). Where courts are required to take notice of a local census, the population as decided by one will be judicially known to the court for the purposes of a local option election. *State ex rel. Retonaz v. Mitchell*, (Mo. App. 1908) 115 S. W. 1098.

3. *State v. Arnold*, 80 S. C. 383, 61 S. E. 891 (1908).

1. *Frost v. State*, (Ala. 1907) 45 So. 203; *City of Bessemer v. Carroll*, (Ala. 1908) 45 So. 419; *Agnew v. Pawnee City*, (Neb. 1907) 113 N. W. 236. Judicial notice will be taken of a town charter. *State v. Matthews*, (Ala. 1907) 45 So. 307. An act incorporating an independent school district is a public act, judicially known by all courts. *Board of Education of Flatwoods Dist. v. Berry*, (W. Va. 1907) 59 S. E. 169. "In chartering such corporations the state in one sense charters a portion of itself. Such corporations are simply instruments in the hands of the state, made use of for the better protection of rights, the administration of justice, and the enforcement of the laws." *Prell v. McDonald*, 7 Kan. 426 (1871).

2. *Aldermen and Council v. Finley*, 10 Ark. 423 (1850); *State v. Ricksecker*, (Kan. 1906) 85 Pac. 547; *Briggs v. Whipple*, 7 Vt. 15 (1835).

Acts in pais must be proved.—"The

fact that a particular village or town has availed itself of the provisions of these statutes, and became incorporated as they authorize, is private in its character, and we know of no principle of law which would require or authorize the courts to take judicial notice of it." *Hard v. City of Decorah*, 43 Iowa 313 (1876). To the same effect, see *Rousey v. Wood*, 47 Mo. App. 465 (1891). If the legislature requires the courts to take judicial cognizance of a fact in pais, e. g., the result of a local (liquor) option election, the court, as in other cases of judicial cognizance will resort to any helpful source of information. "And since no sources of information are pointed out, it is incumbent on this as well as all other courts to inform itself by recourse to any and all sources of information." *Puckett v. State*, 71 Miss. 192 (1893). The following cases are in accord: *Whitman v. State*, 80 Md. 410 (1894); *Thomas v. Com.*, 90 Va. 92 (1893). Courts cannot judicially know that towns, even where they are county seats, are incorporated towns. *Bluitt v. State*, 56 Tex. Cr. R. 525, 121 S. W. 168 (1909).

3. *Alabama*.—*Albrittin v. Huntsville*, 60 Ala. 486, 492 (1877).

*Arkansas*.—*Alderman v. Finley*, 10 Ark. 423, 428 (1850).

*California*.—*Payne v. Treadwell*, 16 Cal. 221, 232 (1860).

where the courts are ordered to regard the latter as public acts.<sup>4</sup>

*Acts prescribing the duties* or establishing the powers, of these public corporations<sup>5</sup> are equally public.<sup>6</sup>

*Connecticut*.—Nichols v. City of Ansonia, 81 Conn. 229, 70 Atl. 636 (1908) (city charter).

*Georgia*.—Beaty v. Sears & Bennett, 132 Ga. 516, 64 S. E. 321 (1909).

*Illinois*.—Jones v. Lake View, 151 Ill. 663, 675, 38 N. E. 688 (1894).

*Indiana*.—Macey v. Titecombe, 19 Ind. 135, 137 (1862).

*Iowa*.—Stier v. Oskaloosa, 41 Iowa 353, 355 (1875).

*Kansas*.—Prell v. McDonald, 7 Kan. 426, 446 (1871).

*Missouri*.—State v. Sherman, 42 Mo. 210, 214 (1868).

*New York*.—Stone v. Auerbach, 117 N. Y. Suppl. 734, 133 App. Div. 75 (1909).

*Oregon*.—Naylor v. McColloch, 103 Pac. 68 (1909).

*Vermont*.—Village of Winooski v. Gokey, 49 Vt. 282 (1877) (village); Briggs v. Whipple, 7 Vt. 15, 19 (1835).

*Wisconsin*.—Davey v. Janesville, 111 Wis. 628, 87 N. W. 813 (1901).

*United States*.—*In re Dunn*, 212 U. S. 374, 29 S. Ct. 299 (1909).

On the other hand, it has been required that the existence of a special city charter should be proved by evidence where the act itself does not provide that the charter should be treated as a public one by the court. *City of Paris v. Tucker*, (Tex. 1907) 104 S. W. 1046.

**Superseded statutes of municipal incorporation** are judicially known. *Swain v. Comstock*, 18 Misc. 463 (1864). It is not material that the earlier statute was enacted under a sovereignty no longer exercising the functions of government in the territory in question. *Payne v. Treadwell*, 16 Cal. 220, 231 (1860). "San

Francisco having been constituted, by a public political act of the former government, a pueblo, we must take judicial notice of its existence, powers and rights." *Payne v. Treadwell*, 16 Cal. 220, 231 (1860).

4. *City of Austin v. Forbis*, (Tex. 1905) 89 S. W. 405.

5. *Alabama*.—Arndt v. Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922 (1901).

*California*.—Bituminous Lime Rock Paving, etc., Co. v. Fulton, 33 Pac. 1117 (1893).

*Delaware*.—Downs v. Smyrna, 2 Pennw. 132, 45 Atl. 717 (1899).

*Florida*.—City of Miami v. Miami Realty, Loan & Guaranty Co., 57 Fla. 366, 49 So. 55 (1909).

*Illinois*.—Vance v. Rankin, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173 [reversing 95 Ill. App. 562] (1902).

*Indiana*.—Moss v. Sugar Ridge Tp., 161 Ind. 417, 68 N. E. 896 (1903).

*Iowa*.—State v. Olinger, 72 N. W. 441 (1897).

*Kansas*.—Solomon v. Hughes, 24 Kan. 211 (1880).

*Kentucky*.—Gifford v. Falmouth, 4 Ky. L. Rep. 902 (1883).

*Maine*.—Belmont v. Morrill, 69 Me. 314 (1879).

*Massachusetts*.—Harris v. Quincy, 171 Mass. 472, 50 N. E. 1042 (1898).

*Minnesota*.—Peterson v. Cokato, 84 Minn. 205, 87 N. W. 615 (1901).

*Missouri*.—Shively v. Lankford, 174 Mo. 535, 74 S. W. 835 (1903) (township organization).

*Nebraska*.—North Platte Water-Works Co. v. North Platte, 50 Neb. 853, 70 N. W. 393 (1897).

*New Hampshire*.—Gross v. Portsmouth, 68 N. H. 266, 33 Atl. 256, 73 Am. St. Rep. 586 (1895).

*Names.*—Statutes establishing or changing<sup>7</sup> the name of a municipal corporation are public. Other direct results as the powers of municipal officers<sup>8</sup> are judicially known by the judges.

*The repeal of acts* incorporating a town are public.<sup>9</sup>

**§ 624. (Judicial Knowledge of Written Law; What Statutes Are Public; Municipal Corporations); Cities.**—Particular facts concerning individual cities, established by<sup>1</sup> or recited in an act relating to such city will be judicially known to the judge who will accord it legal force as part of a public statute, declining to hear evidence to any contrary or inconsistent effect. Acts providing for the erection of municipal buildings<sup>2</sup> and, occasionally, the adoption of a general municipal incorporation law by a particular city<sup>3</sup> need not be proved.

*Statutes providing individual relief* are, in their nature, private.<sup>4</sup>

*New Jersey.*—*Hawthorne v. Hoboken*, 32 N. J. L. 172 (1867).

*New York.*—*Shaw v. New York Cent., etc., R. Co.*, 83 N. Y. Suppl. 91 85 App. Div. 137 (1903).

*Oregon.*—*State v. Banfield*, 43 Or. 287, 72 Pac. 1093 (1902).

*Tennessee.*—*State v. Murfreesboro*, 11 Humphr. 217 (1850).

*Texas.*—*Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666 (1896).

*Vermont.*—*Winooski v. Gokey*, 49 Vt. 282 (1877).

*Washington.*—*Seattle v. Turner*, 29 Wash. 515, 69 Pac. 1083 (1902).

*West Virginia.*—*Beasley v. Beckley*, 28 W. Va. 81 (1886).

*Wisconsin.*—*Davey v. Janesville*, 111 Wis. 628, 87 N. W. 813 (1901).

**6.** Where all acts of incorporation are declared to be public, no question exists that acts conferring powers on municipal corporation are included. *Foley v. Ray*, 27 R. I. 127, 61 Atl. 50 (1905) (fire district furnish water).

**7.** *State v. Cooper*, 101 N. C. 684 (1888) (township).

**8.** *Lynn v. People*, 170 Ill. 527, 48 N. E. 964 (1897); *Jones v. Lake*

*View*, 151 Ill. 663, 38 N. E. 688 (1894) (assessors); *Alford v. State*, 8 Tex. App. 545 (1880).

**9.** Board of Tp. Com'rs for Sullivan's Island v. Buckley, 82 S. C. 352, 64 S. E. 163 (1909) (Moultrieville). The date of the incorporation of a town will be judicially noticed. *Badgett v. State*, (Ala. 1908) 48 So. 54.

**1.** *Harris v. Quincy*, 171 Mass. 472, 50 N. E. 1042 (1898) (valuation).

**2.** *Burlington Mfg. Co. v. Board of Court-house, etc., Com'rs*, 67 Minn. 327, 69 N. W. 1091 (1897) (city hall and courthouse).

**3.** *Davey v. Janesville*, 111 Wis. 628, 87 N. W. 813 (1901).

**Acts in pais.**—It may be required by statute that a court should take judicial notice of all cities and villages actually incorporated under a general incorporation law. *Welch v. Shumway*, 232 Ill. 54, 83 N. E. 549 (1908).

**4.** *State v. H. & C. Turnpike Co.*, 65 N. J. L. 97, 46 Atl. 700 (1900); *Leland v. Wilkinson*, 6 Pet. 317, 319 (1832). An act for the survey of a tract of land is special. *Allegheny v. Wilson*, 25 Pa. St. 332 (1855).

**§ 625. (Judicial Knowledge of Written Law; What Statutes are Public); Mercantile Corporations; Acts of Incorporation.**

— General acts of incorporation for business or other private purposes, are public statutes,<sup>1</sup> especially where, as in case of railways<sup>2</sup> the purpose is one which concerns the general public.

*Federal Courts.*— In case of the federal courts of the United States, this knowledge covers not only incorporation granted by

1. *Alabama.*—Burdine v. Grand Lodge, 37 Ala. 478 (1861).

*Arkansas.*—Hammett v. Little Rock, etc., R. Co., 20 Ark. 204 (1859).

*Connecticut.*—Woodruff v. Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346 (1893).

*Delaware.*—Wilmington, etc., Bank v. Wollaston, 3 Harr. 90 (1839).

*Georgia.*—Jackson v. State, 72 Ga. 28 (1883).

*Illinois.*—Nimmo v. Jackman, 21 Ill. App. 607 (1886).

*Indiana.*—Delawter v. Sand Creek Ditching Co., 26 Ind. 407 (1866).

*Iowa.*—Durham v. Daniels, 2 Greene 518 (1850).

*Kentucky.*—Commercial Bank v. Newport Mfg. Co., 1 B. Monr. 13, 35 Am. Dec. 171 (1840).

*Maine.*—State v. Webb's River Imp. Co., 97 Me. 559, 55 Atl. 495 (1903).

*Maryland.*—Miller v. Matthews, 87 Md. 464, 40 Atl. 176 (1898).

*Massachusetts.*—Portmouth Livery Co. v. Watson, 10 Mass. 91 (1813).

*Michigan.*—Chapman v. Colby, 47 Mich. 46, 10 N. W. 74 (1881).

*New Hampshire.*—Hall v. Brown, 58 N. H. 93 (1877).

*New Jersey.*—Stephens, etc., Transp. Co. v. New Jersey Cent. R. Co., 33 N. J. L. 229 (1869).

*New York.*—Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482 (1859).

*South Carolina.*—Simpson v. South Carolina Mut. Ins. Co., 59 S. C. 195, 37 S. E. 18, 225 (1900).

*Tennessee.*—Owen v. State, 5 Sneed 493 (1858).

*Texas.*—Alabama Bank v. Simonton, 2 Tex. 531 (1847).

*Vermont.*—Buell v. Warner, 33 Vt. 570 (1861).

*Virginia.*—Hays v. Northwestern Bank, 9 Gratt. 127 (1852).

*West Virginia.*—State v. Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803 (1879).

*United States.*—Case v. Kelly, 133 U. S. 21, 10 S. Ct. 216, 33 L. ed. 513 (1889); Covington Drawbridge Co. v. Shepherd, 20 How. 227, 15 L. ed. 896 (1857); Beaty v. Knowler, 4 Pet. 152, 7 L. ed. 813 (1830); Pennsylvania R. Co. v. Baltimore, etc., R. Co., 37 Fed. 129 (1888); U. S. v. Williams, 28 Fed. Cas. No. 16,706, 4 Biss. 302 (1869); Georgetown, etc., Cent. Bank v. Tayloe, 5 Fed. Cas. No. 2,548, 2 Cranc. C. C. 427 (1823). A company incorporated by public statute will be noticed and its identity with the one named in pleadings will be assumed. MacGregor v. Dover Ry. Co., 18 Q. B. 618, 627 (1852); Church v. Imperial Gas Co., 6 Ad. & E. 856 (1838). Whether there be another corporation of the same name as defendant can not be judicially known. Mobile Light & R. Co. v. Mackay, (Ala. 1909) 48 So. 509.

**Assessment insurance.**—The court will recognize the existence in the state of insurance companies having no capital stock and paying losses by means of assessments collected from the members. Ingle v. Batesville Grocery Co., 89 Ark. 378, 117 S. W. 241 (1909).

2. Heaston v. R. Co., 16 Ind. 275, 278 (1861).

public acts of Congress,<sup>3</sup> but those created under the public statutes of a state.<sup>4</sup> They know also powers conferred by act of Congress on existing corporations, state<sup>5</sup> or national.

*Corporate Acts in Pais.*—Unless required by law to do so courts will not notice acceptance by a corporation of its charter, as to what corporations are established by acts *in pais* under the provisions of a general statute of incorporation,<sup>6</sup> or, where there are several available statutes of incorporation, as to which was actually employed.<sup>7</sup> This is all *in pais* and is not, therefore, part of a court's judicial knowledge. Neither will a judge judicially know whether a given corporation has adopted the terms of a certain act,<sup>8</sup> has in fact consolidated with another corporation as authorized by a statute,<sup>9</sup> whether it has lost or forfeited its charter,<sup>10</sup> or has adopted by-laws, and, if so, what these are.<sup>11</sup> In like man-

3. *Central Bank v. Tayloe*, 5 Fed. Cas. No. 2,548, 2 Cranch C. C. 427 (1823).

4. *Beaty v. Knowler*, 4 Pet. (U. S.) 152, 7 L. ed. 813 (1830). See also *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227, 15 L. ed. 896 (1857).

5. *Pennsylvania R. Co. v. Baltimore, etc.*, R. Co., 37 Fed. 129 (1888) (railroad company authorized to bridge navigable waters).

6. *Danville, etc., Plank-Road Co. v. State*, 16 Ind. 456 (1861); *People v. De Mill*, 15 Mich. 164, 93 Am. Dec. 179 (1867); *Trice v. State*, 2 Head (Tenn.) 591 (1859). See also:

*Arkansas.*—*Hammett v. Little Rock, etc.*, R. Co., 20 Ark. 204 (1859).

*California.*—*Wall v. Mines*, 130 Cal. 27, 62 Pac. 386 (1900).

*Maine.*—*Dutton Ministerial, etc., Fund v. Kendrick*, 12 Me. 381 (1835).

*Maryland.*—*Towson v. Havre-de-Grace Bank*, 6 Harr. & J. (Md.) 47, 14 Am. Dec. 254 (1823).

*Massachusetts.*—*Portsmouth Livery Co. v. Watson*, 10 Mass. 91 (1813).

*New York.*—*Purdy v. Erie R. Co.*, 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669 [affirming 54 N. Y. Suppl. 1114, 33 App. Div. 643] (1900).

*North Carolina.*—*Chicago State*

*Bank v. Carr*, 130 N. C. 479, 41 S. E. 876 (1902).

*Oregon.*—*Goodale Lumber Co. v. Shaw*, 41 Or. 544, 69 Pac. 546 (1902).

*United States.*—*U. S. v. Williams*, 25 Fed. Cas. No. 16,706, 4 Biss. 302 (1869).

The organization of "national banks" under the federal banking act has been noticed. *U. S. v. Williams*, 25 Fed. Cas. No. 16,706, 4 Biss. 302 (1869).

7. *Danville, etc., Plank-Road Co. v. State*, 16 Ind. 456 (1861).

8. *Danville, etc., Plank-Road Co. v. State*, 16 Ind. 456 (1861).

9. *Southgate v. Atlantic, etc., R. Co.*, 61 Mo. 89 (1875); *Columbus, etc., R. Co. v. Skidmore*, 69 Ill. 566 (1873). And see also *Brown v. Dibble*, 65 Mich. 520, 32 N. W. 656 (1887).

10. *Shea v. Knoxville, etc., R. Co.*, 6 Baxt. (Tenn.) 277 (1873).

11. *Bushnell v. Hall*, 9 Ky. L. Rep. 684 (1887); *Portage Lake Miners', etc., Benev. Soc. v. Phillips*, 36 Mich. 22 (1877); *Haven v. New Hampshire Insane Asylum*, 13 N. H. 532, 38 Am. Dec. 512 (1843); *Simpson v. South Carolina Mut. Ins. Co.*, 59 S. C. 195, 37 S. E. 18, 225 (1900).



ner, a court will not judicially know what officers a certain corporation has elected and what powers it has conferred on them,<sup>12</sup> or, indeed, whether any other act *in pais* whatever, has been done by the corporation,<sup>13</sup> or its board of directors.<sup>14</sup> Such acts must be proved, though a court knows what powers the general incorporation act confers upon corporations organized under its provisions.

*Private Corporations.*—Statutes of incorporation for private business purposes will not be judicially known. Even the name<sup>15</sup> of such a corporation must be proved. In like manner, no judicial notice will be taken of the seal of private corporations.<sup>16</sup> They must be established by proof.

**§ 626. (Judicial Knowledge of Written Law; What Statutes Are Public; Mercantile Corporations); Existence of Such Corporations.**—As a result accomplished by the direct operation of a law which it is obliged to know the court judicially knows the existence of private corporations established by a domestic public statute,<sup>1</sup> their names,<sup>2</sup> and powers,<sup>3</sup> and the duties of its

12. *Crawford v. Mobile Branch State Bank*, 7 Ala. 205 (1844); *Brown v. Missouri, etc., R. Co.*, 67 Mo. 122 (1877).

13. *Illinois Cent. R. Co. v. Johnson*, 40 Ill. 35 (1864) (adopted a seal); *Dunlap v. Wilson*, 32 Ill. 517 (1863); *People v. Tierney*, 57 Hun (N. Y.) 357, 589, 10 N. Y. Suppl. 940, 948 (1890) (business relations with the United States government); *Market Nat. Bank v. Pacific Nat. Bank*, 27 Hun (N. Y.) 465 (1882) (foreign bank insolvent); *Topp v. Watson*, 12 Heisk. (Tenn.) 411 (1873); *Topp v. Watson*, 12 Heisk. (Tenn.) 411 (1873) (assignment made or trustee appointed under authority of statute); *Chapman v. Pittsburgh, etc., R. Co.*, 8 W. Va. 184 (1881) (acquired any particular land).

14. *Crawford v. Mobile Branch State Bank*, 7 Ala. 205 (1844) (action of directors); *Dunlap v. Wilson*, 32 Ill. 517 (1863); *Topp v. Watson*, 12 Heisk. (Tenn.) 411 (1873).

15. *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420, 428 (1860).

16. *Griffing Bros. Co. v. Winfield*, (Fla. 1907) 43 So. 687.

1. *State v. Briscoe*, (Del. 1907) 67 Atl. 154; *Com. v. Newport, L. & A. Turnpike Co.*, 100 S. W. 871, 30 Ky. L. Rep. 1235 (1907).

2. *Jackson v. State*, 72 Ga. 28 (1883); *Georgetown, etc., Cent. Bank v. Tayloe*, 5 Fed. Cas. No. 2,548, 2 Cranch C. C. 427 (1823).

3. *Alabama*.—*Burdine v. Grand Lodge*, 37 Ala. 478 (1861).

*Arkansas*.—*Hammett v. Little Rock, etc., R. Co.*, 20 Ark. 204 (1859).

*Georgia*.—*Jackson v. State*, 72 Ga. 28 (1883).

*Indiana*.—*Gordon v. Montgomery*, 19 Ind. 110 (1862).

*Kentucky*.—*Lexington Mfg. Co. v. Dorr*, 2 Litt. 256 (1822).

*Maine*.—*State v. Webb's River Imp. Co.*, 97 Me. 559, 55 Atl. 495 (1903).

*Maryland*.—*Miller v. Matthews*, 87 Md. 464, 40 Atl. 176 (1898).

officers<sup>4</sup> and of a time limit upon its corporate existence,<sup>5</sup> so far as any has been imposed by law.<sup>6</sup>

*Federal Courts.*—For analogous reasons, a federal court will judicially know that a certain corporation is established under act of Congress.<sup>7</sup>

**§ 627. (Judicial Knowledge of Written Law; What Statutes Are Private; Mercantile Corporations; Existence of Such Corporations); Under Private Acts.**—Except where the fact is a notorious one in the community or where required by law so to do, the court will not know the existence of domestic corporations existing under a *private* act,<sup>1</sup> or that of corporations established under the law of a foreign country or sister state.<sup>2</sup>

Where the otherwise private act relates to a public purpose, a somewhat different question is presented to the court in the exer-

*Massachusetts.*—Portsmouth Livery Co. v. Watson, 10 Mass. 91 (1813).

*Michigan.*—Chapman v. Colby, 47 Mich. 46, 10 N. W. 74 (1881).

*South Carolina.*—Simpson v. South Carolina Mut. Ins. Co., 59 S. C. 195, 37 S. E. 18, 225 (1900).

*Tennessee.*—Owens v. State, 5 Sneed 493 (1858).

*Texas.*—Alabama Bank v. Simon-ton, 2 Tex. 531 (1847).

*Vermont.*—Buell v. Warner, 33 Vt. 570 (1861).

*West Virginia.*—State v. Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803 (1879).

4. Douglass v. Mobile Branch Bank, 19 Ala. 659 (1851) (commissioners of the state bank).

5. Terry v. Merchants', etc., Bank, 66 Ga. 177 (1880).

6. County courts are required, by statute, in certain jurisdictions, to know judicially the existence of corporations whose articles are recorded in the county. Such a provision does not affect a higher court. Cicero Hygiene Draining Co. v. Craighead, 28 Ind. 274 (1867); Delawter v. Sand Creek Ditching Co., 26 Ind. 407 (1866).

7. Heffelfinger v. Choctaw, O. & G. R. Co., (Tenn. 1905) 140 Fed. 75.

1. Mobile v. Louisville, etc., R. Co., 124 Ala. 132, 26 So. 902 (1899); Kirby v. Wabash R. Co., 85 Mo. App. 345 (1900); State v. Haddonfield, etc., Turnpike Co., 65 N. J. L. 97, 46 Atl. 700 (1900); Conley v. Columbus Tap. R. Co., 44 Tex. 579 (1876).

2. *Alabama.*—Savage v. Russell, 84 Ala. 103, 4 So. 235 (1887).

*Maine.*—Savage Mfg. Co. v. Armstrong, 17 Me. 34, 35 Am. Dec. 227 (1840).

*Maryland.*—Agnew v. Gettysburg Bank, 2 Harr. & G. 478 (1828).

*Massachusetts.*—Portsmouth Livery Co. v. Watson, 10 Mass. 91 (1813).

*Michigan.*—Brown v. Dibble, 65 Mich. 520, 32 N. W. 656 (1887).

*Missouri.*—Southern Illinois, etc., Bridge Co. v. Stone, 174 Mo. 1, 73 S. W. 453 (1902).

*Ohio.*—Lewis v. Kentucky Bank, 12 Ohio 132, 40 Am. Dec. 469 (1843).

*Oregon.*—Law Trust Soc. v. Hogue, 37 Or. 544, 62 Pac. 380, 63 Pac. 690 (1900).

*Tennessee.*—Nashville Trust Co. v. Weaver, 102 Tenn. 66, 50 S. W. 763 (1899).

*England.*—St. Charles Nat. Bank v. DeBernales, 1 C. & P. 569, R. & M. 193, 12 E. C. L. 325 (1825).

cise of its administrative power. The result which such a statute effects is usually a matter of notoriety. The impulse to transmute common into judicial knowledge for the expediting of public business or the furtherance of justice in other ways is one to which the judge may reasonably yield. In the absence of the common legislative requirement to the same effect, a court may well treat special charters incorporating persons to carry on certain business enterprises of a public or semi-public nature, as banking,<sup>3</sup> operating a railroad, street railway, or an electric light<sup>4</sup> or power plant, as within the range of judicial knowledge.

**§ 628. (*Judicial Knowledge of Written Law; What Statutes Are Public; Mercantile Corporations*); Statutes Conferring Powers.**—For the same reasons statutes prescribing the powers and duties of all corporations of this class, or of all corporations organized for certain purposes, e. g., operating a railroad,<sup>1</sup> and the like,<sup>2</sup> stand in the same position. In like manner, it will be

**3. Arkansas.**—*McKiel v. Real Estate Bank*, 4 Ark. 592 (1841) (state bank of Arkansas).

**Georgia.**—*Davis v. Bank of Fulton*, 31 Ga. 69 (1860).

**Indiana.**—*Gordon v. Montgomery*, 19 Ind. 110 (1862) (insurance company given privileges of banking).

**South Carolina.**—*Bank of Newbury v. R. Co.*, 9 Rich. L. 495 (1855).

**Tennessee.**—*Shaw v. State*, 3 Sneed (Tenn.) 86 (1855) (bank of Tennessee).

**Vermont.**—*Buell v. Warner*, 33 Vt. 570, 578 (1861).

**Virginia.**—*Hays v. Northwestern Bank*, 9 Gratt. 127 (1852).

**4. Necessity for legal authority.**—A court of general jurisdiction will not judicially know, in the absence of positive requirement, the existence or terms of a municipal ordinance. *Supra*, § 611. Still, that certain acts will only be permitted where such an ordinance exists, e. g., that an electric light company must, in order to light the streets of a city receive permission from its authorities may be a primary result of law which the court will judicially know. *Nelson v. Nar-*

*ragansett Electric Lighting Co.*, 26 R. I. 258, 58 Atl. 802 (1904).

**1. Georgia.**—*Caldwell v. Richmond Ry. Co.*, 89 Ga. 550 (1892).

**Kentucky.**—*Chicago, St. L. & N. O. R. Co. v. Liebel*, 86 S. W. 549, 27 Ky. L. Rep. 716 (1905).

**Maryland.**—*Chesapeake & O. Canal Co. v. Western Maryland R. Co.*, (Md. 1904) 58 Atl. 34.

**New Hampshire.**—*Hall v. Brown*, 58 N. H. 93 (1877).

**Texas.**—*Hall v. International & G. N. Ry. Co.*, (Tex. 1904) 81 S. W. 520.

Judicial notice has *however* been refused to private railroad charters. *Jersey City v. Jersey City & B. R. Co.*, (N. J. Sup. 1904) 57 Atl. 445. Where the courts are required to take judicial notice of the private laws of a state, the question as to what are the powers conferred by a railroad charter present a mere question of law. *New York, N. H. & H. R. Co. v. Offield*, 78 Conn. 1, 60 Atl. 740 (1905).

**2. Miller v. Mathews**, 87 Md. 464, 40 Atl. 176 (1898) (company empowered to become sole surety on an official bond).

judicially known that a corporation, operating a canal in a navigable river can acquire a fee in such property only by a grant from the legislature.<sup>3</sup>

**§ 629. (*Judicial Knowledge of Written Law; What Statutes Are Public; Mercantile Corporations*); Minor Facts.**— Minor facts relating to corporations as that all stockholders, residents of the state, are among its citizens<sup>1</sup> are not within the judicial knowledge of the court. Facts of this class may be known wherever they are notorious in the community or historical, in some general sense.<sup>2</sup> In the case of certain well-known bodies notice will be taken that they are not organized for business purposes; e. g., that the Free Masons are incorporated to help, aid and assist each other in charitable ways.<sup>3</sup> Protection of workingmen is a public purpose. Thus statutory regulations of the duties due a servant from his master are public in their nature.<sup>4</sup>

**§ 630. (*Judicial Knowledge of Written Law; What Statutes Are Public; Mercantile Corporations*); Railroads.**— Direct results of legislation as that railroad companies are common carriers<sup>1</sup> and, as such, have certain duties to perform,<sup>2</sup> will be recognized by the court as a matter of law, i. e., judicially known. The creation of a railroad company either as an original corpora-

3. *State v. Portland General Electric Co.*, (Or. 1908) 98 Pac. 160 [*rehearing denied*, 95 Pac. 722]. Courts judicially know that a mercantile corporation could acquire rights in the bed, banks and water of a navigable river only by an act of the Legislature. *State v. Portland Gen. Electric Co.*, (Or. 1908) 95 Pac. 722 [*rehearing denied*, 98 Pac. 160 (1908)].

1. *Lexington Mfg. Co. v. Dorr*, 2 Litt. (Ky.) 256 (1822).

2. *Ohio L. Ins., etc., Co. v. Debolt*, 16 How. (U. S.) 416, 435, 14 L. ed. 997 (1853) (legislative conditions attending incorporation by special charters). See also *State v. Franklin County Sav. Bank, etc., Co.*, 74 Vt. 246, 52 Atl. 1069 (state banks) (1902).

3. *Burdine v. Grand Lodge*, 37 Ala. 478 (1861).

4. *Squillache v. Tidewater Coal & Coke Co.*, 64 W. Va. 337, 62 S. E. 446 (1908).

**Acts imposing penalties** for failure to provide certain safeguards against injuries to employees from factory machinery are judicially noticed as public statutes. *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S. W. 1108 (1908).

1. *Caldwell v. Richmond, etc., R. Co.*, 89 Ga. 550, 15 S. E. 678 (1892); *Boyle v. Great Northern R. Co.*, 13 Wash. 383, 43 Pac. 344 (1896); *Condran v. Chicago, etc., R. Co.*, 67 Fed. 522, 523 (1895). See also *Caldwell v. Richmond, etc., R. Co.*, 89 Ga. 550, 15 S. E. 678 (1892).

2. *Evansville, etc., R. Co. v. Duncan*, 28 Ind. 441 (1867).

tion, by charter or by certificate under a general law,<sup>3</sup> or as successor to another railroad<sup>4</sup> will be noticed judicially. By the weight of authority, it is held that a special charter incorporating a railroad will not be deemed a public statute,<sup>5</sup> though there is authority to the contrary.<sup>6</sup>

*Taxation.*—The involution into any mixed situation of an element of legal enactment may assist to induce the judge to take judicial notice of a fact of history, or of one in some other branch of common knowledge. Thus, where the legislature has provided a system of assessing railroad taxes, the fact that the railroads of the state have paid the taxes so assessed<sup>7</sup> is said to be judicially known.

**§ 631. (*Judicial Knowledge of Written Law; What Statutes Are Public; Mercantile Corporations*); Street Railways.**—The incorporation of a street railway by special charter is a direct result of a public statute of which courts take judicial notice. It follows that the presiding judge will know that no special charter has been issued to a particular street railway company.<sup>1</sup> In like manner, and for the same reasons, courts judicially know the legal

3. *Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co.*, 124 Ga. 125, 52 S. E. 320 (1905); *McArdle v. Chicago City Ry. Co.*, 141 Ill. App. 59 (1908); *Com. v. Kinniconick & F. S. R. Co.*, 31 Ky. L. Rep. 859, 104 S. W. 290 (1907). The court judicially knows the principal office or legal residence of a railroad company incorporated under its laws. *White v. Atlanta, B. & A. Ry. Co.*, 5 Ga. App. 308, 63 S. E. 234 (1908).

The *res gestæ* or constituent facts cannot be established by judicial knowledge or assumption, or as a matter of notoriety. *Infra*, § 699. This principle, it is to be observed, is most highly important in criminal cases. Thus, where the corporate existence of a railroad is a constituent fact on a criminal proceeding for keeping a bucket shop, the fact of incorporation must be pleaded and proved. *People v. Wirsching*, 239 Ill. 522, 88 N. E. 169 (1909).

4. *Atlanta & W. P. R. Co. v. At-*

*lanta, B. & A. R. Co.*, 125 Ga. 529, 54 S. E. 736 (1906).

5. *Perry v. R. Co.*, 55 Ala. 413, 426 (1876); *Ohio R. Co. v. Ridge*, 5 Black. 78 (1839); *Atchison, T. & S. F. R. Co. v. Blackshire*, 10 Kan. 477, 487 (1872). They "operate upon particular persons and private concerns." *Ohio, etc., R. Co. v. Ridge*, 5 Blackf. 78 (1839).

6. *Wright v. Hawkins*, 28 Tex. 452, 471 (1866).

7. *Gulf & S. I. R. Co. v. Adams*, 85 Miss. 772, 38 So. 348 (1905).

1. *American Steel & Wire Co. v. Bearer*, 194 Mass. 596, 80 N. E. 623 (1907). But see also *Ingersoll v. Davis*, (Wyo. 1906) 82 Pac. 867. The courts will take judicial notice that a domestic street railway corporation was organized under the general law, and not under a special charter. *Murphy v. Worcester Consol. St. Ry. Co.*, 199 Mass. 279, 85 N. E. 507 (1908).

powers and duties conferred or imposed on such creations of law; — e. g., that they are common carriers of passengers.<sup>2</sup>

**§ 632. (*Judicial Knowledge of Written Law; What Statutes Are Public; Mercantile Corporations*); Telegraph Companies.**—Particular facts relating to telegraph companies, neither of general importance, nor a direct result of legal enactment, as that there are only two telegraph companies in the state,<sup>1</sup> will not be treated as a matter of judicial knowledge.

**§ 633. (*Judicial Knowledge of Written Law; What Statutes Are Public*); Private Acts Made Public.**—The legislature may order that certain acts, otherwise private, shall be treated as being public.<sup>1</sup> This regulation may apply to private acts of a given class,<sup>2</sup> or to all private acts whatever,<sup>3</sup> or to all statutes except those which expressly declare themselves to be of a private nature.<sup>4</sup>

*Amendments or recognition of a private act* by a public one entail judicial knowledge of the private act.<sup>5</sup> In like manner, the regulations of an administrative board, e. g., the board of health,<sup>6</sup> may, if adopted by a public statute, receive judicial notice.

2. *Indianapolis St. Ry. Co. v. Ray*, (Ind. 1906) 78 N. E. 978.

1. *State v. Atlantic Coast Line R. Co.*, (Fla. 1906) 40 So. 875.

1. *Illinois*.—*Gormley v. Day*, 114 Ill. 185 (1885) (village incorporation).

*Indiana*.—*Eel River Draining Association v. Topp*, 16 Ind. 242 (1861).

*Texas*.—*Missouri, K. & T. R. Co. v. Colburn*, 90 Tex. 230, 38 S. W. 153 (1896).

*United States*.—*Beaty v. Lessee of Knowler*, 4 Peters 152 (1830).

*England*.—*Beaumont v. Mountain*, 10 Bing. 404 (1834). It is sufficient that the act itself, in terms, declares that it shall be deemed public. *Buell v. Warner*, 33 Vt. 570 (1861).

Special pleading of private statutes may be excused by legislative enactment. *Halbert v. Skyles*, 1 A. K. Marsh. (Ky.) 368 (1818); *Hart v. Balt. & O. R. R.*, 6 W. Va. 336 (1873).

2. *Doyle v. Village of Bradford*, 90 Ill. 416 (1878) (village organiza-

tions); *Beaty v. Lessee of Knowler*, 4 Pet. 152 (1830) (incorporation of proprietors of lands).

3. *Doyle v. Bradford*, 90 Ill. 416 (1878); *Eel River D. Assn. v. Topp*, 16 Ind. 242 (1861); *Bixler's Adm. v. Parker*, 3 Bush, 166 (1867).

4. *Covington Drawbridge Co. v. Shepherd*, 20 How. 227 (1857) (constitutional provision). "The judicial notice we are to take of it, is the same with that which we give to laws of a general and public nature." *Somerville v. Wimbish*, 7 Gratt. 205 (1850). A private statute, though it contains a clause requiring it to be judicially noticed as a public one, is not evidence at all against strangers either of notice or any of the facts recited. *Taylor v. Parry*, 1 M. & R. 504 (1835).

5. *Lavalle v. People*, 6 Ill. App. 157 (1880). *Supra*, §§ 600, 609.

6. *Cohen v. Department of Health of City of New York*, 113 N. Y. Suppl. 88, 61 Misc. 124 (1908).

**§ 634. (Judicial Knowledge of Written Law; What Statutes Are Public); Statutes of Sister State.**—The law-making body of a jurisdiction may see fit to require that the courts organized within it should know judicially the written constitution or public statutes<sup>1</sup> of another state. In such case, the foreign law need not be introduced into evidence.<sup>2</sup> This action has been taken by a state of the American Union in relation to the public<sup>3</sup> written laws of a sister state.<sup>4</sup>

**§ 635. How Judicial Knowledge of Law is Acquired.**—Knowledge of domestic law, being a judicial function, is beyond the field of evidence and the judge is not called upon to receive it when tendered.<sup>1</sup> Constructively, i. e., in intendment of law, the judge already knows the law. Any assistance from without which he may require, or accepts from a party, or even from an *amicus curiæ*, is simply to refresh the judicial memory.<sup>2</sup> This is commonly expressed by saying that the judge is “presumed to know the law.”<sup>3</sup> This is not a “presumption” or inference.<sup>4</sup> It states merely a necessary principle of administration, viz.;—that trials must proceed upon the basis or assumption that the judge knows the law,<sup>5</sup> although, in point of fact, he frequently does not know it. Many judges might well say with Baron Parke,<sup>6</sup> “though we are supposed to keep the statutes in our heads, we do not.” A statute may in reality have recently been passed and the court not know it.<sup>7</sup> The law may be doubtful or unsettled; it is possible even to mistake the application of a settled principle. In discharging his function of knowing the law, a judge need not make any investigation, or invite any assistance. He may merely

1. *Bates v. McCully*, 27 Miss. 584 (1854); *Lockhead v. B. S. W. & I. Co.*, 40 W. Va. 553, 21 S. E. 1031 (1895).

2. *F. E. Creelman Lumber Co. v. J. A. Lesh & Co.*, (Ark. 1904) 83 S. W. 320.

3. Private statutes are not included within the terms of such a statute unless it is distinctly so provided. *Miller v. Johnston*, 71 Ark. 174, 72 S. W. 371 (1903).

4. *Miller v. Johnston*, 71 Ark. 174, 72 S. W. 371 (1903); *Bates v. McCully*, 27 Miss. 584 (1854); *Hobbs*

*v. Memphis, etc., R. Co.*, 9 Heisk. (Tenn.) 873 (1872).

1. *In re Howard County*, 15 Kan. 194 (1875).

2. *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475 (1831); *Clegg v. Levy*, 3 Campb. 166 (1811).

3. *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475 (1831).

4. *Infra*, § 1027.

5. *Supra*, § 571.

6. *Frost's Trial*, *Gurney's Rep.* 168 (1840).

7. *People v. Dowling*, 84 N. Y. 478 (1881).

announce his ruling leaving parties aggrieved to their rights, if any, before revisory courts. If he sees fit to do so the judge may examine into what the law is, in his own way; or he may require the assistance of the parties, and adjourn or continue<sup>8</sup> the case until he gets it. If he decides to examine the matter for himself, he may resort to any source of information which he feels is calculated to aid him,<sup>9</sup> as he would in ascertaining a matter of common knowledge. "The existence of a public act is determined by the judges themselves, who if there be any difficulty, are to make use of ancient copies, transcripts, books, pleadings or any other memorial, to inform themselves."<sup>10</sup> The same is true with regard to the existence of any other rule of law. The judge may resort to official documents in the executive<sup>11</sup> or legislative departments;—seeking the most conclusive, if available,<sup>12</sup> unless the legislature has regulated the matter for him.<sup>13</sup> He may examine text books as to the domestic law; or may equally well, consult the printed official decisions of his jurisdiction.

**§ 636. (*How Judicial Knowledge of Law Is Acquired*); Foreign Law.**—The unwritten law of a foreign state or country is a fact of a peculiar nature;—by reason of its close analogy, frequently recognized in legislation, to rules of domestic law. Even in the absence of statutory requirement, judges frequently take or, perhaps, more properly, acquire judicial knowledge of such a law in the manner appropriate to a rule of domestic law.<sup>1</sup> This

8. Richardson County School Dist. No. 56 v. St. Joseph F. & M. Ins. Co., 101 U. S. 472, 25 L. ed. 868 (1879) (furnish list of statutes on brief).

9. Alabama.—Cary v. State, 76 Ala. 78 (1884).

Iowa.—Clare v. State, 5 Iowa 509 (1857).

Maryland.—Strauss v. Heiss, 48 Md. 292 (1877).

Minnesota.—State v. Stearns, 72 Minn. 200, 75 N. W. 210 (1898).

Mississippi.—Puckett v. State, 71 Miss. 192, 14 So. 452 (1893).

Missouri.—Bowen v. Missouri Pac. R. Co., 118 Mo. 541, 24 S. W. 436 (1893).

United States.—Gardner v. Barney, 6 Wall. 499, 18 L. ed. 890 (1867).

10. Bowen v. Missouri Pac. Ry., 118 Mo. 541, 24 S. W. 436 (1893); Sedgwick Const. St. (2d ed.), p. 26.

11. Clare v. State, 5 Iowa 509 (1857) (secretary of state's office); State v. Stearns, 72 Minn. 200, 75 N. W. 210 (1898) (election returns); Puckett v. State, 71 Miss. 192, 14 So. 452 (1893) (election returns); Bowen v. Missouri Pac. R. Co., 118 Mo. 541, 24 S. W. 436 (1893) (secretary of state's office).

12. Gardner v. Barney, 6 Wall. (U. S.) 499, 18 L. ed. 890 (1867).

13. Puckett v. State, 71 Miss. 192, 14 So. 452 (1893).

1. It will be observed that in certain connections, more especially in those covered by civil or international



proceeding on the part of the judge may be really in lieu of evidence as to the foreign law, as verifying facts which such evidence tends to establish, or the judge's individual researches may amplify the evidence itself and confirm the conclusions which he has reached.<sup>2</sup> He may consult text books<sup>3</sup> or other authoritative printed or written statements,<sup>4</sup> official decisions,<sup>5</sup> volumes of statutes and the like; or, indeed, any other source of information he may deem reliable.<sup>6</sup> In such cases, the rapprochement to the status of a domestic rule of law is still more complete. The judge is rather examining the law itself than weighing evidence as to it. While these books are frequently introduced into evi-

law, text writers, if of a certain grade of recognized authority, possess a quasi-legislative power. By stating what the law, in their opinion is, they not ineffectually assist to create the situation which they say already exists. See, for example, *The Paquete Habana*, 175 U. S. 677, 20 Sup. 220 (1899), in which, on a question of the exemption, by international law, of fishing vessels from seizure as prize, Ortolan, Calvo and other authorities are cited.

2. "If the witness says 'I know the law, and this book truly states the law,' then you have the authority of the witness and of the book." *Sussex Peerage Case*, 11 Cl. & F. 85 (1844) per Lord Denman.

3. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. 139, 162 (1894); *The Pawashick*, 2 Low. 148 (1872) (Abbott on Shipping as to Admiralty law of England); *Breadalbane v. Chandos*, 2 Myl. & Cr. 711, 741 (1836); *Lacon v. Higgins*, 3 Stark. 178, Dowl. & R. N. P. 42, Abbott, C. J. (1822); *Picton's Trial*, 30 How. St. Tr. 483, 492, 511 (1806); *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 54 (1811) (law of Scotland). But see, also, *Perth Peerage Case*, 2 H. L. Cas. 865 (1848); *R. v. Crouch*, 1 Cox Cr. 94 (1844).

4. *Iowa*.—*De Sonora v. Bankers' M. C. Co.*, (Iowa 1903) 95 N. W. 232 (Bouvier's Law Dictionary as to law of Mexico).

*New York*.—*Devenbagh v. Devenbagh*, 5 Paige Ch. 554, 556, Walworth, C. (1836).

*United States*.—*The Paquete Habana*, 175 U. S. 677, 20 Sup. 290 (1899) (international law).

*England*.—*Bremer v. Freeman*, 10 Moore P. C. 306, 363 (1857); *Nelson v. Bridport*, 8 Beav. 527, per Lord Langdale, M. R. (1845) (Sicilian Codes, Treatises, Statutes, etc.); *Baron de Bode's Case*, 8 Q. B. 208, Lord Denman, C. J. (1845); *Picton's Trial*, 30 How. St. Tr. 492 (1805) (Spain) per Lord Ellenborough.

*Canada*.—*Rice v. Gunn*, 4 Ont. 589 (1884).

5. *The Pawaspick*, 2 Low. 148 (1872).

6. The authority of the book or text writer must be established by evidence from a competent source. The judge's personal knowledge either as to the fact itself or as to professional opinion concerning it would be sufficient. *The Pawashick*, 2 Low. 148 (1872). But production of the book alone is not satisfactory. "Proof of the law itself, in a case of foreign law, could not be taken from the work of the law, but from the witness who described the law. If the witness says 'I know the law, and the book truly states the law,' then you have the authority of the witness and of the book." Lord Denman, in *Sussex Peerage Case*, 11 Cl. & F. 85 (1844).

dence and their admissibility is thus made to present the appearance of an exception to the rule against hearsay;<sup>7</sup> to infer the existence of an exception to the rule would be to misapprehend the situation. No error attends the introduction of such books in evidence;—any more than would occur were a domestic public statute put in evidence. It is, so far as probative effect goes, simply a work of supererogation. The judge might, if he saw fit, give any statement in the book the same weight were it brought to his attention without the formality of offering it in evidence. This is the only objection to putting the book in evidence;—that it obscures the real nature of what is actually going on. Offering the printed works in evidence, has, however, an incidental advantage of no small administrative value. It acquaints the parties with what is in the judge's mind—always valuable knowledge—and so prevents surprise and enables the party adversely affected to present countervailing and, possibly, prevailing considerations to the judge.

§ 637. **Judicial Knowledge of the Results of Law.**—The second and remaining branch of judicial knowledge properly so called, is a knowledge, cognizance, notice or whatever may be the term preferred, of facts which are the direct result of law. This knowledge may, under some circumstances, be actual;—as where a judge knows of the establishment of a county or other political division of the state. In most cases, however, the knowledge is of the imputed, constructive kind characteristic of knowledge of the rules of law themselves;—the sort of knowledge which one may be said to have who is merely forbidden to say that he does not know. A judge judicially knows that which is “matter of law.” The phrase is sufficiently elastic to cover both the rules of law and such facts as laws directly establish. In many cases these are practically inseparable. One striking difference, however, between the two branches of judicial knowledge, (1) knowledge of law and (2) knowledge of the results of law—lies in the different proportion of administration<sup>1</sup> which they respectively exhibit. In all announcement and enforcement of the rules of law—substantive or procedural—there is an element of administration. The various rules are to be harmonized to each other and adjusted to the facts, certain being given force and extension,

7. *Infra*, § 2700.

1. *Supra*, § 174.

others subordinated. The function of administration in this connection is, however, a minor one. But in regard to matters judicially known because established by law, the element of administration assumes a much larger relative influence and importance. The underlying reason of this is obvious. These facts are especially used as the basis of administrative assumptions designed for the expediting of judicial business. In reality, it may fairly be said that the first class of facts judicially known consists of rules of law, with incidental administration; the second covers instances of administration with incidental knowledge of rules of law.

**§ 638. (*Judicial Knowledge of the Results of Law*); Governmental Assumptions.**—Perhaps as a relic of early days where the King, the source of all government, as well as the fountain of justice, personally sat in Court of King's Bench and gave judgment, courts, to a certain extent, regard themselves as knowing what the other departments of government know. Actual judicial administration, in certain connections, is difficult to understand except by recognizing the influence of what may be called the comity between the different branches in the government of the sovereign. The courts recognize that they are parts of a system or scheme of governmental administration. As such, they assume, in a spirit of co-ordinate responsibility, the correctness of the official actions of other departments. In this way, the administrative power of the judge is used to good effect in expediting judicial business and, at the same time, extending a proper courtesy and recognition to other departments of the common government. These assumptions, as usual,<sup>1</sup> are made by means of rulings as to the burden of evidence.<sup>2</sup> It is said that the burden of evidence, "burden of proof," as it is most often termed, is on him who disputes the fact which the court provisionally assumes as true. In their aspect of shifting the burden of evidence ("proof") these administrative assumptions are very often spoken of as "presumptions of law," which have the same effect. In their aspect of dispensing with proof, they are often referred to as judicial knowledge—which also requires no evidence.

*The three functions of a trial judge, judicial knowledge, use of common knowledge and judicial administration are apt to unite*

1. *Supra*, § 546.

2. *Infra*, §§ 967 et seq.

and blend with each other in a rather confusing way in any given case. Thus, for example, a judge may know, because every one knows, who is president of the United States; the incumbency of the office is also a direct result of law which he judicially knows. A proclamation by the president, under his signature, authenticated by the seal of state, is presented in evidence. The authority of law under which the supreme executive has acted is part of the judge's judicial knowledge. But is the paper genuine? The judge is personally unfamiliar with both signature and seal of office. But shall he accept them as authenticating the document or, on the other hand, shall he require proof? That, in the absence of some procedural requirement, presents a question of administration. If he should rule that proof is unnecessary, the judge is very apt to say that he judicially knows the signature of the president and seal of state. Yet he does not, and, if he did, he could by no means know but that the signature had been forged or the seal imitated or impressed on the paper by one who had no authority to do so.

*As a matter of administration*, the judge assumes that all is as it appears on the surface to be — a genuine signature of the executive under the seal of state. The proponent need to introduce no evidence on the point. If the opponent can show any infirmative facts, he may do so. The burden of evidence has been *shifted*.<sup>3</sup> Whether the process be called taking judicial knowledge, raising a presumption of regularity<sup>4</sup> or otherwise, the real action is one of judicial administration proceeding by way of an assumption of the correctness of official proceedings in another branch of the domestic government.<sup>5</sup>

*Church Establishment.*—In England, for example, the existence and legal establishment under various acts of Parliament, of a state church, have resulted in a requirement that the courts, being part of the same government, should, under the adminis-

3. *Infra*, § 971.

4. *Infra*, §§ 1193 *et seq.*

5. Probably it is in this way that a court will *assume* that public officials keep within the sums appropriated by law for their use. *Stein v. Morrison*, (Idaho 1904) 75 Pac. 246. Courts can take judicial notice of all questions relating to public policy. *Hall v. O'Neil Turpentine Co.*, (Fla.

1908) 47 So. 609. The history of previous legislation upon a given subject and the practical contemporaneous construction placed upon statutes of that nature by officers charged with their enforcement will be known to the presiding judge. *State v. Rutland R. Co.*, 81 Vt. 508, 71 Atl. 197 (1908).

trative principle now under consideration, dispense with proof of many of the more direct results of these enactments. In this connection, moreover, as elsewhere, this course is made the more natural and inviting by the notorious nature<sup>6</sup> of the fact itself of which cognizance is taken. Thus the courts take notice of the diocese in which the superior courts at Westminster are situate.<sup>7</sup> It has been held, however, that a court cannot judicially know that a given town is within a particular diocese.<sup>8</sup> In the same way, these courts recognize the days of festivals appointed by the calendar of the Church of England.<sup>9</sup> Similarly, the limits of ecclesiastical jurisdiction are said to be a subject of judicial cognizance.<sup>10</sup>

**§ 639. (*Judicial Knowledge of the Results of Law; Governmental Assumptions*); Official Position.**—In determining judicial action the incumbency, past or present, of high public position in other departments of government may be an important fact. All the courts of a country know who is or at any time was the executive head of the state; — as president of the United States,<sup>1</sup> who are<sup>2</sup> or, at a given time, were cabinet officers,<sup>3</sup> foreign ministers,<sup>4</sup> or at the head of the great departments of government,<sup>5</sup> or of important bureaus in these departments.<sup>6</sup> In minor official connections, they know as a rule who are deputies or acting substitutes, while the latter are exercising the functions of the office,

6. *Infra*, § 699.

7. *Adams v. Savage*, 6 Mod. 134 (1794).

8. *R. v. Sympson*, 2 Ld. Raym. 1379 (1701).

9. *Brough v. Perkins*, 6 Mod. 81 (1794).

10. *Adams v. Savage*, 2 Ld. Raym. 854 (1701).

1. *Liddon v. Hodnett*, 22 Fla. 442, 450 (1886) (Andrew Jackson, President in 1830).

2. *Backus Portable Steam Heater Co. v. Simonds*, 2 App. Cas. (D. C.) 290 (1894); *Herriot v. Broussard*, 4 Mart. N. S. (La.) 260, 262 (1826).

3. *Walden v. Canfield*, 2 Rob. (La.) 466 (1842). See also *Perovich v. Perry*, 167 Fed. 789 (1909) (cabinet officer).

4. *Wetherbee v. Dunn*, 32 Cal. 106 (1867); *Walden v. Canfield*, 2 Rob. (La.) 466 (1842).

5. This involves judicial knowledge that certain persons are *not* occupying certain offices but that their successors have been elected, qualified and inducted into office. *State v. Board of State Canvassers*, (Mont. 1905) 79 Pac. 402 (Attorney-General; Treasurer).

6. *Backus Portable Steam Heater Co. v. Simonds*, 2 App. Cas. (D. C.) 290 (1894) (commissioner of patents); *Liddon v. Hodnett*, 22 Fla. 442 (1886) (commissioner of general land office); *Keyser v. Hitz*, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531 (1889) (controller of the currency).

in the absence of the chief,<sup>7</sup> and, less frequently, in case of important officers, who are the deputies empowered to act for the chief.<sup>8</sup> The court knows who are the principal subordinate department officials,<sup>9</sup> receivers of public money,<sup>10</sup> as chief clerk,<sup>11</sup> and the like.

**§ 640. (*Judicial Knowledge of the Results of Law; Governmental Assumptions; Official Position*); *De Facto* and *De Jure* Officers.**—It has been reasonably held that only *de jure* officials could be judicially noticed.<sup>1</sup> Judicial knowledge is reserved for matters of law—law or its direct results or creations. Facts regarding the *de facto* tenure of office may well be notorious and so the subject of common knowledge. Administrative convenience may often warrant treating the *de facto* magistrate as if he were *de jure*. But judicial knowledge, properly so called, does not apply to such officers. The distinction, however, is not well established.

*Time of holding elections* for national officers, including congressmen;<sup>2</sup> or for the governor and other high officials of a state, will, when established by law, be judicially known by all the courts of a state.

**§ 641. (*Judicial Knowledge of Results of Law*); *Tenure of Minor Offices.***—Minor political details as to official tenure of state officers, as the appointment by the governor<sup>1</sup> or election by the

7. *Barton v. Hempkin*, 19 La. 510 (1841) (acting commissioner of general land office); *Keyser v. Hitz*, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531 (1889) (acting controller of the currency); *York, etc., R. Co. v. Winans*, 17 How. (U. S.) 30, 15 L. ed. 27 (1854) (acting commissioner of patents).

8. *Wetherbee v. Dunn*, 32 Cal. 106 (1867) (marshal).

Who are deputy United States marshals will not be known to state courts. *Ward v. Henry*, 19 Wis. 76, 88 Am. Dec. 672 (1865).

9. *Bullock v. Wilson*, 5 Port. (Ala.) 338 (1837).

10. *Herriot v. Broussard*, 4 Mart. N. S. (La.) 260 (1826).

11. *Barton v. Hempkin*, 19 La. 510 (1841) (chief clerk).

1. *Alabama*.—*Williams v. Finch*, (Ala. 1906) 41 So. 834.

2. *State v. Custer*, 28 R. I. 222, 66 Atl. 306 (1907).

1. *Alabama*.—*Colgin v. State Bank*, 11 Ala. 222 (1847).

*Arkansas*.—*Kaufman v. Stone*, 25 Ark. 336 (1869) (commissioner of deeds).

*Georgia*.—*Bailey v. McAlpin*, 122 Ga. 616, 50 S. E. 388 (1905).

*Kentucky*.—*Louisville v. Board of Park Com'rs*, 112 Ky. 409, 65 S. W. 860, 24 Ky. L. Rep. 38 (1901) (election commissioner).

*Tennessee*.—*State v. Evans*, 8 Humphr. (Tenn.) 110 (1847) (attorney-general).

legislature<sup>2</sup> or the voters, of inferior state officers,<sup>3</sup> whether *de jure* or *de facto*, their tenure of office<sup>5</sup> and the date of the election or appointment<sup>6</sup> will be known to the courts. The appointee of a state official whose own tenure is itself judicially known is not, however, an official within the meaning of the rule.<sup>7</sup>

*Tenure Under Local Ordinances.*—The rule above stated<sup>8</sup> that courts take judicial notice of the primary and immediate results of laws of which they are bound to take judicial cognizance, is equally true in the reversed form. Courts do not take judicial notice of the primary results of statutes of which they do not take such cognizance. As they do not take such notice of local ordinances,<sup>9</sup> *a fortiori* they do not judicially know their results. For example, a state or provincial court will not notice the salary of a policeman<sup>10</sup> established by a municipal ordinance.

**Who are notaries public in the state** will be judicially noticed.

*Alabama.*—Russell v. Huntsville R., etc., Co., 137 Ala. 627, 34 So. 855 (1902).

*Illinois.*—Hertig v. People, 159 Ill. 237, 42 N. E. 879, 50 Am. St. Rep. 162 (1896).

*Iowa.*—Black v. Minneapolis, etc., R. Co., 122 Iowa 32, 96 N. W. 984 (1903).

*South Dakota.*—Wiley v. Carson, 15 S. D. 298, 89 N. W. 475 (1902).

2. Colgin v. State Bank, 11 Ala. 222 (1847); Bennett v. State, Mart. & Y. (Tenn.) 133.

3. *Alabama.*—Cary v. State, 76 Ala. 78 (1884); Colgin v. State Bank, 11 Ala. 222 (1847) (bank commissioner).

*California.*—Wetherbee v. Dunn, 32 Cal. 106 (1867).

*Illinois.*—Fisk v. Hopping, 169 Ill. 105, N. E. 323 (1897) (commissioner of deeds).

*Louisiana.*—Follain v. Lefevre, 3 Rob. (La.) 13, 14 (1842) (all functionaries commissioned in this state).

*Michigan.*—People v. Johr, 22 Mich. 461 (1871) (auditor general).

*New York.*—New York v. Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659 (1904) (tax officer).

*Tennessee.*—State v. Cooper, (Tenn. Ch. App. 1899) 53 S. W. 391.

*Texas.*—Roach v. Fletcher, 11 Tex. Civ. App. 225, 32 S. W. 585 (1895) (state agent).

*England.*—Rex v. Bembridge, 22 How. St. Tr. 29 (1783) (paymaster).

*Canada.*—Simms v. Quebec, etc., R. Co., 22 L. C. Jur. 20 (1877) (attorney-general). See also R. v. Anderson, 9 Q. B. 663 (1846) (assessor and collector of the land tax).

4. New York v. Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659 (1904); Roach v. Fletcher, 11 Tex. Civ. App. 225, 32 S. W. 585 (1895); State v. Williams, 5 Wis. 308, 68 Am. Dec. 65 (1856).

5. Cary v. State, 76 Ala. 78 (1884); McCarty v. Johnson, 20 Tex. Civ. App. 184, 49 S. W. 1098 (1899); Romero v. U. S., 1 Wall. (U. S.) 721, 17 L. ed. 627 (1863).

**Length of an official term** established by statute need not be proved. Aultman Taylor Machinery Co. v. Burchett, (Okla. 1905) 83 Pac. 719.

6. Lindsey v. Atty.-Gen., 33 Miss. 508, 528 (1857).

7. Crawford v. State, 155 Ind. 692, 57 N. E. 931 (1900) (deputy attorney-general).

8. *Supra*, § 637.

9. *Supra*, § 611.

10. Gibbs v. City of Manchester, 73 N. H. 265, 61 Atl. 128 (1905).

**§ 642. (*Judicial Knowledge of Results of Law*); Official Proceedings; In General.**—In other words, the reasons which control a court's action in dealing with official proceedings are several. Judicial knowledge in this connection is a function of three variables, (a) notoriety in the community; (b) directness of relation to a rule of law; (c) difficulty of making other proof as compared to the readiness with which the matter can be set at rest by inspection. The more generally known is the existence of a fact or the accuracy of an official publication, the more nearly it is a direct effect of a known proposition of written or unwritten law, the easier it is for the judge to ascertain the fact and the more difficult it would be, as a practical matter, for the party to produce competent evidence of it, the more often will a judge regard it as a matter of judicial knowledge. In few cases does the court's actual knowledge extend to saying whether, in any particular instance, an official act has been properly done.<sup>1</sup> But the general manner in which officials in close touch with the public discharge the duties of their respective offices, as that in the collection of taxes, property is not assessed by the owner,<sup>2</sup> but by public officers who customarily apprise it at less than its market value,<sup>3</sup> that taxes are not at all times collected until years after they are assessed,<sup>4</sup> will be regarded as known.

**§ 643. (*Judicial Knowledge of Results of Law; Official Proceedings*); Correspondence.**—Official correspondence, letters and the like, proceeding with apparent regularity from the executive

1. *Roach v. Fletcher*, 11 Tex. Civ. App. 225, 32 S. W. 585 (1895).

Whether a patent has issued will not be judicially noticed. *Bottle Seal Co. v. Dela Vergne Bottle, etc., Co.*, 47 Fed. 59 (1891).

2. *Chicago, etc., R. Co. v. Smith*, 6 Ind. App. 262, 33 N. E. 241 (1892).

3. *Bureau County v. Chicago, etc., R. Co.*, 44 Ill. 229 (1867); *State v. Savage*, 65 Neb. 714, 91 N. W. 716 (1902); *Wray v. Knoxville, L. F. & J. R. Co.*, (Tenn. 1904) 82 S. W. 471; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903 (1879); *Railroad, etc., Co. v. Tennessee*, 85 Fed. 302 (1897); *Cincinnati Southern R. Co. v. Guenther*, 19 Fed. 395 (1884).

4. *Mullen v. Sackett*, 14 Wash. 100, 44 Pac. 136 (1896). That tax officers are at least *de facto* members of the executive government and that the administrative assumption of regularity will, therefore, be accorded their acts need not be proved. *City of New York v. Vanderveer*, 86 N. Y. Suppl. 659, 91 App. Div. 303 (1904).

It will be judicially known that it is not within the official or personal duty of a state auditor to collect current defaulted insurance taxes. *Dailey v. State*, 171 Ind. 646, 87 N. E. 4 (1909) [*transferred from the Appellate Court*, 86 N. E. 498 (1908)].



department of national government, will be assumed to be what they purport to be. This is the practical meaning of judicial knowledge in this connection. Thus, the letter of the official head of the national land office relating to routine business is a public document<sup>1</sup> which is said to be judicially known.

**§ 644. (*Judicial Knowledge of Results of Law; Official Proceedings*); Publications.**—Printed official copies are, as a rule, incompetent to establish facts of which judicial knowledge is taken.<sup>1</sup> Judicial cognizance of facts stated in certain official publications such as the gazette,<sup>2</sup> may be required by law. Public documents, as the returns of railroad companies<sup>3</sup> to appropriate administrative boards, rendered in accordance with the requirements of law, are proper subjects of judicial knowledge. Reports of departments, or administrative boards, to the executive or legislative branches of the government, if ordered, recognized or sanctioned by law, stand in the same position.<sup>4</sup>

**§ 645. (*Judicial Knowledge of Results of Law*); Executive Department; Nation.**—All courts recognize, without proof who is, and at any time in the past, was the chief executive head of the nation, and of any nation which has exercised jurisdiction over any portion of the territory now constituting the sovereignty of the forum, and who was in office while such jurisdiction was in force. The incumbents of the principal departments into which the administration of national executive authority is divided, as the State, Treasury,<sup>1</sup> War, Interior or Navy departments; and of the principal bureau offices established in these departments, need not be proved. This judicial knowledge is taken equally whether the incumbent is regular and permanent or holds as a substitute,<sup>2</sup> or *locum tenens*. A state court will take judicial notice of the inferior federal officers located within the state.<sup>3</sup>

1. *Southern Pac. R. Co. v. Willard*, (Cal. 1906) 83 Pac. 452.

1. *Gordon v. Bucknell*, 38 Iowa 438 (1874) (state land office); *Wellington First Nat. Bank v. Chapman*, 173 U. S. 205, 19 S. Ct. 407, 43 L. ed. 669 (1898).

2. *Simms v. Quebec, etc., R. Co.*, 22 L. C. Jur. 20 (1878); *Ex p. Dubois*, 7 Rev. Leg. 430 (1875).

3. *Staton v. Atlantic Coast Line R. Co.*, 144 N. C. 135, 56 S. E. 794 (1907).

4. *State v. Candland*, (Utah 1909) 104 Pac. 285 (official report of Board of Regents of the University).

1. *An English court will notice who are commissioners of the treasury. R. v. Jones*, 2 Campb. 131 (1809).

2. *York & M. R. Co. v. Winans*, 17 How. 30 (1854) (acting commissioner of patents).

3. *Frederick v. Goodbee*, (La. 1908) 45 So. 606 (cabinet minister); *Kellogg v. Finn*, (S. D. 1909) 119 N. W. 545.

**§ 646. (*Judicial Knowledge of Results of Law; Executive Department; Nation*); Proclamations and Other Executive Acts.—**

Public proclamations,<sup>1</sup> messages,<sup>2</sup> orders<sup>3</sup> and other official acts of the national executive,<sup>4</sup> as in declaring a state of war<sup>5</sup> or peace,<sup>6</sup> the existence of martial law<sup>7</sup> in certain territory, are judicially known. In like manner, the granting of amnesty or pardon,<sup>8</sup> establishing the status of a foreign country,<sup>9</sup> of a set of its people,

1. *Indiana*.—*Moss v. Sugar Ridge Tp.*, 161 Ind. 417, 68 N. E. 896 (1903).

*Missouri*.—*Wells v. Missouri Pac. R. Co.*, 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847 (1892).

*New York*.—*Woods v. Wilder*, 43 N. Y. 164, 3 Am. Rep. 684 (1870).

*United States*.—*U. S. v. Johnson*, 26 Fed. Cas. No. 15,488, 2 Sawy. 482 (1873).

*Canada*.—*Theberge v. Danjou*, 12 Quebec 1 (1886). Royal proclamations, especially when authenticated by publication in the Gazette, will be judicially known by an English court without proof. *Van Omeron v. Dowick*, 2 Camp. 44 (1809); *Dupays v. Shepard*, 12 Mod. 216 (1796).

2. *Wells v. Missouri Pac. R. Co.*, 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847 (1892).

3. *State v. Tully*, (Mont. 1904) 78 Pac. 760 (establishing military reservation). *Re Stanbro*, 2 Manitoba 1 (1884).

4. *Woods v. Wilder*, 43 N. Y. 164, 3 Am. Rep. 684 (1870); *Rex v. Holt*, 2 Leach C. C. 593, 5 T. R. 436 (1793); *Taylor v. Barclay*, 7 L. J. Ch. O. S. 65, 2 Sim. 213, 29 Rev. Rep. 82, 2 Eng. Ch. 213 (1828); *Rex v. De Berenger*, 3 M. & S. 67, 15 Rev. Rep. 415 (1814); *Dolder v. Huntingfield*, 11 Ves. Jr. 283, 8 Rev. 139, 32 Eng. Reprint 1097 (1805).

5. *Woods v. Wilder*, 43 N. Y. 164, 3 Am. Rep. 684 (1870); *Sutton v. Tiller*, 6 Coldw. (Tenn.) 593, 98 Am. Dec. 471 (1869); *Ogden v. Lund*, 11 Tex. 688 (1854); *Philips v. Hatch*, 19 Fed. Cas. No. 11,094, 1 Dill. 571 (1871).

6. *U. S. v. Anderson*, 9 Wall. (U. S.) 56, 19 L. ed. 615 (1869); *U. S. v. One Thousand Five Hundred Bales of Cotton*, 27 Fed. Cas. No. 15,958 (1872).

7. *Jeffries v. State*, 39 Ala. 655 (1866).

8. *State v. Keith*, 63 N. C. 140 (1869); *Jenkins v. Collard*, 145 U. S. 546, 12 S. Ct. 868, 36 L. ed. 812 (1891); *Armstrong v. U. S.*, 13 Wall. (U. S.) 154, 20 L. ed. 614 (1871); *In re Greathouse*, 10 Fed. Cas. No. 5,741, 2 Abb. 382, 4 Sawy. 487 (1864).

9. *Jones v. U. S.*, 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691 (1890); *U. S. v. Lynde*, 11 Wall. (U. S.) 632, 20 L. ed. 230 (1870); *U. S. v. Yorba*, 1 Wall. (U. S.) 412, 17 L. ed. 635 (1863); *R. v. De Berenger*, 3 M. & S. 67 (1834) (existence of war with a foreign state). Where the British government has recognized the existence of a foreign state, it will then, and not otherwise, be judicially known by the English courts. *Foster v. Globe Venture Syndicate*, 1 Ch. 811 (1900); *Taylor v. Barclay*, 2 Sim. 213 (1828); *City of Berne v. Bank of England*, 9 Ves. 347 (1804).

The courts of a country will recognize the political status of another country to the extent, and only to the extent and in such manner as it has been recognized or acknowledged by the executive branch of the government under which the court itself is established. *Foster v. Globe Venture Synd.*, 1 Ch. 811 (1900); *Underhill v. Hernandez*, 168 U. S. 250, 18 Supp. 83 (1897); *Taylor v. Barclay*, 2 Sim. 213 (1828).

or of certain lands,<sup>10</sup> as related to the domestic government will be judicially known by all courts.<sup>11</sup> This knowledge on the part of judges of the international relations of the government under which they act is, historically, as has been suggested,<sup>12</sup> a survival of the ideas of the time when judges sat as the direct representatives of the king, and might therefore be required to know what the king himself knew in other branches of his sovereignty, e. g., his relation to other nations. The recognition by the national executive of who is the sovereign, *de jure* or *de facto* of a territory conclusively binds the judges of the government of the forum,<sup>13</sup> as it binds all other citizens. A government so recognized,<sup>14</sup> its official name and style,<sup>15</sup> boundaries,<sup>16</sup> the existence of its colonial possessions,<sup>17</sup> its flag<sup>18</sup> and other usual evidence of sovereignty will thereupon be judicially known to all courts established under the recognizing government. The existence of a state of peace<sup>19</sup> with such a government will be recognized. But this judicial knowledge does not extend so far as to cover the question what are the departments of state in the country so recognized.<sup>20</sup>

10. *Jones v. U. S.*, 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691 (1890) (Guano Island);

11. "A public act of which all courts of the United States are bound to take notice and to which all courts are bound to give effect." *Armstrong v. U. S.*, 13 Wall. 154 (1871).

12. *Supra*, § 638.

13. *Jones v. U. S.*, 137 U. S. 202, 212, 11 S. Ct. 80, 34 L. ed. 691 (1890); *Mighell v. Sultan of Johore*, 1 Q. B. 149, 158 (1893); *Yrisarri v. Clement*, 2 C. & P. 223, 225 (1825); *U. S. v. Trumbull*, 48 Fed. 99, 104 (1891).

The existence of a state not recognized by the executive authority of the forum must be proved. *Jones v. U. S.*, 137 U. S. 202, 212, 11 Sup. 80 (1890); *Underhill v. Hernandez*, 168 U. S. 250, 18 Sup. 83 (1897).

14. *Calhoun v. Ross*, 60 Ill. App. 309 (1895); *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404 (1862); *Underhill v. Hernandez*, 168 U. S. 250, 18 S. Ct. 83, 42 L. ed. 456 (1897);

*U. S. v. Palmer*, 3 Wheat. (U. S.) 610, 4 L. ed. 471 (1818); *U. S. v. Wagner*, L. J. 2 Ch. 624 (1866); *Yrisarri v. Clement*, 3 Bing. 432, 11 E. C. L. 213, 2 C. & P. 223, 12 E. C. L. 538, 11 Moore C. P. 308 (1826); *Taylor v. Barclay*, 2 Sim. 213, 7 L. J. Ch. O. S. 65, 29 Rev. Rep. 82, 2 Eng. Ch. 213 (1828).

15. *U. S. v. Wagner*, L. J. 2 Ch. 624 (1866).

16. *Foster v. Globe Venture Synd.*, 1 Ch. 811 (1900).

17. *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404 (1862) (Canada a British possession); *Lumley v. Wabash R. Co.*, 71 Fed. 21 (1895); *Ex p. Lane*, 6 Fed. 34 (1881). See also *Calhoun v. Ross*, 60 Ill. App. 309 (1895).

18. *Watson v. Walker*, 23 N. H. 471 (1851).

19. *Trotta's Adm'r v. Johnson, Briggs & Pitts*, 28 Ky. L. Rep. 851, 90 S. W. 540 (1906).

20. *Schoerken v. Swift, etc., Co.*, 7 Fed. 469, 19 Blatchf. 209 (1881).

*Other acts of state of the chief national executive*<sup>21</sup> or by an official high in one of the chief departments of government<sup>22</sup> or of a prominent bureau in such a department,<sup>23</sup> may be judicially known by the courts.

**§ 647. (*Judicial Knowledge of Results of Law; Executive Department*); State.**—Who, at any particular time, is the chief executive of the state<sup>1</sup> or, for any given series of years, was the chief magistrate of the state itself,<sup>2</sup> or of any other state or nation which at any time had jurisdiction over it<sup>3</sup> need not be proved. Courts will with equal readiness take judicial knowledge as to who are, or at any time in the past were, officers which the law requires should be commissioned by the governor,<sup>4</sup> at the head of the principal departments of state<sup>5</sup> and who were their deputies, appointed under authority of law.<sup>6</sup> This judicial knowledge

21. *Dole v. Wilson*, 16 Minn. 525 (1871) (president).

22. *Southern Pac. R. Co. v. Groeck*, 68 Fed. 609 (1895) (secretary of the interior).

23. *Lerch v. Snyder*, 112 Pa. St. 161, 4 Atl. 336 (1886) (collector of customs).

1. *Indiana*.—*Hizer v. State*, 12 Ind. 330 (1859).

*Iowa*.—*State v. Minnick*, 15 Iowa 123 (1863).

*Kentucky*.—*Powers v. Com.*, 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 23 Ky. L. Rep. 146, 53 L. R. A. 245 (1901).

*Mississippi*.—*Lindsey v. Atty.-Gen.*, 33 Miss. 508 (1857).

*Nebraska*.—*State v. Boyd*, 34 Neb. 435, 51 N. W. 964 (1892).

*New Hampshire*.—*Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 Am. Dec. 575 (1866).

*Texas*.—*Deweese v. Colorado County*, 32 Tex. 570 (1870).

*Wisconsin*.—*State v. Williams*, 5 Wis. 308, 68 Am. Dec. 65 (1856). See *infra*, §§ 652 *et seq.* "The court must take judicial notice of the changes made in the executive department." *Lindsey v. Atty.-Gen.*, 33 Miss. 508, 528 (1857).

Any changes in the office of governor, will be noticed. *Lindsey v. Attorney-General*, 33 Miss. 508, 528 (1857).

2. *Wells v. Jackson I. M. Co.*, 47 N. H. 235, 260 (1866); *Deweese v. Colorado County*, 32 Tex. 570 (1870). See also *Holman v. Burrow*, 2 Ld. Raym. 794 (1702); *Whaley v. Carlisle*, 17 Ir. C. L. 792 (1866).

3. *Jones v. Gale*, 4 Mart. (La.) 635 (1817); *Hayes v. Berwick*, 2 Mart. (La.) 133, 5 Am. Dec. 727 (1812).

4. *Abrams v. State*, 121 Ga. 170, 48 S. E. 965 (1904); *Osburn v. State*, 121 Ga. 170, 48 S. E. 965 (1904).

5. *In re Clement*, 117 N. Y. Suppl. 30, 132 App. Div. 598 (1909) (State Commissioner of Excise). "We have more than once held that we would not require evidence of the official capacity of functionaries commissioned in this state, and would take notice of the offices held by them." *Follain v. Lefevre*, 3 Rob. (La.) 13 (1842).

6. *People v. Johr*, 22 Mich. 461 (1871) (deputy auditor-general, "being a state officer known to the law.")

covers the heads of departments, or deputies provided by law, of any other state while the latter exercised the functions of government over any portion of the territory of the sovereignty of the forum.

**§ 648. (*Judicial Knowledge of Results of Law; Executive Department; State*); Proclamations and Other Executive Acts.—**

A state court takes judicial cognizance of the proclamations<sup>1</sup> or official messages to the legislature by the chief executive of the jurisdiction. The general orders of military governors commanding in a state stand in the same position, and are judicially known.<sup>2</sup>

*Federal Courts.*—It is said that federal courts will not take cognizance of the facts stated in the messages of a state governor, civil or military.<sup>3</sup>

*Other executive acts of the chief magistrate,*<sup>4</sup> or of his principal officer of state<sup>5</sup> or of prominent general officers,<sup>6</sup> may be noticed judicially. The prominence of the official is chiefly important as bearing on the notoriety of the act itself. An act done by one occupying elevated official station is not only apt to be of public importance, but the eminence in station of the actor may make an act of otherwise comparative general indifference, one of public interest. In case of a high official, therefore, an act may be sufficiently notorious to warrant judicial cognizance while it might not be in itself of such a public nature as to seem to the mind of the court to warrant him in dispensing with proof. With this modification in particulars the rule is general that acts of any state functionary which nearly affect the public will be

1. *Hanson v. South Scituate*, 115 Mass. 336 (1874) (calling for troops); *Bosworth v. Union R. Co.*, 26 R. I. 309, 58 Atl. 982 (1904). See also *Poheim v. Meyers*, (Cal. App. 1908) 98 Pac. 65 (proclamation of holiday).  
2. *New Orleans Canal, etc., Co. v. Templeton*, 20 La. Ann. 141, 96 Am. Dec. 385 (1868); *Gates v. Johnson County*, 36 Tex. 144 (1872). But see *Johnston v. Wilson*, 29 Gratt. (Va.) 379 (1877); *Burke v. Miltenberger*, 19 Wall. (U. S.) 519, 22 L. ed. 158 (1873).

3. *Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 20 S. Ct. 545, 44 L. ed. 272 (1899). But see *Coeur d'Alene Consol., etc., Co. v. Miners' Union*, 51 Fed. 260, 19 L. R. A. 382 (1892).

4. *State v. Gramelspacher*, 126 Ind. 398, 26 N. E. 81 (governor) (1890).

5. *State v. Scampini*, 77 Vt. 92, 59 Atl. 201 (1904) (secretary of state); *Martin v. State*, 51 Wis. 407, 8 N. W. 248 (secretary of state) (1881).

6. *Roach v. Fletcher*, 11 Tex. Civ. App. 225, 32 S. W. 585 (1895) (agent).

judicially noticed,<sup>7</sup> while those of local importance or limited interest will require proof.<sup>8</sup> A judge is more apt to take judicial cognizance of a fact easily ascertainable from the public official records<sup>9</sup> than where learning the truth in regard to it involves assuming a duty of investigation which more reasonably should be discharged by a party.

**§ 649. (*Judicial Knowledge of Results of Law; Executive Department*); County.**— Courts of all grades judicially know the persons who hold the principal executive offices in the counties of the state.<sup>1</sup> The element of notoriety<sup>2</sup> has also a very considerable influence in this connection. The courts of a county may well deem practically all the officers of its own county as of sufficient prominence to warrant dispensing with proof as to who they

**7. Indiana.**— *State v. Gramelspacher*, 126 Ind. 398, 26 N. E. 81 (1890) (selection of site for state university).

**Louisiana.**— *D'Inwilliers v. New Orleans Second Municipality*, 5 Rob. (La.) 123 (1843) (issuing paper currency).

**Nebraska.**— *State v. Savage*, 65 Neb. 714, 91 N. W. 716 (1902) (assessment of taxes).

**Ohio.**— *Guckenberger v. Dexter*, 8 Ohio S. & C. Pl. Dec. 530 (1896) (sale of municipal bonds).

**Texas.**— *Roach v. Fletcher*, 11 Tex. Civ. App. 225, 32 S. W. 585 (1895) (sale of land scrip certificates).

**United States.**— *Railroad, etc., Co. v. Tennessee*, 85 Fed. 302 (1897) (assessment of taxes); *Southern Pac. R. Co. v. Groeck*, 68 Fed. 609 (1895) (withdrawing public lands from sale). See also *New York v. Barker*, 179 U. S. 279, 21 S. Ct. 121, 45 L. ed. 190 (1900).

**8. State v. Wise**, 7 Ind. 645 (1856) (establishing ferries).

**Maryland.**— *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 1 (1832) (means employed to carry out a public statute).

**Minnesota.**— *Dole v. Wilson*, 16 Minn. 525 (1871) (sale of land scrip under Indian treaty).

**Mississippi.**— *Bledsoe v. Little*, 4 How. (Miss.) 13 (1839) (lands offered for sale).

**New York.**— *Porter v. Waring*, 2 Abb. N. Cas. (N. Y.) 230 (1877) (what constitutes a sidewalk).

**Ohio.**— *Cincinnati, etc., R. Co. v. Hoffhines*, 46 Ohio St. 643, 22 N. E. 871 (1889) (changing name of a railroad company).

**Texas.**— *Thompson v. San Antonio, etc., R. Co.*, 11 Tex. Civ. App. 145, 32 S. W. 427 (1895) (regulating freight rates); *Archer v. State*, 9 Tex. App. 78 (1880) (establishing license fees).

**United States.**— *McKeoin v. Northern Pac. R. Co.*, 45 Fed. 464 (1891) (filing a railroad location).

**9. Smith v. Flournoy**, 47 Ala. 345 (1872); *Pleasant Valley Coal Co. v. Salt Lake County*, 15 Utah 97, 48 Pac. 1032 (1897); *Martin v. State*, 51 Wis. 407, 8 N. W. 248 (1881).

**1. Slaughter v. Barnes**, (Ky.) 13 Am. Dec. 190, 192, note (1821); *Despau v. Swindler*, 3 Mart. N. S. (La.) 705 (1825); *Lanfear v. Mes-tier*, 89 Am. Dec. 658, 682, note (1866).

**2. Infra**, § 699.

are.<sup>3</sup> In case of the officers of other counties a higher degree of official standing is necessary to warrant a similar course;<sup>4</sup> and, in the absence of statutory requirement, courts will not judicially know who are the deputies appointed by county officials.<sup>5</sup> Chief among county officers judicially known by courts in any county are those at any time, holding the office of sheriff. The latter is not only a court officer, but has been charged, from early times, with other important duties, more purely administrative.<sup>6</sup> The same judicial knowledge accorded the sheriff extends to tax collectors<sup>7</sup> or other officials discharging the duties usually included in the office of sheriff.<sup>8</sup>

**§ 650. (*Judicial Knowledge of Results of Law; Executive Department*); Municipal.**—All courts know, as a primary result of legislation, what officers are legally required, at any time, for the administration of municipal government, the respective powers and duties of such officers, their terms of office, amount of salary and similar facts. Any relation which the law has established

3. *Alabama*.—*Russell v. Huntsville, etc., Co.*, 137 Ala. 627, 34 So. 855 (1902).

*California*.—*Wetherbee v. Dunn*, 32 Cal. 106 (1867).

*Illinois*.—*Hertig v. People*, 159 Ill. 237, 50 Am. St. 162, 42 N. E. 879 (1896).

*Kentucky*.—*Slaughter v. Barnes*, 3 A. K. Marsh. (Ky.), 412, 13 Am. Dec. 190, note (1821).

*Oregon*.—*Dennison v. Story*, 1 Or. 272 (1859). See also *Koenig v. State*, 33 Tex. Crim. R. 367, 47 Am. St. 35 (1894).

4. *White v. Rankin*, 90 Ala. 541, 8 So. 118 (1889); *Cary v. State*, 76 Ala. 78 (1884); *State v. Ledford*, 28 N. C. (6 Ired.) 5 (1845); *Browne v. Philadelphia Bank*, 6 Serg. & R. (Pa.) 484, 9 Am. Dec. 463 (1821).

5. *Alabama*.—*Land v. Patteson*, Minor (Ala.), 14 (1820).

*Arkansas*.—*State Bank v. Curran*, 10 Ark. 142 (1849).

*California*.—*Joyce v. Joyce*, 5 Cal. 449 (1855).

*Kentucky*.—*Slaughter v. Barnes*, 3

A. K. Marsh. (Ky.), 412, 13 Am. Dec. 190 (1821).

*Texas*.—*Alford v. State*, 8 Tex. App. 545 (1880).

*Wisconsin*.—*Ward v. Henry*, 19 Wis. 76, 88 Am. Dec. 672 (1865). But see also:

*California*.—*Himmelman v. Hoadley*, 44 Cal. 213 (1872).

*Michigan*.—*People v. Johr*, 22 Mich. 461 (1871).

*Nebraska*.—*Davis v. Watkins*, 56 Neb. 288, 76 N. W. 575 (1898).

*Utah*.—*People v. Lyman*, 2 Utah, 30 (1877).

*Wisconsin*.—*Martin v. C. Aultman Co.*, 80 Wis. 150, 49 N. W. 749 (1891).

6. *Doe v. Riley*, 28 Ala. 164, 65 Am. Dec. 334 (1856); *Slaughter v. Barnes*, (Ky.) 13 Am. Dec. 190, 192, note (1821); *Alexander v. Burnham*, 18 Wis. 199 (1864).

7. *Burnett v. Henderson*, 21 Tex. 588 (1858).

8. *Feld v. Loftis*, 140 Ill. App. 530 (1908) [judgment affirmed, 88 N. E. 281 (1909)] (keeper of county jail).

between incumbency of one municipal office and that of another, is a proper subject of judicial knowledge. For example, the courts of Indiana "take notice, as matter of law, that the trustee of a civil township is also trustee of the school township."<sup>1</sup> What individuals, at any time, are the municipal officers will be known to the courts of the municipality itself.<sup>2</sup> It has been said that judicial knowledge will not be taken as to who are constables. The fact is not "of public notoriety."<sup>3</sup> The courts of a county in which a given city is located will judicially know who is, from time to time, its mayor.<sup>4</sup>

**§ 651. (*Judicial Knowledge of Results of Law; Executive Department*); Public Surveys.**— Knowledge of the existence of public surveys made under national authority, as an act of parliament,<sup>1</sup> or of Congress,<sup>2</sup> or under state authority,<sup>3</sup> will be judicially taken by all courts<sup>4</sup> as a secondary legal result of great public notoriety. The possession and opening up for development of large tracts of public lands in the United States has necessarily given especial prominence to this branch of the court's knowledge in the sections of the national territory in which a patent based upon the public survey is the foundation of land ownership, and the divisions established by it are coincident with the political divisions for governmental purposes. For the same reason, salient results of these surveys in particular jurisdictions are noticed. Not only is the position of the boundaries of states, counties,

1. *Inglis v. Hughes*, 61 Ind. 212 (1878).

2. *Fluegal v. Lards*, 108 Mich. 682, 66 N. W. 585 (1896) (city marshal).

3. *Doe v. Blackman*, 1 D. Chipman (Vt.) 109 (1797).

4. *Lucas v. Boyd*, (Ala. 1908) 47 So. 209; *People v. Hall*, (Colo. 1909), 100 Pac. 1129.

1. *Birrell v. Dryer*, 9 App. Cas. 345, 5 Aspin. 267, 51 L. T. Rep. (N. S.) 130 (1884) (admiralty chart).

2. *Alabama*.—*Ledbetter v. Borland*, 128 Ala. 418, 29 So. 579 (1900).

*Arkansas*.—*Bittle v. Stuart*, 34 Ark. 224 (1879).

*California*.—*Rogers v. Cady*, 104 Cal. 288, 38 Pac. 1 (1894); *Faekler v. Wright*, 86 Cal. 210, 24 Pac. 996 (1890).

*Illinois*.—*Gardner v. Eberhart*, 82 Ill. 316 (1876).

*Indiana*.—*Burton v. Ferguson*, 69 Ind. 486 (1880); *Murphy v. Hendricks*, 57 Ind. 593 (1877) (north-western territory).

*Iowa*.—*Hyfner v. Walsh*, 3 Greene 509 (1852).

*Minnesota*.—*Quinn v. Champagne*, 38 Minn. 322, 37 N. W. 451 (1888) (general system of governmental surveys).

*Wisconsin*.—*Atwater v. Schenck*, 9 Wis. 160 (1859).

3. *Bank of Lemoore v. Fulgham*, (Cal. 1907) 90 Pac. 936.

4. *Wright v. Phillips*, 2 Greene (Iowa) 191 (1849) (justice of the peace).



towns, township and other municipalities, as related to the principal lines, established by these surveys—the consideration of which seems more appropriate in connection with the geography of these political divisions of government,<sup>5</sup> known to all courts of localities within which these facts are of public interest, but the position of the meridian,<sup>6</sup> range<sup>7</sup> and section<sup>8</sup> lines established in such localities are regarded in a similar way. In the same manner the nomenclature,<sup>9</sup> including abbreviations, adopted by the government surveyors, the numbering<sup>10</sup> and relative position<sup>11</sup> of territorial divisions, as counties,<sup>12</sup> towns, townships whole<sup>13</sup> or fractional,<sup>14</sup> and the like, need not be proved. Incidentally the court judicially knows the actual<sup>15</sup> and relative<sup>16</sup> size, of such divisions; and also their position both as regards each other<sup>17</sup> and also in relation to the meridian lines<sup>18</sup> or points of the compass.<sup>19</sup>

*On the other hand*, facts of a limited public interest as the topography of a certain locality,<sup>20</sup> its minor divisions,<sup>21</sup> the position of a particular lot upon the surface of the ground,<sup>22</sup> or whether a certain piece of land is within the public domain,<sup>23</sup> fall outside the range of the court's judicial knowledge.

5. *Infra*, § 737.

6. *Muse v. Richards*, 70 Miss. 581, 12 So. 821 (1893).

7. *Muse v. Richards*, 70 Miss. 581, 12 So. 821 (1893).

8. *Hill v. Bacon*, 43 Ill. 477 (1867); *Meacham v. Sunderland*, 10 Ill. App. 123 (1888); *Muse v. Richards*, 70 Miss. 581, 12 So. 821 (1893).

9. *Quinn v. Windmiller*, 67 Cal. 461, 8 Pac. 14 (1885).

10. *Smitha v. Flournoy*, 47 Ala. 345 (1872); *Kile v. Yellowhead*, 80 Ill. 208 (1875); *Mossman v. Forrest*, 27 Ind. 233 (1866); *Albert v. Salem*, 39 Or. 466, 65 Pac. 1068, 66 Pac. 233 (1901).

11. *King v. Kent*, 29 Ala. 542 (1857); *Mossman v. Forrest*, 27 Ind. 233 (1866).

12. *Brannan v. Henry*, (Ala. 1905) 39 So. 92; *Huxford v. Southern Pine Co.*, 124 Ga. 181, 52 S. E. 439 (1905); *Stanford v. Bailey*, 122 Ga. 404, 50 S. E. 161 (1905); *O'Brien v. Krockinski*, 50 Ill. App. 456 (1893); *Buchanan v. Whitham*, 36 Ind. 257 (1871).

13. *Peck v. Sims*, 120 Ind. 345, 22 N. E. 313 (1889).

14. *Webb v. Mullins*, 78 Ala. 111 (1884).

15. *Quinn v. Windmiller*, 67 Cal. 461, 8 Pac. 14 (1885); *Parker v. Chancellor*, 73 Tex. 475, 11 S. W. 503 (1889).

16. *Hill v. Bacon*, 43 Ill. 477 (1867); *Parker v. Chancellor*, 73 Tex. 475, 11 S. W. 503 (1889).

17. *Muse v. Richards*, 70 Miss. 581, 12 So. 821 (1893).

18. *O'Brien v. Krockinski*, 50 Ill. App. 456 (1893).

19. *Kile v. Yellowhead*, 80 Ill. 208 (1875); *Buchanan v. Whitham*, 36 Ind. 257 (1871).

20. *Wilcox v. Jackson*, 109 Ill. 261 (1883).

21. *Stanberry v. Nelson*, Wright (Ohio) 766 (1834).

22. *Goodwin v. Scheerer*, 106 Cal. 690, 694, 40 Pac. 18 (1895).

23. *Schwerdtle v. Placer Co.*, 108 Cal. 589, 41 Pac. 448 (1895).

*An administrative assumption of regularity exists in favor of the surveys made under official authority.*<sup>24</sup> This may assist to explain the readiness with which judicial or common knowledge is taken of the accuracy of maps, plans, topographical surveys and the like printed under official authority. The general methods and results of government surveys may well be matters for either judicial or common knowledge.<sup>25</sup>

**§ 652. (*Judicial Knowledge of Results of Law; Executive Department*); Rules and Regulations; Nation.**—The procedure adopted in and the regulations prescribed by the great departments of national government<sup>1</sup> as the department of state,<sup>2</sup> department of the treasury,<sup>3</sup> department of the interior,<sup>4</sup> post-

24. *Town of West Seattle v. West Seattle Land Improvement Co.*, 38 Wash. 359, 80 Pac. 549 (1905) (two miles around Seattle). *Infra*, §§ 1193 *et seq.*

25. *Little v. Williams*, (Ark. 1908) 113 S. W. 340. A court will take judicial notice of maps published by state authority. *Davis v. State*, (Wis. 1908) 115 N. W. 150.

The facts set out in an admiralty chart respecting a particular portion of the sea may be taken by the court as judicially known. "I think that the court should take judicial notice of the geographical position and the general names applied to such districts as this, [St. Lawrence] in short, of all that we see on the admiralty chart of this part of the sea. I do not know whether the first discoverers of America called the gulf that of St. Lawrence, and then gave the same name to the river, or *vice versa*, nor do I think it material. The name has for many years been applied to both. I think, that applying the name as we find it used, in charts and by geographers, to a well defined district, it includes both the river and the gulf." *Birrell v. Dryer*, 9 App. Cas. 345-347, 353 (1884).

1 *Caha v. U. S.*, 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415 (1893); *U. S. v. Eaton*, 144 U. S. 677, 12 S. Ct.

764, 36 L. ed. 591 (1891); *Wilkins v. U. S.*, 96 Fed. 837, 37 C. C. A. 588 (1899).

2. *Zevely v. Weimer*, (Ind. T. 1904) 82 S. W. 941.

3. *District of Columbia*.—*Prather v. U. S.*, 9 App. Cas. (D. C.) 82 (1896).

*Kentucky*.—*Moore v. Worthington*, 2 Duv. (Ky.) 307 (1865).

*Maine*.—*Low v. Hanson*, 72 Me. 104 (1881).

*Massachusetts*.—*Sears v. Dewing*, 14 Allen (Mass.) 413, 424 (1867).

*United States*.—*Dominici v. U. S.*, 72 Fed. 46 (1896).

**Regulations adopted by the Bureau of Internal Revenue** must be proved. *Com. v. Crane*, 158 Mass. 218, 33 S. W. 388 (1893).

4. *California*.—*Kimball v. McKee*, 149 Cal. 435, 86 Pac. 1089 (1906) (land office).

*District of Columbia*.—*Prather v. U. S.*, 9 App. Cas. (D. C.) 82 (1896).

*Indian Territory*.—*Zevely v. Weimer*, (Ind. T. 1904) 82 S. W. 941; *Weimer v. Zevely*, (Ind. T. 1905) 138 Fed. 1006.

*Missouri*.—*Campbell v. Wood*, 116 Mo. 196, 202, 22 S. W. 796 (1893) (instructions of surveyor general to his deputies).

*Montana*.—*U. S. v. Williams*, 6 Mont. 379, 12 Pac. 851 (1887).

office,<sup>5</sup> or of war or the navy, will be judicially known. Judicial knowledge has, however, been refused, even in the federal courts<sup>6</sup> and the requirement made that these rules and regulations should be proved as facts and introduced into the record on appeal. In general, however, where a statute gives a department or other agency of government the right to pass regulations intimately affecting the conduct of large sections of the public, courts whose duty it is to enforce such regulations will judicially know them.<sup>7</sup> As a matter of administration, this judicial knowledge is taken in part because the action of such departments intimately affects the public, and, consequently is known to it. Another reason is that the power to enact these regulations not only to control the action of the public in doing business with a department, or any of its bureaus, but equally to pass ordinances for conduct of the community, as where the lighthouse board determines the number and kind of lights which shall be placed upon drawbridges across navigable waters,<sup>8</sup> regulations are made by federal author-

*Nebraska.*—*Larson v. Pender First Nat. Bank*, (Neb. 1902) 92 N. W. 729 (Indian bureau).

*New Mexico.*—*U. S. v. Gumm*, 9 N. M. 611, 58 Pac. 398 (1899) (timber regulations).

*Washington.*—*Whitney v. Spratt*, 25 Wash. 62, 64 Pac. 919, 87 Am. St. Rep. 738 (1901) (land office).

*United States.*—*Caha v. U. S.*, 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415 (1893) (interior regulations for land office suits); *Bigelow v. Chatterton*, 51 Fed. 614, 2 C. C. A. 402 (1892) (delay in issuing patents from land office). See also *U. S. v. Bedgood*, 49 Fed. 54 (1891).

The main rules of practice of the land office are of general notoriety. The principal results which are commonly created under them, need, by consequence, no proof. *Parkersville Drainage Dist. v. Wattier*, (Or. 1906) 86 Pac. 775 (appropriation of water rights on public domain). See also *Nurnberger v. United States*, (N. D. 1907) 156 Fed. 721, 84 C. C. A. 377 (general land office).

The practice of the patent office

as to the consecutive numbering of patents falls within the scope of judicial knowledge. *A. Smith, etc., Carpet Co. v. Skinner*, 91 Hun (N. Y.) 641, 36 N. Y. Suppl. 1000 (1895).

**Department of justice.**—A court will judicially know that the action of the president of the United States in passing upon an application for pardon may properly be taken through the department of justice. *Perovich v. Perry*, 167 Fed. 789 (1909).

**Interstate Commerce Commission.**—The court knows that the Interstate Commerce Commission has much to do with the regulation of freight rates on articles transported in commerce between the states or with foreign nations. *Law Reporting Co. v. Elwood Grain Co.*, (Mo. App. 1909) 115 S. W. 475.

5. *Carr v. First Nat. Bank*, (Ind. App. 1905) 73 N. E. 947.

6. *Nagle v. United States*, (U. S. C. C. A., N. Y. 1906) 145 Fed. 302.

7. *State v. Southern Ry. Co.*, (N. C. 1906) 54 S. E. 294.

8. *Smith v. Shakopee*, 103 Fed. 240, 44 C. C. A. 1 (1900).

ity for the quarantine and transportation of infected cattle,<sup>9</sup> or the British orders in council are adopted by virtue of an act of Parliament,<sup>10</sup> has often been granted by the terms of a public statute. The latter reason alone is not sufficient, for when the action of an administrative board, as supervising inspectors of steam vessels,<sup>11</sup> come but little into direct touch with the public, their regulations will not receive judicial notice. On the contrary, where a great department of government, such as that of agriculture, is expressly empowered to regulate a matter which intimately concerns the public, e. g., the transportation of cattle,<sup>12</sup> the courts of a state will judicially notice these regulations. It naturally follows that the practice of the departments will be judicially cognized and given suitable weight by the courts in the construction of a statute.<sup>13</sup>

**§ 653. (*Judicial Knowledge of Results of Law; Executive Department; Rules and Regulations; Nation*); Administrative Boards.**—The rules and regulations adopted by administrative boards, departments of state or other executive agencies of government are thus judicially cognized by the court;—but no very definite line can be drawn between the cases where notice is taken and, on the other hand, where proof is required. It is largely a matter of what an individual judge deems to be a reasonable exercise of his administrative powers. The commonly applied test is whether the rules and regulations are such as may be assumed to affect and, consequently, to be known by, a large proportion of the community. On the other hand, regulations which affect only

9. *Wabash R. Co. v. Campbell*, 219 Ill. 312, 76 N. E. 346 (1905).

10. *Reg. v. The Ship Minnie*, 4 Can. Exch. 151 (1894). While the Articles of War printed by the royal printer, will be judicially noticed, the book called "Rules and Regulations for the Government of the Army" will not be noticed in the same way. *Bradley v. Arthur*, 4 B. & C. 304 (1825); *R. v. Withers*, 5 T. R. 446 (1814).

**Authority of Congress.**—Regulations made by an executive department in pursuance of authority delegated by Congress have the force of law, and the courts take judicial no-

tice of their existence and provisions. *U. S. v. Moody*, (Mich. 1908) 164 Fed. 269. See also *Beck v. Johnson*, (Ky. 1909) 169 Fed. 154.

11. *The E. A. Packer*, 140 U. S. 360, 11 S. Ct. 794, 35 L. ed. 453 (1890); *The Clara*, 55 Fed. 1021, 5 C. C. A. 390 (1893).

12. *State v. Southern Ry. Co.*, (N. C. 1906) 54 S. E. 294. See also *Kansas City Southern Ry. Co. v. State*, (Ark. 1909) 119 S. W. 288 (commissioner of agriculture).

13. *Griner v. Baggs & Perry*, (Ga. App. 1908) 61 S. E. 147.

the internal administration of the office adopting them,<sup>1</sup> or a limited portion of the public, will not be judicially known. In any case, unless expressly required to take judicial notice of the action of an administrative board a court may decline to do so and require that the fact be proved.<sup>2</sup>

**§ 654. (*Judicial Knowledge of Results of Law; Executive Department; Rules and Regulations*); State.**— Rules for the transaction of business<sup>1</sup> adopted by the chief departments of state,<sup>2</sup> or important state<sup>3</sup> or county<sup>4</sup> officials, may be judicially recognized by the courts. Regulations may properly be prescribed by executive departments for other purposes than to facilitate the business of the department itself. They may prescribe or prohibit conduct of the public in their relations with each other or to the state. Cognizance is especially easy where the power to prescribe regulations is expressly conferred by statute.<sup>5</sup> For example, quarantine regulations, e. g., those affecting the transportation of diseased cattle,<sup>6</sup> will be noticed. The regulations of official boards which come but little into contact with the general public<sup>7</sup> must be proved.

**§ 655. (*Judicial Knowledge of Results of Law; Executive Department*); Signatures and Seals; National.**— The great seal of

1. *Hensley v. Tarpey*, 7 Cal. 288 (1857) (removing original papers from the files).

2. *Robinson v. Baltimore & O. R. Co.*, 64 W. Va. 406, 63 S. E. 323 (1908).

1. *People v. Palmer*, 6 N. Y. App. Div. 19, 39 N. Y. Suppl. 631 (1896) (custody of records maintained by clerks).

2. *Seaboard Air Line Ry. v. Shackelford*, 5 Ga. App. 395, 63 S. E. 252 (1908) (regulations); *City of Jeffersonville v. Louisville & J. Bridge Co.*, 169 Ind. 645, 83 N. E. 337 (1908) (reports of state board of tax commissioners); *Larson v. Pender First Nat. Bank*, (Neb. 1902) 92 N. W. 729.

3. *People v. Kent County*, 40 Mich. 481 (1879) (supervisors).

4. That recorders of deeds keep plans in their offices on which are

shown plats of cities and towns or lands additional thereto will be noticed. *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727 (1895); *Miller v. Indianapolis*, 123 Ind. 196, 24 N. E. 228 (1889).

5. *Larson v. Pender First Nat. Bk.* (Neb. 1902) 92 N. W. 729.

6. *Wabash R. Co v. Campbell*, 117 Ill. App. 630 [*affirmed*, 219 Ill. 312, 76 N. E. 346 (1905)].

7. *New York City Health Dept. v. City Real Property Invest. Co.*, 86 N. Y. Suppl. 18 (1904) (health department); *People v. Dalton*, 46 N. Y. App. Div. 264, 61 N. Y. Suppl. 263 (1899) (civil service commissioners); *Josh v. Marshall*, 33 N. Y. App. Div. 77, 53 N. Y. Suppl. 419 (1898) (fish commissioners); *Palmer v. Aldridge*, 16 Barb. (N. Y.) 131 (1852) (canal commissioners).

the nation<sup>1</sup> and the national seal of any government,<sup>2</sup> or any of its provinces,<sup>3</sup> recognized by the executive of the sovereignty of the court of the forum, will be judicially cognized; but the seal of an unacknowledged government must be proved by such testimony as the nature of the case admits.<sup>4</sup>

When a judge says in this or any other connection regarding knowledge of official signatures and seals, that he judicially knows them he is using an expression which, while convenient and too deep-rooted in forensic practice to be disturbed, is, in reality, not in accordance with the truth. He does not know the accuracy of the signature or the authenticity of the seal; or as to the effect of either in identifying or authenticating the document. What is actually true is that the judge is willing, as a matter of administration, to proceed, in his judicial capacity, as if he did know. In other words, he *assumes* that in view of the regularity of official business and the other circumstances of the case, the signature or seal, or both, would not be attached to the document unless the truth were as *prima facie* appears. He deems it good administration, as, indeed, it is, to spend as little of the court's time as possible over matters not really in dispute. Should the other side object to the reception of the evidence and show any reason why this assumption is not correct, in point of fact, it will then be time enough to call upon the proponent to prove the signature and seal. The judge may well deem it a waste of time to require him to do so in the first instance;—and, moreover, a neglect of his duty to expedite trials.<sup>5</sup> National courts, and, in many instances, courts of state jurisdiction,<sup>6</sup> judi-

1. *Yount v. Howell*, 14 Cal. 465 (1859). English courts notice judicially the great seal of state. *Ld. Melville's Case*, 29 How. St. Tr. 707 (1806). In the same way no proof need be offered of the royal privy seal or signet. *Lane's Case*, 2 Coke's Rep. 17b (1596).

2. *Connecticut*.—*Griswold v. Pitcairn*, 2 Com. 85 (1816).

*New Hampshire*.—*Watson v. Walker*, 23 N. H. 471 (1851).

*New York*.—*Lincoln v. Bartelle*, 6 Wend. 475 (1831).

*Texas*.—*Phillips v. Lyons*, 1 Tex. 392 (1846).

*United States*.—The *Santissima Trinidad*, 7 Wheat. 283, 5 L. ed. 454 (1822); *U. S. v. Palmer*, 3 Wheat. 610, 4 L. ed. 471 (1818).

*England*.—Anonymous, 9 Mod. 66 (1723).

3. *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404 (1862) (Canada).

4. *U. S. v. Palmer*, 3 Wheat. (U. S.) 610, 4 L. ed. 471 (1818).

5. *Supra*, §§ 544 et seq.

6. *Yount v. Howell*, 14 Cal. 465 (1859); *Jones v. Gale*, 4 Mart. (La.) 635 (1817).

cially notice the signature even by initials,<sup>7</sup> and the seals, of national officials, of the higher grades<sup>8</sup> such as the chief executive,<sup>9</sup> or the head of departments of state, or of bureaus under them,<sup>10</sup> asking no further proof. In the same way the courts of a jurisdiction, state or national, would judicially know, for administrative purposes, the signatures and seals of consuls,<sup>11</sup> and other diplomatic representatives, including substitutes appointed in accordance with some provision of law, whether such officials themselves are elected or appointed.

**§ 656. (*Judicial Knowledge of Results of Law; Executive Department; Signatures and Seals; National*); Executive Magistrates of Foreign State.**—Except where other provision is made by statute,<sup>1</sup> the seal of the chief magistrate, or an executive governmental department,<sup>2</sup> of a foreign state or of any municipality existing therein<sup>3</sup> will not be noticed, but is a subject of proof.

**§ 657. (*Judicial Knowledge of Results of Law; Executive Department; Signatures and Seals*); State.**—The great seal of state of the sovereignty of the forum,<sup>1</sup> the seal of every state<sup>2</sup> and

7. *Liddon v. Hodnet*, 22 Fla. 442 (1886) (president of the United States).

8. Anonymous, 1 Wkly. Rep. 186 (1852) (commissioner to administer oaths); *Ferguson v. Benyon*, 16 Wkly. Rep. 71 (1867) (commissioner to administer oaths). A telegram signed with the surname of the Attorney-General of the United States, purporting to state the president's decision on an application by a convicted prisoner for a commutation of sentence, will be presumed authentic. *Perovich v. Perry*, 167 Fed. 789 (1909).

9. *Yount v. Howell*, 14 Cal. 465 (1859) (president of the United States); *Gardner v. Barney*, 6 Wall. (U. S.) 499, 18 L. ed. 890 (1867) (president of the United States).

10. *York, etc., Line R. Co. v. Wilians*, 17 How. (U. S.) 30, 15 L. ed. 27, 30 (1854) (commissioner of patents).

11. *Barber v. Mexico International Co.*, 73 Conn. 587, 48 Atl. 758 (1901).

1. *Duffey v. Bellefonte Presb. Cong.*, 48 Pa. St. 51 (1864) (mayor of Wilmington, Del.). See also *Hadfield v. Jameson*, 2 Munf. (Va.), 53, 70 (1809). Where the condemnation of a vessel for a fraud on the revenue laws of St. Domingo during the French occupancy of the island was a fact in issue, the attestation of the proper British authorities who had subsequently conquered and then held the island, was deemed sufficient, though "certified only under the governor's seal at arms, instead of a colonial or public seal."

2. *Church v. Hubbard*, 2 Cranch (U. S.) 187, 2 L. ed. 249 (1804); *Schoerken v. Swift, etc., Co.*, 7 Fed. 469, 19 Blatchf. 209 (1881).

3. *Chew v. Keck*, 4 Rawle (Pa.) 163 (1833) (corporate seal of London, Eng).

1. *Chicago, etc., R. Co. v. Keegan*, 152 Ill. 413, 39 N. E. 33 (1894).

2. *U. S. v. Amedy*, 11 Wheat. 392 (1826).

territory<sup>3</sup> in the American Union, will be judicially noticed by all courts, state and federal, in the United States. So also the signature and public<sup>4</sup> seal of the present or any past governor of the state.<sup>5</sup> Even when under a former government,<sup>6</sup> and those of leading officers of state,<sup>7</sup> present, or past,<sup>8</sup> or of their substitutes,<sup>9</sup> will be noticed by all courts within a state of the Union.

**§ 658. (*Judicial Knowledge of Results of Law; Executive Department; Signatures and Seals*); County.**—The signature and seals of the principal county executive officials,<sup>1</sup> as recorder

**3. Maine.**—Robinson v. Gilman, 20 Me. 299 (1841).

**New Hampshire.**—State v. Carr, 5 N. H. 367 (1831).

**New York.**—Coit v. Millikin, 1 Den. (N. Y.) 376 (1845).

**Texas.**—Phillips v. Lyons, 1 Tex. 392 (1846).

**United States.**—Patterson v. Winn, 5 Pet. (U. S.) 233, 8 L. ed. 108 (1831); U. S. v. Amedy, 11 Wheat. (U. S.) 392, 6 L. ed. 502 (1826); 1 U. S. St. at L. 122 [U. S. Comp. St. (1901), p. 677], construed in U. S. v. Johns, 4 Dall. (U. S.) 412, 1 L. ed. 888, 26 Fed. Cas. No. 15,481 (1806).

**4. An unofficial seal must be proved.** Beach v. Workman, 20 N. H. 379 (1850).

**5. Powers v. Com.,** 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 53 L. R. A. 245 (1901); Jones v. Gale, 4 Mart. (La.) 635 (1817); Wells v. Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575 (1866).

**6. Jones v. Gale's Curatrix,** 4 Mart. (La.) 635 (1817) (Spanish governor).

**7. Alabama.**—Cary v. State, 76 Ala. 78 (1884).

**Arkansas.**—Kaufman v. Stone, 25 Ark. 336 (1869) (commissioner of deeds).

**California.**—Wetherbee v. Dunn, 32 Cal. 106, 108 (1867).

**Louisiana.**—Dwight v. Splane, 11 Rob. (La.) 487 (1845) (commissioner of deeds).

**Michigan.**—People v. Johr, 22 Mich. 461 (1871) (auditor general).

**Tennessee.**—State v. Evans, 8 Humphr. (Tenn.) 110 (1847) (attorney general); Bennett v. State, Mart. & Y. (Tenn.) 133 (1827) (attorney general); State v. Cooper, (Tenn. Ch. App. 1899) 53 S. W. 391 (registers in State land office).

**Texas.**—Roach v. Fletcher, 11 Tex. Civ. App. 225, 32 S. W. 585 (1895) (agent of provisional government of Texas). "Courts are authorized and required, to take judicial notice of the various commissioned officers of the state, and to know the extent of their authority, their official signatures, and their respective terms of office,—when such terms commence, and when they expire. The dates of these commissions are matters of public record in the executive department of the state government, being accessible to inquiry by all who may be concerned, and the law fixes the duration of each official term." Cary v. State, 76 Ala. 78 (1884).

**8. Smyth v. New Orleans C. & B. Co.,** 35 C. C. A. 646, 93 Fed. 899 (1899) (government secretary of Louisiana as a Spanish colony).

**9. People v. Johr,** 22 Mich. 461 (1871) (deputy auditor general).

**1. Himmelmann v. Hoadley,** 44 Cal. 213 (1872); Wetherbee v. Dunn, 32 Cal. 106 (1867); State v. Evans, 8 Humphr. (Tenn.) 110 (1847).



of deeds,<sup>2</sup> registers,<sup>3</sup> sheriff,<sup>4</sup> tax collector<sup>5</sup> and the like need not be proved. Judicial knowledge is also taken of the signatures and seals if any of the deputies of such county officers<sup>6</sup> appointed by virtue of statute, and acting for them.<sup>7</sup> In case of important county offices, closely in touch with the general public, the same cognizance will be taken by national courts.<sup>8</sup>

*The administrative nature of the judicial assumption is shown by the fact that it contains little or no element of probative force. It follows that it cannot be used to establish the res gestæ of a given transaction. It will be observed hereafter that the res gestæ or constituent facts cannot be established as matters of common knowledge.<sup>9</sup> In like manner, although the official signatures on a county warrant will, under other circumstances, be judicially known, formal proof of them must be made where their genuineness is placed in issue by the pleadings.<sup>10</sup>*

**§ 659. (Judicial Knowledge of Results of Law; Executive Department; Signatures and Seals); Cities, Towns, etc.—**

The official seals of city, town and other municipal officers will be noticed judicially. No proof need be offered of the signatures of such city, town or other municipal officers nor of the signatures

2. *Scott v. Jackson*, 12 La. Ann. 640 (1857).

3. *Francher v. De Montegre*, 1 Head (Tenn.) 40 (1858).

4. *Alabama*.—*Ingram v. State*, 27 Ala. 17 (1855); *Miller v. McMillan*, 4 Ala. 527 (1842).

*Illinois*.—*Thielmann v. Burg*, 73 Ill. 293 (1874).

*Louisiana*.—*Graham v. Gibson*, 14 La. 146 (1839); *Wood v. Fitz*, 10 Mart. (La.) 196 (1821).

*Tennessee*.—*Major v. State*, 2 Sneed (Tenn.) 11 (1854).

*Texas*.—*Alford v. State*, 8 Tex. App. 545 (1880).

*Wisconsin*.—*Martin v. Aultman*, 80 Wis. 150, 49 N. W. 749 (1891). The signature will be judicially noticed though the title is incorrectly given or indicated by initials, if duly official, even in cases where the name is itself abbreviated, or given in initials. *Miller v. McMillan*, 4 Ala. 527 (1842).

5. *Wetherbee v. Dunn*, 32 Cal. 106 (1867) (levee); *Walcott v. Gibbs*, 97 Ill. 118 (1880); *Templeton v. Morgan*, 16 La. Ann. 438 (1862) (levee tax collector).

6. "The courts will take judicial notice of the officers of the county and the genuineness of their signatures; and when the law provides for the appointment of a deputy by one of these officers, courts will also judicially recognize such deputy and the genuineness of his signature." *Himmelmenn v. Hoadley*, 44 Cal. 213, 226 (1872).

7. *Himmelmenn v. Hoadley*, 44 Cal. 213, 226 (1872); *Martin v. Aultman*, 80 Wis. 150, 49 N. W. 749 (1891).

8. *Alcock v. Whatmore*, 8 Dowl. P. C. 615 (1840).

9. *Infra*, § 700.

10. *Apache County v. Barth*, 177 U. S. 538, 20 S. Ct. 718, 44 L. ed. 878 (1899) [*reversed* in (*Ariz.* 1898) 53 Pac. 187].

of their deputies appointed under legal authority.<sup>1</sup> The official seals of domestic cities, towns and other municipalities, will be judicially known by the courts as an administrative matter. For example, the courts of England will judicially know, in this sense, the seal of the city of London.<sup>2</sup>

**§ 660. (*Judicial Knowledge of Results of Law*); Legislative Department; General Facts.**—The existence of the national and its own state<sup>1</sup> legislature, the number of members in its several branches,<sup>2</sup> general facts regarding its membership, as that a certain body of men comprise the legislature,<sup>3</sup> and when a certain session ended,<sup>4</sup> will be noticed by all the courts.

*But facts pertaining to individuals* as that a particular person is a member,<sup>5</sup> or with relation to the internal machinery of law making<sup>6</sup> are outside the category;—except where the fact is one of notoriety, either by reason of its historical importance<sup>7</sup> or otherwise.

*Municipalities.*—The legislative branch of a municipal government, as the aldermen of a city,<sup>8</sup> will be judicially noticed.

**§ 661. (*Judicial Knowledge of Results of Law; Legislative Department*); Journals.**—Journals of a branch of the legislature

1. *Himmelman v. Hoadley*, 44 Cal. 213 (1872) (deputy superintendent of streets).

2. *Woodmass v. Mason*, 1 Esp. 53 (1793).

1. *People v. Burt*, 43 Cal. 560 (1872).

**House of Commons.**—The established privileges of the House of Commons need not be proved to an English court. *Bradlaugh v. Gossett*, 12 Q. B. D. 271 (1884); *Stockdale v. Hansard*, 9 Ad. & E. 1 (1839).

2. *State v. Mason*, 155 Mo. 486, 55 S. W. 636 (1900).

3. *State v. Kennard*, 25 La. Ann. 238 (1873). The terms of state senators will be the subject of judicial cognizance. *State v. Schnitger*, (Wyo. 1908) 95 Pac. 698. The court will take judicial notice of the membership of the legislature and the terms of the senators as the senate is constituted and the journal of either branch of the legislature in so far as it is

germane to and bears on the question of the validity of a legislative apportionment act. *State v. Schnitger*, (Wyo. 1908) 95 Pac. 698, 699. To determine the validity of a legislative apportionment statute a court will judicially know the members of the legislature. *State v. Schnitger*, (Wyo. 1908) 95 Pac. 698.

4. *Perkins v. Perkins*, 7 Conn. 558, 18 Am. Dec. 120 (1829).

5. *Prentis v. Com.*, 5 Rand. (Va.) 697, 16 Am. Dec. 782 (1827); *State v. Polacheck*, 101 Wis. 427, 77 N. W. 708 (1898).

6. *Judah v. Vincennes University*, 16 Ind. 56 (1861) (proper ways of influencing legislation); *State v. Dow*, 53 Me. 305 (1865) (committee reports).

7. *Walden v. Canfield*, 2 Rob. La. 466, 469 (1842) (Edward Livingston a senator).

8. *Fox v. Com.*, 32 Leg. Int. (Pa.) 257, 1 W. N. C. 243 (1873).

are public records. "They prove their own authenticity."<sup>1</sup> Being kept in virtue of a provision of law, judicially known to the judge, their existence and function in legislation are also judicially known.<sup>2</sup> Judges of a majority of American states<sup>3</sup> hold that they may resort to these journals for the purpose of ascertaining what is the law which they are charged with the responsibility of knowing at their peril;<sup>4</sup>—when a statute went into effect whether it was properly enacted, and facts of similar nature. In so doing, they judicially notice facts brought to their attention on such inspection, and give effect to them even to the extent of controlling the official certificate of enactment.<sup>5</sup>

1. *Grob v. Cushman*, 45 Ill. 119 (1867); *State v. Denny*, 118 Ind. 449 (1888); *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. R. Co.*, 4 Gill & J. 1, 63 (1832).

2. *State v. Swiggart*, 118 Tenn. 556, 102 S. W. 75 (1907).

3. *Alabama*.—*Stein v. Leeper*, 78 Ala. 517 (1885).

*Arkansas*.—*Worthen v. Badgett*, 32 Ark. 496 (1877).

*California*.—*Sherman v. Story*, 30 Cal. 253, 275 (1866).

*Florida*.—*State v. Hocker*, 36 Fla. 358, 18 So. 767 (1895).

*Indiana*.—*City of Evansville v. State*, 118 Ind. 426, 434, 21 N. E. 267 (1888).

*Iowa*.—*Koehler v. Hill*, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609 (1883).

*Kansas*.—*In re Vanderberg*, 28 Kan. 243 (1882); *Division of Howard County*, 15 Kan. 194 (1875).

*Louisiana*.—*Barnard v. Gall*, 43 La. Ann. 959, 10 So. 5 (1891).

*Maryland*.—*Legg v. Annapolis*, 42 Md. 203 (1874).

*Michigan*.—*Hart v. McElroy*, 72 Mich. 446, 40 N. W. 750 (1888).

*Mississippi*.—*Green v. Weller*, 32 Miss. 650 (1856).

*Missouri*.—*McCaffery v. Mason*, 155 Mo. 486, 55 S. W. 636 (1900).

*Nebraska*.—*State v. Frank*, 61 Neb. 679, 85 N. W. 956 (1901).

*New Hampshire*.—*Opinion of Justices*, 52 N. H. 622 (1873).

*New Jersey*.—*Pangborn v. Young*, 32 N. J. L. 29 (1866).

*New York*.—*People v. Chenango*, 8 N. Y. 317 (1853).

*Ohio*.—*Miller v. State*, 3 Ohio St. 475 (1854).

*Oregon*.—*City of Portland v. Yicks*, —(Or. 1904). 75 Pac. 706.

*Pennsylvania*.—*Southwark Bank v. Com.*, 26 Pa. St. 446 (1856).

*South Carolina*.—*State v. Platt*, 2 S. C. 150, 16 Am. Rep. 647 (1870).

*South Dakota*.—*Somers v. State*, 5 S. D. 321, 58 N. W. 804 (1894).

*Tennessee*.—*Williams v. State*, 6 Lea 549 (1880).

*Utah*.—*Ritchie v. Richards*, 14 Utah 345, 47 Pac. 670 (1896).

*Vermont*.—*In re Welman*, 20 Vt. 653, 29 Fed. Cas. No. 17,407 (1844).

*West Virginia*.—*Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640 (1871).

*Wisconsin*.—*Dane County v. Reindahl*, 104 Wis. 302, 80 N. W. 438 (1899); *McDonald v. State*, 80 Wis. 407, 50 N. W. 185 (1891).

*Wyoming*.—*State v. Schnitger*, 95 Pac. 698 (1908).

*United States*.—*Post v. Supervisors*, 105 U. S. 667 (1881); *Blake v. New York Nat. City Bank*, 23 Wall. 307, 23 L. ed. 119 (1874); *Gardner v. The Collector*, 6 Wall. (U. S.) 499 (1867); *Gardner v. Barney*, 6 Wall. 499, 18 L. ed. 890 (1867).

4. *Supra*, §§ 571 *et seq.*

5. The right of the legislature to amend its journal so as to conform

*In other jurisdictions* different views prevail. Not only is the certificate of the proper official that the act has duly become a law been accepted as final,<sup>6</sup> and the journals when relied upon to prove the falsity of the statement held irrelevant (though this ground is not always the one assigned); but the journals, even when used for a legitimate purpose, have been refused the status of public records.<sup>7</sup> In these states they have been treated merely as public documents,<sup>8</sup> which were to be proved by evidence in the usual way<sup>9</sup> upon an issue as to the validity of the statute regularly raised.<sup>10</sup>

*The question, it will be noted, is really one of administration.* So far as principle may properly be predicated in connection with a matter so largely of constitutional and statutory regulation, it would seem to lie on the side of the majority opinion. The judge charged with knowledge of law as part of his administrative function may, in accordance with the general rule<sup>11</sup> consult any source of information deemed by him calculated to yield it. The legislative journals seem well adapted to that end. As in other cases of such action by the court, fairness to the parties might suggest that the basis of judicial knowledge should be brought to their attention; such a course would prevent surprise and conduce to full consideration. It is not necessary, however,

to the facts at the same session, is not disputed. *Turley v. Logan*, 17 Ill. 151 (1855).

6. *Harwood v. Wentworth*, 162 U. S. 547, 16 Sup. Ct. 890 (1895); *Field v. Clark*, 143 U. S. 649 (1891). See also *Legg v. Mayer*, 42 Md. 203, 220 (1874).

7. *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 85 (1866); *Pangborn v. Young*, 32 N. J. L. 29 (1866); *Rex v. Arundel*, Hob. K. B. 109 (1617).

8. *Grob v. Cushman*, 45 Ill. 119 (1867); *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710 (1869); *Coleman v. Dobbins*, 8 Ind. 156, 161 (1856).

9. *Illinois*.—*Grob v. Cushman*, 45 Ill. 119 (1867).

*Indiana*.—*Coleman v. Dobbins*, 8 Ind. 156 (1856).

*Kentucky*.—*Auditor v. Haycraft*, 14 Bush (Ky.) 284 (1878).

*Minnesota*.—*Burt v. Winona, etc.*, R. Co., 31 Minn. 472, 18 N. W. 285, 289 (1884).

*Mississippi*.—*Green v. Weller*, 32 Miss. 650, 686 (1856).

*United States*.—*Re Duncan*, 139 U. S. 449, 457, 11 Sup. Ct. 573 (1890). Original journals of the House of Representatives or Senate concerning the passage of statutes cannot be made the subject of judicial notice. *Erford v. City of Peoria*, 229 Ill. 546, 82 N. E. 374 (1907).

10. *Illinois Cent. R. Co. v. People*, 143 Ill. 434, 33 N. E. 173 (1892); *Auditor v. Haycraft*, 14 Bush (Ky.) 284 (1878); *Webster v. City of Hastings*, 56 Neb. 669, 77 N. W. 127 (1898); *People v. Supervisors*, 8 N. Y. 317 (1853).

11. *Supra*, § 635.

that the journals themselves should be introduced in evidence. A rule of practice would answer every purpose.

**§ 662. (*Judicial Knowledge of Results of Law; Legislative Department*); Legislative Proceedings.**—Where a court is required to take judicial notice of all public or private official acts of the legislature the judge may resort to the journal of a branch of the legislature and will thereupon take judicial notice of the fact which it learns there that the branch in question has done certain official acts other than the enactment of laws;—e. g., expelled certain of its members.<sup>1</sup> An English court, in like manner, judicially knows the order and course of proceedings in Parliament.<sup>2</sup>

*Municipal legislative bodies* stand in a somewhat similar position. Thus, where a city council is required by law to meet at certain intervals,<sup>3</sup> the fact will be known to the court.

**§ 663. (*Judicial Knowledge of Results of Law; Legislative Department*); Direct Results of Legislation.**—The judge knows judicially the direct results of legal enactments by public statutes, e. g., that the sale of intoxicating liquor is prohibited in a particular county<sup>1</sup> of the state. That certain counties, cities, towns<sup>2</sup> and the like, are municipal corporations, need not be proved. Nor need the statute be introduced in evidence.<sup>3</sup>

**§ 664. (*Judicial Knowledge of Results of Law*); Judicial Department; General Facts.**—Both in range of primary and secondary facts established by legal enactment, the familiarity of the court with matters relating to the judicial department of government shows itself in an unusually extended judicial knowledge. Among results of a primary nature established by law are the existence, organization, jurisdiction and powers of the judge's

1. *French v. State Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556 (1905).

2. *Lake v. King*, 1 Wms. Saund. 131b (1846).

3. *Stoner v. City Council of City of Los Angeles*, (Cal. App. 1908) 97 Pac. 692

1. *Bass v. State*, 1 Ga. App. 728, 790, 57 S. E. 1054 (1907).

2. *City of Brownsville v. Arbuckle*, 99 S. W. 239, 30 Ky. L. Rep. 414 (1907). Where towns of the sixth

class are those having less than a given population it need not be proved to a court that a town in that class has less than that number of inhabitants. *Schweirman v. Town of Highland Park*, (Ky. 1908) 113 S. W. 507.

3. *Mobile, J. & K. C. R. Co. v. Bromberg*, (Ala. 1904) 37 So. 395. See also *In re Mohawk River Bridge Connecting Towns of Rotterdam and Glenville*, 112 N. Y. Suppl. 428, 128 App. Div. 54 (1908) (construction of canal).

own court,<sup>1</sup> and of other courts established by the constitution<sup>2</sup> or statutes of the state<sup>3</sup> or nation<sup>4</sup> under the authority of which the court is organized. The existence of all courts established by Act of Parliament will be judicially noticed in England.<sup>5</sup>

**§ 665. (Judicial Knowledge of Results of Law; Judicial Department; General Facts); Inferior Courts.**—The same rule or practice applies to courts of inferior jurisdiction,<sup>1</sup> as county<sup>2</sup> or municipal<sup>3</sup> courts. In the same way, a court of quarter sessions judicially knows the petty sessional divisions of a county.<sup>4</sup>

1. *State v. Schlessinger*, 38 La. Ann. 564 (1886); *Carberry v. Cook*, 3 Com. L. Rep. 995 (1906).

2. *Tucker v. State*, 11 Md. 322 (1857).

3. *Alabama*.—*Ex p. Peterson*, 33 Ala. 74 (1858).

*District of Columbia*.—*Lanckton v. U. S.*, 18 App. Cas. 348 (1901).

*Illinois*.—*Russell v. Sargent*, 7 Ill. App. 98 (1880).

*Iowa*.—*Upton v. Paxton*, 72 Iowa 295, 33 N. W. 773 (1887).

*Maryland*.—*Tucker v. State*, 11 Md. 322 (1857).

*New York*.—*In re Hackley*, 21 How. Pr. 103 (1861).

*Pennsylvania*.—*Kilpatrick v. Com.*, 31 Pa. St. 198 (1858).

*South Dakota*.—*Nelson v. Ladd*, 4 S. D. 1, 54 N. W. 809 (1893).

*Texas*.—*Long v. State*, 1 Tex. App. 709 (1877).

*Vermont*.—*State v. Marsh*, 70 Vt. 288, 40 Atl. 836 (1898).

*England*.—*Caldwell v. Hunter*, 10 Q. B. 83 (1847); *Place v. Potts*, 8 Exch. 705, 17 Jur. 1168 (1853); *Tregany v. Fletcher*, 1 Ld. Raymd. 154 (1697).

4. *Alabama*.—*Womack v. Dearman*, 7 Port. (Ala.) 513 (1838) (federal courts).

*Georgia*.—*Headman v. Rose*, 63 Ga. 458 (1879).

*Wisconsin*.—*Jarvis v. Robinson*, 21 Wis. 523 (1867).

*United States*.—*Ledbetter v. U. S.*, 108 Fed. 52, 47 C. C. A. 191 (1901) (federal courts); *Lathrop v. Stuart*, 14 Fed. Cas. No. 8,113, 5 McLean 167 (1850) (federal courts).

*England*.—*Tregany v. Fletcher*, 1 Ld. Raym. 154 (1697) (exchequer in Wales). See also *U. S. v. Beebe*, 2 Dak. 292, 11 N. W. 505 (1880). "We all know that the circuit courts of the several states are courts of general jurisdiction, as well as we know that courts of justice of the peace are not; and why should judges assume a degree of ignorance on the bench which would be unpardonable in them when off of it?" *Jarvis v. Robinson*, 21 Wis. 523 (1867).

**Bankruptcy courts are within the rule.**—*Lathrop v. Stuart*, 14 Fed. Cas. No. 8,113, 5 McLean 167 (1850). "State courts are bound to take judicial notice of the existence of the federal courts." *Mims v. Swartz*, 37 Tex. 13 (1872).

5. *Tregany v. Fletcher*, 1 Ld. Raym. 154 (1694).

1. *Nelson v. Ladd*, 4 S. D. 1 (1893).

2. *St. Louis, etc., R. Co. v. Magness*, 68 Ark. 289, 57 S. W. 933 (1900); *Nelson v. Ladd*, 4 S. D. 1, 54 N. W. 809 (1893); *Long v. State*, 1 Tex. App. 709 (1877); *Reg. v. Whittles*, 13 Q. B. 248, 13 Jur. 403, 18 L. J. M. C. 96, 66 E. C. L. 248 (1849) (petty sessions).

3. *Hearson v. Graudine*, 87 Ill. 115 (1877); *Heffernan v. Hervey*, 41 W. Va. 766, 24 S. E. 592 (1896).

4: *R. v. Whittles*, 13 Q. B. 248 (1849). On the contrary, it has been held that the courts will not notice judicially the nature and jurisdiction of local inferior courts. *Moravia v. Sloper*, Willes 37 (1737).

§ 666. (*Judicial Knowledge of Results of Law; Judicial Department; General Facts*); Special Tribunals.—In the same manner, no proof need be offered as to the existence, jurisdiction, and the like, of federal commissioners,<sup>1</sup> justices of the peace<sup>2</sup> and tribunals of special functions as probate<sup>3</sup> courts, of inquest<sup>4</sup> or other irregular judicial bodies.<sup>5</sup> The rule that where a special and limited jurisdiction is conferred legal authority to act in any particular instance must be shown or the act will be merely a nullity, may be put into the form of saying that the court cannot take judicial notice of such proceeding; e. g., in case of a grand jury.<sup>6</sup>

§ 667. (*Judicial Knowledge of Results of Law; Judicial Department; General Facts*); Federal Courts.—The jurisdiction of the federal courts over places within the limits of a state ceded to the national government by the state legislature is also a primary result of the public law of the forum and will be known<sup>1</sup> upon fundamental principles.<sup>2</sup> Acquisition of title by purchase or by the exercise of eminent domain by national authority being, in themselves, acts *in pais* are secondary rather than primary results of legislation, and the jurisdiction of a federal court, so acquired, must be proved.<sup>3</sup>

§ 668. (*Judicial Knowledge of Results of Law; Judicial Department; General Facts*); Foreign Courts.—The jurisdiction of a foreign court is not noticed.<sup>1</sup> But the courts of any forum recognize, as a fact of notoriety, “that tribunals are established in the several states, for the adjustment of controversies and the

1. *Ex p. Lane*, 6 Fed. 34 (1881).

Commissioners' courts are judicially noticed in England. *Ex p. Dubois*, 7 Rev. Leg. 430 (1875).

2. *Olmstead v. Thompson*, 91 Ala. 130, 8 So. 755 (1890); *Goodsell v. Leonard*, 23 Mich. 374 (1871).

3. *La Salle v. Milligan*, 143 Ill. 321, 32 N. E. 196 (1892); *State v. Green*, 52 S. C. 520, 30 S. E. 683 (1898).

4. *State v. Marsh*, 70 Vt. 288, 40 Atl. 836 (1897).

5. It is a corollary from this knowledge that a judge will know that there is no court of a certain name in the jurisdiction. *Tucker v. State* 11 Md. 322 (1857).

6. *Chicago, W. & V. Coal Co. v. People*, 114 Ill. App. 75 (1904) [judgment affirmed, 73 N. E. 770, 214 Ill. 421 (1905)].

1. *Lasher v. State*, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922 (1891).

2. *Supra*, § 571.

3. *People v. Collins*, 105 Cal. 504, 39 Pac. 16 (1895).

1. *Newell v. Newton*, 10 Pick. 470 (1830). The seal or proceedings of a foreign court will not be noticed. *Henry v. Adey*, 3 East 221 (1803); *Ganer v. Lanesborough*, Peake 17 (1790).

ascertainment of rights;"<sup>2</sup> and that the same is true of the Dominion of Canada.<sup>3</sup> Other notorious facts concerning courts of a sister state or foreign country, as that courts of general jurisdiction are courts of record<sup>4</sup> are equally known. That tribunals of inferior jurisdiction in another state are courts of record<sup>5</sup> will not be officially known.

**§ 669. (*Judicial Knowledge of Results of Law; Judicial Department*); Districts.**—The location and boundaries of the judicial districts, into which the nation<sup>1</sup> or a state<sup>2</sup> or a territory is divided, are established by statute and are, therefore, primary results of legislation of which judicial notice is necessarily taken.<sup>3</sup> This implies knowledge of the relation of the boundary lines of such divisions to the political divisions of the state into counties, townships, etc., which is considered elsewhere.<sup>4</sup> Where a particular municipality is mentioned in a public statute as within the jurisdiction of a particular court, the judges of the state will take judicial notice that such is the fact.<sup>5</sup>

**§ 670. (*Judicial Knowledge of Results of Law; Judicial Department*); Terms.**—Courts, whether of general or inferior<sup>1</sup> jurisdiction, for the same reason, judicially know the times appointed by statute for holding terms of any court lawfully established by state or national<sup>2</sup> authority in their jurisdiction.<sup>3</sup> It is

2. *Dozier v. Joyce*, 8 Port. (Ala.) 303, 312 (1838). To the same effect, see *Jarvis v. Robinson*, 21 Wis. 523, 94 Am. Dec. 560 (1867).

3. *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404 (1862).

4. *Morse v. Hewett*, 28 Mich. 481 (1874); *Shotwell v. Harrison*, 22 Mich. 410 (1871).

5. *Holly v. Bass*, 68 Ala. 206 (1880); *Hill v. Taylor*, 77 Tex. 295, 14 S. W. 366 (1890).

1. *State v. Arthur*, (Iowa 1905) 105 N. W. 422; *U. S. v. Johnson*, 26 Fed. Cas. No. 15,488, 2 Sawy. 482 (1873). See also *U. S. v. Beebe*, 2 Dak. 292, 11 N. W. 505 (1880).

2. *Alabama, etc., Ins. Co. v. Cobb*, 57 Ala. 547 (1877) (chancery districts); *State v. Pope*, (Mo. App. 1905) 85 S. W. 633; *Chicago, etc.,*

*R. Co. v. Hyatt*, 48 Neb. 161, 67 N. W. 8 (1896).

3. *Chicago, etc., R. Co. v. Hyatt*, 48 Neb. 161, 67 N. W. 8 (1896).

4. *Infra*, § 737.

5. *Davis v. State*, (Wis. 1908) 115 N. W. 150.

1. *Ex p. Vincent*, 43 Ala. 402 (1869). See also *Ex p. Dubois*, 7 Rev. Leg. 430 (1875).

2. *Ledbetter v. U. S.*, 108 Fed. 52, 47 C. C. A. 191 (1901); *Lindsay v. Williams*, 17 Ala. 229 (1850); *Ross v. Austill*, 2 Cal. 183 (1852). "And of the times when and the places where its sessions appointed by law are to be held." *Kidder v. Blaisdell*, 45 Me. 461 (1858). See also *Meadows v. Osterkamp*, (S. D. 1909) 122 N. W. 419.

3. *Alabama*.—*McMullan v. Long*, (Ala. 1905) 39 So. 777.



indifferent, in this connection, whether the term is that of the judge's own court<sup>4</sup> or that of a court whose action is under review.<sup>5</sup> The rule applies equally to a court of limited jurisdiction.<sup>6</sup>

*California*.—*Ross v. Anstall*, 2 Cal. 183, 191 (1852).

*Georgia*.—*Edwards v. State*, 123 Ga. 542, 51 S. E. 630 (1905).

*Illinois*.—*Fry v. Radzinski*, 219 Ill. 526, 76 N. E. 694 (1906).

*Indiana*.—*Anderson v. Anderson*, 141 Ind. 567, 40 N. E. 131 (1895); *Spencer v. Curtis*, 57 Ind. 221, 227 (1877).

*Maine*.—*Kidder v. Blaisdell*, 45 Me. 461, 470 (1858).

*South Carolina*.—*State v. Toland*, 36 S. C. 515, 523, 15 S. E. 599 (1892).

*Virginia*.—*Thomas v. Com.*, 90 Va. 92, 94, 17 S. E. 788 (1893).

4. *Anderson v. Dickson*, 8 Ala. 733 (1845); *Harwood v. Toms*, 130 Mo. 225, 32 S. W. 666 (1895); *Foster v. Frost*, 15 N. C. 424 (1834). See also *Ex p. Dubois*, 7 Rev. Leg. 430 (1875).

5. *Alabama*.—*Olmstead v. Thompson*, 91 Ala. 130, 8 So. 755 (1890); *Rodgers v. State*, 50 Ala. 102 (1874) (circuit court of a particular county).

*Arkansas*.—*State v. Hammett*, 7 Ark. 492 (1847).

*California*.—*Talbert v. Hopper*, 42 Cal. 397 (1871); *Boggs v. Clark*, 37 Cal. 236 (1869).

*Colorado*.—*Van Duzer v. Towne*, 12 Colo. App. 4, 55 Pac. 13 (1898); *Cooper v. American Cent. Ins. Co.*, 3 Colo. 318 (1877).

*District of Columbia*.—*Lanckton v. U. S.*, 18 App. Cas. 348 (1901).

*Indiana*.—*Moss v. Sugar Ridge Tp.*, Clay County, 161 Ind. 417, 68 N. E. 896 (1903); *Taylor v. Canaday*, 155 Ind. 671, 59 N. E. 20 (1900); *Anderson v. Anderson*, 141 Ind. 567, 40 N. E. 131, 1082 (1895). See also *Moss v. Sugar Ridge Tp.*, 161 Ind. 417, 68 N. E. 896 (1903).

*Kansas*.—*Scruton v. Hall*, 6 Kan. App. 714, 50 Pac. 964 (1897).

*Kentucky*.—*Com. v. Pritchett*, 11 Bush (Ky.) 277, 281 (1875).

*Maine*.—*Kidder v. Blaisdell*, 45 Me. 461 (1858).

*Massachusetts*.—*Com. v. Stevens*, 142 Mass. 457, 8 N. E. 344 (1886).

*Michigan*.—*Tromble v. Hoffman*, 130 Mich. 676, 90 N. W. 694 (1902).

*Missouri*.—*State v. Broderick*, 70 Mo. 622 (1879); *Harwood v. Toms*, 130 Mo. 225, 32 S. W. 666 (1895).

*New Hampshire*.—*Fabyan v. Russell*, 38 N. H. 84 (1859).

*New York*.—*Matter of Hackley*, 21 How. Pr. 103 (1861).

*South Carolina*.—*State v. Toland*, 36 S. C. 515, 15 S. E. 599 (1892).

*South Dakota*.—*Nelson v. Ladd*, 4 S. Dak. 1, 54 N. W. 809 (1893).

*Tennessee*.—*Pugh v. State*, 2 Head 227 (1858).

*Texas*.—*Accousi v. G. A. Stowers Furniture Co.*, (Tex. Civ. App. 1904) 83 S. W. 1104; *Emery v. League*, (Tex. Civ. App. 1903) 72 S. W. 603; *Davidson v. Peticolas*, 34 Tex. 27 (1870).

*Virginia*.—*Thomas v. Com.*, 90 Va. 92, 17 S. E. 768 (1893).

*Wyoming*.—*Natrona County v. Shaffner*, 10 Wyo. 181, 68 Pac. 14 (1901); *Donovan v. Terr.*, 3 Wyo. 91 (1884).

*United States*.—*Ledbetter v. United States*, 108 Fed. 52 (1901).

6. *Alabama*.—*Rodgers v. State*, 50 Ala. 102 (1874).

*Colorado*.—*Van Duzer v. Towne*, 12 Colo. App. 4, 55 Pac. 13 (1898).

*Indiana*.—*Moss v. Sugar Ridge Tp.*, 161 Ind. 417, 68 N. E. 896 (1903).

*Missouri*.—*State v. Broderick*, 70 Mo. 622 (1879).

*Tennessee*.—*Pugh v. State*, 2 Head 227 (1858).

*Texas*.—*Davidson v. Peticolas*, 34 Tex. 27 (1870) (district court).

*Wyoming*.—*Donovan v. Territory*, 3 Wyo. 91, 2 Pac. 532 (1884).

§ 671. (*Judicial Knowledge of Results of Law; Judicial Department; Terms*); Administrative Boards.—The same reason and the same rule apply in the case of the legally preappointed sittings of administrative boards, exercising judicial functions, as county commissioners<sup>1</sup> or supervisors.<sup>2</sup> The places at which these sittings are appointed to be held<sup>3</sup> will also be judicially known. These are among the primary effects of law.

§ 672. (*Judicial Knowledge of Results of Law; Judicial Department; Terms*); Length of Terms.—Judicial knowledge of the established terms of courts and the like extends to cover their length, when the fact is determined by law;<sup>1</sup>—subject, of course, to the court's power of adjournment.<sup>2</sup>

The rule is the same as to terms of administrative boards possessing judicial powers.

*Term Time and Vacation.*—The coincidence of the days of the week or month, with the days appointed for a term or sitting and consequently whether an act done on a certain day was done in term time or vacation<sup>3</sup> are also facts of the almanac<sup>4</sup> and are considered in that connection.

§ 673. (*Judicial Knowledge of Results of Law; Judicial Department*); Sessions; Length of Actual Sitting.—The actual length of a session or sitting of a court, is a secondary consequence, as it were, of legislation;—which cannot judicially be known.<sup>1</sup> In the same way the time at which a legally constituted

1. *Kane County v. Young*, 31 Ill. 194 (1863); *Collins v. State*, 58 Ind. 5 (1877).

2. *State v. Smith*, (Miss. 1906) 40 So. 22.

3. *Ross v. Anstill*, 2 Cal. 183, 191 (1852).

1. *McMullan v. Long*, (Ala. 1905) 39 So. 777; *Rogers v. State*, 50 Ala. 103 (1874); *Durre v. Brown*, 7 Ind. App. 127 (1893); *Fabyan v. Russell*, 38 N. H. 84 (1859); *State v. Maier*, 36 W. Va. 757, 15 S. E. 991 (1892). See also *Estwick v. Cooke*, 2 Ld. Raym. 1557 (1701). Appellate courts take notice of the beginning, but not of the ending, of circuit court terms. *Breimeyer v. Star Bottling Co.*, 136 Mo. App. 84, 117 S. W. 119 (1909).

2. *Harrison v. Meadors*, 41 Ala. 274 (1867).

3. *Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841 (1893); *Barnwell v. Marion*, 58 S. C. 459, 36 S. E. 818 (1900); *Donovan v. Terr.*, 3 Wyo. 91, 2 Pac. 532 (1884).

4. *Infra*, § 727.

1. *Alabama*.—*Harrison v. Meadors*, 41 Ala. 274 (1867).

*Kansas*.—*Dudley v. Barney*, 4 Kan. App. 122, 46 Pac. 178 (1896).

*Missouri*.—*Hadley v. Bernero*, 97 Mo. App. 314, 71 S. W. 451 (1902).

*Ohio*.—*Gilliland v. Sellers*, 2 Ohio St. 223 (1853).

*Utah*.—*Felt v. Cook*, (Utah 1906) 87 Pac. 1092. But see *contra*, *Spencer v. Curtis*, 57 Ind. 221, 227 (1877). "This court judicially knows that the

body, like a grand jury,<sup>2</sup> the date of whose meetings are not fixed by law, in fact met, or the time to which any court or board, other than the court in question,<sup>3</sup> actually adjourned its sitting<sup>4</sup> must be proved.

**§ 674. (*Judicial Knowledge of Results of Law; Judicial Department*); Judges and Magistrates.**—While the number of judges established for a particular court,<sup>1</sup> the length of their term of office,<sup>2</sup> the amount of their salaries<sup>3</sup> and the manner of their selection<sup>4</sup> and qualifications are primary results of legislation and therefore cognized as “matter of law,” knowledge as to what persons compose the judiciary of the state or nation cannot well be so regarded. It is, however, deemed a matter of notoriety, certainly in the legal community<sup>5</sup> of which judicial notice is taken, although the fact, in relation to the legislation itself, is essentially

fall term of the circuit court of Lowndes County begins on the fourth Monday in October in each year, and may continue three weeks; and that November 5th, 1873, was a day of the second week of said term.” *Rodgers v. State*, 50 Ala. 102 (1874). But see *Gilliland v. Sellers*, 2 Ohio St. 223 (1853).

2. *Matter of Hackley*, 21 How. Pr. (N. Y.) 103 (1861).

Facts regarding the holding of grand jury terms which are primary results of law, as that a grand jury elected at a particular time serves for a given period, will be noticed. *Dorman v. State*, 56 Ind. 454 (1877).

3. *Hadley v. Bernero*, 97 Mo. App. 314, 71 S. W. 451 (1902).

4. *Baker v. Knott*, 3 Ida. 700, 35 Pac. 172 (1893).

1. *Vahle v. Brackenseik*, 145 Ill. 231 (1893); *State v. Pope*, (Mo. App. 1905) 85 S. W. 633. Where the terms of all justices of the peace by law expire on a certain day the court will take notice of that fact. *Stubbs v. State*, 53 Miss. 437 (1876).

2. *Alabama*.—*Ex p. Peterson*, 33 Ala. 74 (1858).

*California*.—*People v. Ebanks*, 120 Cal. 626, 52 Pac. 1078 (1898).

*Illinois*.—*Vahle v. Brackenseik*, 145 Ill. 231, 34 N. E. 524 (1893).

*Indiana*.—*Cincinnati, etc., R. Co. v. Grames*, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421 (1893).

*Iowa*.—*Upton v. Paxton*, 72 Iowa 295, 33 N. W. 773 (1887).

*Maryland*.—*Tucker v. State*, 11 Md. 322 (1857).

*Mississippi*.—*Stubbs v. State*, 53 Miss. 437 (1876).

*Pennsylvania*.—*Kilpatrick v. Com.*, 31 Pa. St. 198 (1858). The judges of an appellate court will judicially notice the expiration of the term of a trial judge pending the allowance of a bill of exceptions taken before him. *Northwestern Port Huron Co. v. Zieckrick*, (S. D. 1908) 115 N. W. 525.

3. *McKinney v. O'Conner*, 26 Tex. 5 (1861).

4. *Mayes v. Palmer*, 206 Mo. 293, 103 S. W. 1140 (1907) (appointment to fill vacancy caused by death of predecessor in office).

5. In *Alabama* the judges know the names of all the judiciary of the State. *Ward v. State*, (Ala. 1905) 39 So. 923.

secondary. The courts of England,<sup>6</sup> Canada<sup>7</sup> and America<sup>8</sup> know who are or at any time were,<sup>9</sup> either officially or as a *locum tenens*,<sup>10</sup> judges of their own tribunals<sup>11</sup> or of any superior court of record within the jurisdiction, state or national,<sup>12</sup> including courts of probate.<sup>13</sup> In the same way they judicially know who was the presiding officer at a given date,<sup>14</sup> at what time,<sup>15</sup> and under what law<sup>16</sup> he was selected,<sup>17</sup> whether a proper commission has issued<sup>18</sup> and at what time a particular judge resigns his office<sup>19</sup> or, for any other reason, ceased to be a judge.<sup>20</sup>

**§ 675. (Judicial Knowledge of Results of Law; Judicial Department; Judges and Magistrates); Inferior Courts.**—With regard to justices of inferior courts, a difference of opinion apparently exists in various jurisdictions as to the judicial knowledge of judges of courts of record with regard to them. In

6. *Skipp v. Hooke*, 2 Stra. 1080 (1737); *Elderton's Case*, 2 Ld. Raym. 978 (1703). See also *Van Sandau v. Turner*, 6 Q. B. 773, 786 (1845) (Court of Review in Bankruptcy).

7. *Watson v. Hay*, 5 N. Brunsw. 559 (1847); *Fay v. Miville*, 2 Rev. Leg. 333 (1816). *Tremaine v. Tonnacour*, 2 Rev. Leg. 471.

8. *Colorado*.—*Means v. Stow*, 29 Colo. 80, 66 Pac. 881 (1901).

*Florida*.—*Perry v. Bush*, 35 So. 225 (1903) (presiding judges).

*Illinois*.—*Vahle v. Brackenseik*, 145 Ill. 231, 34 N. E. 524 (1893).

*Indiana*.—*Indianapolis St. R. Co. v. Lawn*, 30 Ind. App. 515, 66 N. E. 508 (1903).

*Iowa*.—*Upton v. Paxton*, 72 Iowa 295, 33 N. E. 773 (1887).

*Louisiana*.—*Dwight v. Splane*, 11 Rob. 487 (1845).

*Maryland*.—*Tucker v. State*, 11 Md. 322 (1857).

*North Carolina*.—*State v. Ray*, 97 N. C. 510, 1 S. E. 876 (1887).

*Texas*.—*Dela Rosa v. State*, (Cr. App. 1893) 21 S. W. 192.

*Vermont*.—*State v. Marsh*, 70 Vt. 288, 40 Atl. 836 (1897).

9. *Indianapolis St. R. Co. v. Lawn*, 30 Ind. App. 515, 66 N. E. 508 (1903); *Barnwell v. Marion*, 58 S. C.

459, 36 S. E. 818 (1900); *Watson v. Hay*, 5 N. Brunsw. 559 (1847).

10. *Bell v. State*, 115 Ala. 25, 22 So. 526 (1896).

11. *Gilliland v. Sellers*, 2 Ohio St. 223 (1853).

12. *Vahle v. Brackenseik*, 145 Ill. 231 (1893); *Barnwell v. Marion*, 58 S. C. 459, 36 S. E. 818 (1900); *Ledbetter v. U. S.*, 108 Fed. 52, 47 C. C. A. 191 (1901).

13. *McCarver v. Hertzberg*, 120 Ala. 523, 25 So. 3 (1898).

14. *Kilpatrick v. Com.*, 31 Pa. 198 (1858) (president of Court of Common Pleas).

15. *Fay v. Miville*, 2 Rev. Leg. 333; *Tremaine v. Tonnacour*, 2 Rev. Leg. 471.

16. *Clark v. Com.*, 29 Pa. St. 129 (1858).

17. *De la Rosa v. State*, (Tex. Crim. App. 1893) 21 S. W. 192 (appointment of A. as district judge).

18. *Follain v. Lefevre*, 3 Rob. (La.) 13 (1842).

19. *Ex p. Peterson*, 33 Ala. 74 (1858) (circuit judge); *People v. McConnell*, 155 Ill. 192, 40 N. E. 608 (1895).

20. *People v. Ebanks*, 120 Cal. 626, 52 N. W. 1078 (1898) (Superior Court).

America, according to the prevailing view, though there is authority to the contrary,<sup>1</sup> judicial cognizance is taken as to who are justices of inferior tribunals<sup>2</sup> or even as to who are justices of the peace.<sup>3</sup> With especial frequency judicial knowledge is taken of magistrates commissioned for or acting in the county in which the court is sitting.<sup>4</sup> Probably the view in England is to a contrary effect.<sup>5</sup> In the same way judicial notice has been taken as

1. *Ripley v. Warren*, 2 Pick. (Mass.) 592, 596 (1824) (doubt suggested as to court's knowledge as to who was first justice of a lower court). See also *County of San Joaquin v. Budd*, 96 Cal. 47 (1892).

2. *Alabama*.—*Ex p. Peterson*, 33 Ala. 74 (1858).

*California*.—*People v. Ebanks*, 120 Cal. 626, 52 Pac. 1078 (1898). See also *Wyatt v. Arnot*, (App. 1907). 94 Pac. 86 (superior court).

*Florida*.—*Perry v. Bush*, (1903) 35 So. 225

*Illinois*.—*Fisher v. City of Chicago*, 213 Ill. 268, 72 N. E. 680 (1904) (county judge); *People v. McConnell*, 155 Ill. 192, 40 N. E. 608 (1895).

*Indiana*.—*Indianapolis St. R. Co. v. Lawn*, 30 Ind. App. 515, 66 N. E. 508 (1903).

*Kentucky*.—*Kennedy v. Com.*, 78 Ky. 447 (1880) (circuit judge).

*Louisiana*.—*Despau v. Swindler*, 3 Mart. (N. S.) 705 (1825).

*Massachusetts*.—*Com. v. Jeffits*, 14 Gray 19 (1859). The rule was *quaried* in *Ripley v. Warren*, 2 Pick. 592 (1824).

*Missouri*.—*Viertel v. Viertel*, 212 Mo. 562, 111 S. W. 579 (1908).

*Pennsylvania*.—*Kilpatrick v. Com.*, 31 Pa. St. 198 (1858).

*South Carolina*.—*Barnwell v. Marion*, 58 S. C. 459, 36 S. E. 818 (1900).

*South Dakota*.—*Nelson v. Ladd*, 4 S. D. 1, 54 N. W. 809 (1893). "The rule is that courts will take notice of what ought to be generally known within the limits of their jurisdiction. There seems to us to be as much reason for our having knowledge of

who are in fact the judges of our constitutional courts, as for our having judicial knowledge of the heads of departments, sheriffs, etc., knowledge of whom is always presumed." *Kilpatrick v. Com.*, 31 Pa. St. 198 (1858); *Cincinnati, etc., R. R. v. Grames*, 8 Ind. App. 112 (1893).

That there is no judge of a particular name will, therefore, be judicially noticed. *Follain v. Lefevre*, 3 Rob. (La.) (1842).

3. *Arkansas*.—*Webb v. Kelsey*, 66 Ark. 180, 49 S. W. 819 (1899).

*California*.—*Ede v. Johnson*, 15 Cal. 53 (1860).

*Illinois*.—*Gilbert v. National Cash-Register Co.*, 176 Ill. 288, 52 N. E. 22 (1898).

*Louisiana*.—*Dwight v. Splane*, 11 Rob. 487 (1845).

*Mississippi*.—*Coleman v. Gordon*, (1894) 16 So. 340.

*Pennsylvania*.—*Hibbs v. Blair*, 14 Pa. St. 413 (1850). That a successor has been appointed or elected at time evidence is offered is not material. *Ryan v. Young*, (Ala. 1906) 41 So. 954 (commissioner).

4. *Gilbert v. Nat'l C. R. Co.*, 176 Ill. 288, 52 N. E. 22 (1898); *Graham v. Anderson*, 42 Ill. 514 (1867).

5. *Skippp v. Hooke*, 2 Str. 1080 (1738). See also *Van Sandau v. Turner*, 6 Q. B. 773, 9 Jur. 296, 14 L. J. Q. B. 154, 51 E. C. L. 773 (1845).

English courts have taken cognizance of justices of the peace. *Elderton's Case*, 2 Ld. Raym. 978, 980 (1703).

to who are the magistrates of parishes.<sup>6</sup> The knowledge of who are judges is not only taken by a judge in a judicial capacity but is taken of the judge as judge, i. e., his judicial official status. When a judge of whom, in his judicial function, notice is taken appears in an individual capacity, he stands on the same footing, so far as regards judicial cognizance, as other men.<sup>7</sup> The court's knowledge does not attach to him personally; it is connected with the mutual interrelation of two parts of a judicial machinery, the smooth running of which is facilitated by such a recognition.

*Other States.*—But judicial cognizance cannot be taken as to who are judges, even of courts of record,<sup>8</sup> in another state. *A fortiori*, they cannot judicially notice who are the magistrates who are commissioned to act in the jurisdiction of a sister state.<sup>9</sup>

**§ 676. (Judicial Knowledge of Results of Law; Judicial Department); Attorneys and Counsel.**—Judicial notice is taken of who is attorney-general,<sup>1</sup> but not of who are deputies.<sup>2</sup> No necessity exists for proving any changes in the incumbency of the office.<sup>3</sup> Judges know, judicially, who are the prosecuting attorneys of the state<sup>4</sup> and their assistants<sup>5</sup> or deputies appointed under authority of law.<sup>6</sup> The legally established length of term of office for these officials is a primary result of legislation of which notice is taken, as of a matter of law.<sup>7</sup> For like reasons, a court will notice who are the attorneys<sup>8</sup> or counsellors admitted to its

6. *Despau v. Swindler*, 3 Mart. (N. S.) 705 (1825).

7. *Shropshire v. State*, 12 Ark. 190 (1851); *San Joaquin County v. Budd*, 96 Cal. 47, 30 Pac. 967 (1893); *Ellsworth v. Moore*, 5 Iowa 486 (1857).

8. *Fellows v. Menasha*, 11 Wis. 558 (1860).

9. *In re Keeler*, 14 Fed. Cas. No. 7,637, Hempst. 306 (1843) (justices of the peace).

1. *Curry v. State*, 7 Baxt. (Tenn.) 154, 156 (1874); *Bennett v. State*, Mart & Y. (Tenn.) 133, 135 (1827); *State v. Evans*, 8 Humphr. (Tenn.) 110 (1847).

2. *Crawford v. State*, 155 Ind. 692, 57 N. E. 931 (1900).

3. *State v. Evans*, 8 Humphr. (Tenn.) 110 (1847) (resignation and appointment to fill vacancy).

4. *State v. Kinney*, 81 Mo. 101 (1883); *Simms v. Quebec, etc., R. Co.*, 22 L. C. Jur. 20 (1878). The court will know judicially who are the prosecuting attorneys of particular counties in the state. *State v. Campbell*, 210 Mo. 202, 109 S. W. 706 (1908).

5. *People v. Lyman*, 2 Utah 30 (1877).

6. *State v. Guglielmo*, (Or. 1905) 79 Pac. 577.

7. *State v. Seibert*, 130 Mo. 202, 32 S. W. 670 (1895).

8. *Illinois*.—*Ferris v. Commercial Nat. Bank*, 158 Ill. 237, 41 N. E. 1118 (1895).

*Louisiana*.—*Dixey v. Irwin*, 23 La. Ann. 426 (1871).

*Missouri*.—*State v. Sanders*, 62 Mo. App. 33 (1895).

bar, and are regularly licensed;<sup>9</sup> but does not know those legally practicing before the bar of an inferior domestic tribunal.<sup>10</sup> But this knowledge is official and applies merely to the professional capacity of the lawyer as an officer of the court—that his standing may be regarded, his signature assumed genuine as a certificate to pleadings and the like. As an individual he stands as any other individual would stand. Facts as to his personal history are not officially known to the court. Whether he is still in active practice<sup>11</sup> or continues to reside in the state,<sup>12</sup> must be proved, if claimed.

**§ 677. (*Judicial Knowledge of Results of Law; Judicial Department; Attorneys and Counsel*); Signatures and Seals.—**

In like manner, the signature of attorneys admitted to practice in the court will, when attached to pleadings<sup>1</sup> or otherwise used, as an attorney, often be noticed judicially. This will not be done where the signature is made by the attorney in his personal capacity;<sup>2</sup>—as where he appears *pro se*.<sup>3</sup> The signature of a prosecuting attorney, in his official capacity, will be noticed,<sup>4</sup> although the description of the office is incorrect.<sup>5</sup>

*Pennsylvania*.—Philadelphia *v.* Jacobs, 22 Wkly. Notes Cas. 348 (1888).

*Wisconsin*.—Cothren *v.* Connaughton, 24 Wis. 134 (1869).

*England*.—*Ex p.* Hore, 3 Dowl. P. C. 600 (1835); *Ex p.* King, 3 Dowl. P. C. 41 (1834). Shoreditch Vestry *v.* Hughes, 17 C. B. N. S. 137, 33 L. J. C. P. 349 (1864) (practice of solicitors). It will be judicially known that by law attorneys are required to be 21 years of age. *State v.* Gebhardt, 219 Mo. 708, 119 S. W. 350 (1909).

*English Court*.—An English Court will judicially know the privileges of its solicitors. *Stokes v.* Mason, 9 East 426 (1808); *Ogle v.* Norcliffe, 2 Ld. Raym. 869 (1701).

9. *Ferris v.* Bank, 158 Ill. 237, 41 N. E. 1118 (1895). *Sloan v.* Hallowell, 83 Nebr. 762, 120 N. W. 449 (1909). The judges of a territory will take judicial notice of the fact

that one appearing or acting as an attorney is or is not duly licensed. *Nolan v.* St. Louis & S. F. R. Co., (Okl. 1907) 91 Pac. 1128.

10. *Clark v.* Morrison, (Ariz. 1898) 52 Pac. 985. See also *Sutton v.* Chicago, etc., R. Co., 98 Wis. 157, 73 N. W. 993 (1898).

11. *Cothren v.* Connaughton, 24 Wis. 134, 138 (1869).

12. *Sutton v.* Chicago, etc., R. Co., 98 Wis. 157, 73 N. W. 993 (1898).

1. *Markes v.* Epstein, 13 N. Y. Civ. Proc. 293 (1888); *Strippelmann v.* Clark, 11 Tex. 296 (1854).

2. *Masterson v.* Le Claire, 4 Minn. 163 (1860).

3. *Alderson v.* Bell, 9 Cal. 315 (1858); *Masterson v.* Le Claire, 4 Minn. 163 (1860).

4. *State v.* Kinney, 81 Mo. 101 (1883).

5. *State v.* Kinney, 81 Mo. 101 (1883).

**§ 678. (*Judicial Knowledge of Results of Law; Judicial Department*); Clerks.**—Judges judicially know who are the clerks of the various courts,<sup>1</sup> whether state<sup>2</sup> or federal,<sup>3</sup> of the forum, and who are their deputies.<sup>4</sup> Neither will it be required that the names<sup>5</sup> should be proved. When the clerk is acting in his official capacity, the judge, in the exercise of his administrative powers, may assume<sup>6</sup> that it is correct, i. e., know it for judicial purposes. The knowledge is not actual, it is not *common*, i. e., that of *notoriety*. It is official, i. e., administrative, judicial. The name of a clerk of court, as that of an *individual* is not a subject of judicial cognizance.<sup>7</sup> As a rule, presenting but few exceptions,<sup>8</sup> courts do not judicially notice who are the clerks of court in other states; and it has been assumed<sup>9</sup> that the clerk of an inferior court would not be judicially noticed.

**§ 679. (*Judicial Knowledge of Results of Law; Judicial Department*); Court Officers and Officials.**—Judges will, speaking in general terms, know for judicial purposes who are the customary<sup>1</sup> and legally appointed officers and officials of their own

1. *White v. Rankin*, 90 Ala. 541, 8 So. 118 (1890); *Major v. State*, 2 Sneed (Tenn.) 11 (1854). See also *State v. Kinney*, (S. D. 1907) 113 N. W. 77. "It is certainly true that the courts will judicially recognize the public officers of the state, under whose laws and organization they act as the chief executive, the heads of departments; judges of courts of general jurisdiction; attorneys for the state, sheriffs, and we see no reason why clerks of the courts should not also be included." *Major v. State*, 2 Sneed 11 (Tenn.) (1854).

2. *Alabama*.—*White v. Rankin*, 90 Ala. 541, 8 So. 118 (1890).

*California*.—*Campbell v. West*, 86 Cal. 197, 24 Pac. 1000 (1890).

*New York*.—*Mackimon v. Barnes*, 66 Barb. 91 (1867).

*Tennessee*.—*State v. Cole*, 9 Humph. 626 (1849); *Major v. State*, 2 Sneed 11 (1854).

*Texas*.—*Goodwin v. Harrison*, 28 Tex. Civ. App. 7, 66 S. W. 308 (1902).

*West Virginia*.—*Central Land Co. v. Calhoun*, 16 W. Va. 361 (1880).

3. *U. S. v. U. S. Bank*, 11 Rob. (La.) 418 (1845); *Ledbetter v. U. S.*, 108 Fed. 52, 47 C. C. A. 191 (1901).

4. *Himmelman v. Hoadley*, 44 Cal. 213 (1872); *State Bank v. Watson*, 15 La. 38 (1840); *State v. Barrett*, 40 Minn. 65, 41 N. W. 459 (1889); *Drumheller v. Mumaw*, 9 Pa. St. 19 (1848).

5. *Mountjoy v. State*, 78 Ind. 172 (1881).

6. *Supra*, § 638.

7. *Com. v. Fray*, 126 Mass. 235 (1879).

8. *Munroe v. Eastman*, 31 Mich. 283 (1875); *Morse v. Hewett*, 28 Mich. 481 (1874).

9. *Davis v. McEnaney*, 150 Mass. 451, 23 N. E. 221 (1890) (police court).

1. A commissioner to administer affidavits has been refused judicial recognition. *Frost v. Hayward*, 2 Dowl. P. C. (N. S.) 566, 6 Jur. 1045, 12 L. J. Exch. 84, 10 M. & W. 673 (1842).



courts<sup>2</sup> and of other courts of state<sup>3</sup> or national<sup>4</sup> jurisdiction exercising judicial functions within the state. The fact is one of notoriety; — especially among those connected with the practical administration of justice.

**§ 680. (*Judicial Knowledge of Results of Law; Judicial Department*); Sheriffs, Constables, etc.**— The office of sheriff is one of such public and general importance as to be cognized not only as a well known element in the governmental equipment of a county and part of its history,<sup>1</sup> but as intimately connected with the machinery of the courts, charged with the duty of executing their orders or process. The court, therefore, judicially and officially knows who is sheriff of a particular county,<sup>2</sup> and in certain jurisdictions his legally appointed deputies;<sup>3</sup>— though the second branch of the proposition is not generally agreed.<sup>4</sup>

*Constables.*— Constables acting as court officers<sup>5</sup> stand in the same position.

*The length of the term of these respective offices* is a primary fact, directly established by law and is known, as a matter of law,<sup>6</sup> and is therefore subject of the court's judicial knowledge.

**§ 681. (*Judicial Knowledge of Results of Law; Judicial Department*); Practice.**— Judges judicially notice the rules regulating the practice of their own courts,<sup>1</sup> but not of those of in-

2. *Cary v. State*, 76 Ala. 78 (1884); *Thielmann v. Burg*, 73 Ill. 293 (1874); *Hamman v. Mink*, 99 Ind. 279 (1884); *State v. Postlewait*, 14 Iowa 446 (1862); *Miller v. Matthews*, 87 Md. 464, 40 Atl. 176 (1898).

3. *Despau v. Swindler*, 3 Mart. (N. S.) (La.) 705 (1825). But see *Norvell v. McHenry*, 1 Mich. 227 (1849).

4. *Buford v. Hickman*, 4 Fed. Cas. No. 2,114a, Hempst. 232 (1834) (a territorial court knows the officers of the United States courts).

1. *Infra*, § 653.

2. *Ingram v. State*, 27 Ala. 17 (1855); *Thompson v. Haskell*, 21 Ill. 215, 74 Am. Dec. 98 (1859). Courts judicially know that the sheriff is constituted by law keeper of the jail of his county and that, as such, he has charge and custody of all prisoners confined in it. *Ex parte Baragliotti*, (Cal. App. 1907) 92 Pac. 96.

3. *Martin v. Aultman*, 80 Wis. 150, 49 N. W. 749 (1891).

4. *Land v. Patteson, Minor* (Ala.) 14 (1820); *State Bank v. Curran*, 10 Ark. 142 (1849).

**Incumbency in the office of deputy marshal** will not be judicially known. *Ward v. Henry*, 19 Wis. 76, 81 (1865). Such an officer is not "commissioned in the name of the state or required by statute to take any oath of office." *State Bank v. Curran*, 10 Ark. 142 (1849).

5. *Harris v. Buehler*, 1 Pennew. (Del.) 346, 40 Atl. 733 (1898); *Graham v. Gibson*, 14 La. 146 (1839).

6. *Ragland v. Wynn*, 37 Ala. 32 (1860).

1. *Packet Co. v. Sickles*, 19 Wall. (U. S.) 611 (1873); *Pugh v. Robinson*, 1 T. R. 116, 118 (1786).

ferior tribunals,<sup>2</sup> unless required to do so by statute or the existence of some revisory or other special relation between the two courts. In the same way the judge of a federal court judicially knows the practice and procedure of his own tribunal, but not those of a state court.<sup>3</sup> Assuming that the rules and regulations of a long established national court can be judicially known as a matter of notoriety, at least in the legal community, the same course cannot be taken with regard to the procedure and practice adopted by a recent statutory tribunal.<sup>4</sup>

*Absence of authority* on the part of a court to do a definite act<sup>5</sup> is a primary result of legislation, i. e., is matter of law.

*An appellate court* judicially knows the rules and practice of the court whose proceedings it has the duty of revising.<sup>6</sup> The supreme court may judicially recognize the long established practice of an administrative board<sup>7</sup> and the construction which it has given to particular statutes.

*Federal courts do not*, in general, judicially know the rules of practice voluntarily adopted in a state court.<sup>8</sup>

*Other Domestic Courts.*—A judge knowing the procedure established in his own court<sup>9</sup> will assume, in the absence of statutory or other controlling regulation, that the practice of other domestic

2. *Bowen v. Webb*, (Mont. 1906) 85 Pac. 739.

3. *Randall v. New England O. of P.*, 118 Fed. 782 (1902); *Yarnell v. Felton*, 104 Fed. 161 (1900).

4. *Van Sandau v. Turner*, 6 Q. B. 773, 784 (1845) (court of review in bankruptcy).

5. *Chitty v. Dendy*, 3 A. & E. 319, 1 H. & W. 169, 4 L. J. K. B. 195, 4 N. & M. 842, 30 E. C. L. 161 (1835) (allow double pleading).

6. *Johnson-Wynne Co. v. Wright*, 28 App. Cas. (D. C.) 375 (1906).

7. *Copper Queen Consol. Min. Co. v. Territorial Board of Equalization*, (Ariz. 1906) 84 Pac. 511 (equalization).

8. *Yardell v. Felton*, 104 Fed. 161 (1900).

9. *Rout v. Ninde*, 111 Ind. 597, 598, 13 N. E. 107 (1887); *Contee v. Pratt*, 9 Md. 67, 73 (1856); *Pugh v. Robin-*

*son*, 1 T. R. 116 (1786). It is a matter of judicial knowledge that the trial docket is used by the judge for making memoranda of orders and judgments rendered in pending cases, and that judgments are written in the book in which is kept the minutes of each day's proceedings during the term and the orders and judgments in the order in which they are entered, which book is the sole memorial of their existence. *Winn v. McCraney*, (Ala. 1908) 46 So. 854. All English judges judicially notice the practice of the superior courts. *Pugh v. Robinson*, 1 T. R. 118 (1808); *Dobson v. Bell*, 2 Lev. 176 (1802). But it is doubtful whether a judge can judicially find the practice of a court to be otherwise than has been decided by a jury. *Caldwell v. Hunter*, 10 Q. B. 86 (1848).

courts,<sup>10</sup> whether sitting at law or in equity,<sup>11</sup> is, in a general way, the same as that of his own. Courts of general jurisdiction will not judicially know the rules of practice adopted by inferior tribunals.<sup>12</sup>

*Sister State; Foreign Country.*—But without statutory regulation,<sup>13</sup> he will not judicially cognize with precision the rules and regulations adopted by other tribunals in the same jurisdiction, whatever their authority,<sup>14</sup> or know or make any assumption as to the procedure or practice of courts in a sister state<sup>15</sup> or foreign country.

10. *Newell v. Newton*, 10 Pick. (Mass.) 470 (1830).

11. *Contee v. Pratt*, 9 Md. 67 (1856); *Oliver v. Palmer*, 11 Gill & J. (Md.) 426 (1841). Common law judges did not take judicial notice of the practice in equity but the latter was proved by witnesses learned on the subject. *Tucker v. Inman*, 4 M. & Gr. 1049 (1842) (Lord Eldon); *Dicas v. Brougham, Ltd.*, 1 M. & Rob. 309 (1833) (equity counsel). A similar course has been adopted in regard to the enrollment office of the court of chancery. *Williams v. Lloyd*, 1 M. & Gr. 671 (1840). It would seem, upon principle, that the different branches of the high court established under the Judicature Act should take judicial notice of the practice of all other divisions. *Pilkington v. Cooke*, 16 M. & W. 615 (1847).

In respect to the practice of a court of admiralty, a common law judge has voluntarily undertaken to inform himself on the matter which is practically equivalent to taking judicial notice of it. *Place v. Potts*, 8 Exch. 705, 22 L. J. Ex. 269 (1853).

12. *Powell v. Springston Lumber Co.*, (Idaho 1906) 88 Pac. 97. The appellate court will not take judicial notice of the rules of the circuit court. *Bonney v. McClelland*, 138 Ill. App. 449 (1908) [judgment affirmed, 235 Ill. 259, 85 N. E. 242].

13. *Kindel v. Le Bert*, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234 (1897).

14. *California.*—*Sweeney v. Stanford*, 60 Cal. 362 (1882).

*Colorado.*—*Kindel v. Le Bert*, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 417 (1897) (circuit court).

*Illinois.*—*Gudgeon v. Casey*, 62 Ill. App. 599 (1895).

*Indiana.*—*Rout v. Ninde*, 118 Ind. 123, 20 N. E. 704 (1888).

*Kansas.*—*McIntosh v. Crawford County Com'rs*, 13 Kan. 171 (1874).

*Kentucky.*—*Cornelison v. Foushee*, 101 Ky. 257, 40 S. W. 680, 19 Ky. L. Rep. 417 (1897) (circuit court).

*Louisiana.*—*Bowman v. Flowers*, 2 Mart. (N. S.) 267 (1824).

*Maryland.*—*Cherry v. Baker*, 17 Md. 75 (1860).

*Nebraska.*—*Dunn v. Bozarth*, 59 Neb. 244, 80 N. W. 811 (1899).

*Tennessee.*—*Harris v. Burris*, 1 Tenn. Cas. 80 (1858).

*England.*—*Van Sandau v. Turner*, 6 Q. B. 773, 9 Jur. 296, 14 L. J. Q. B. 154, 51 E. C. L. 773 (1845); *Sargent v. Wedlake*, 11 C. B. 732, 73 E. C. L. 732 (1851); *Re Ramsden*, 10 Jur. 879, 15 L. J. Q. B. 234, 1 Saund. & C. 133 (1846).

15. *Newell v. Newton*, 10 Pick. (Mass.) 470 (1830) ("pending" does not imply proper service as it would in the forum). "The courts of one State cannot judicially take notice of the laws and practice of another." *Newell v. Newton*, 10 Pick. 470 (1830).

§ 682. (*Judicial Knowledge of Results of Law; Judicial Department*); Court Records, Papers, etc.—It is not, in general, necessary or usual that a judge should require that the record of a case in his own court, after it has been extended, or the original papers in it,<sup>1</sup> docket entries, etc.,<sup>2</sup> which compose the record until it has been extended, should be formally proved to him by evidence.<sup>3</sup> Indeed, evidence on the point may properly be rejected by him.<sup>4</sup> Their existence, as a secondary result of legislation, is cognizable by the judge as matter of law. Facts contained on the record or in the papers must be proved by the record or papers,<sup>5</sup> other proof being excluded by the rules of law relating to the use and effect of a record. Inspection by the judge is the natural and often the necessary mode of proving a fact of record—such being, indeed, an ancient mode of trial.<sup>6</sup> When a fact of record is made constituent<sup>7</sup> by being placed in issue, the exclusive means of establishing such facts is the personal examination of the judge.

*Administration.*—The court, however, may not only act *judicially* but by way of administration. He may feel that it is scarcely worth while to compel parties to make formal proof, sometimes difficult, of undisputed matters of fact which he himself may settle, once for all, at a glance. Both as a matter, at times, of legal requirement and by reason of the difficulty of making other proof and the ease and appropriateness of this method of establishing facts on a court record or in court papers, judges take judicial notice of such records and papers.<sup>8</sup> They will, under

1. *Maguire v. State*, 47 Md. 485 (1877); *Washington, etc., Steam Packet Co. v. Sickles*, 24 How. (U. S.) 333, 16 L. ed. 650 (1860).

2. *State v. Logan*, 33 Md. 1 (1870).

3. *California*.—*Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57 (1894). But see *People v. Dela Guerra*, 24 Cal. 73 (1864).

*Illinois*.—*Robinson v. Brown*, 82 Ill. 279 (1876).

*Iowa*.—*Conlee Lumber Co. v. Meyer*, 74 Iowa 403, 38 N. W. 117 (1888).

*Mississippi*.—*McGuire v. State*, 76 Miss. 504, 25 So. 495 (1898).

*Missouri*.—*State v. Ulrich*, 110 Mo. 350, 19 S. W. 656 (1892).

4. *Spengler v. Kaufman*, 43 Mo. App. 5 (1890).

5. See DOCUMENTARY EVIDENCE.

6. *Supra*, § 151.

7. *Supra*, § 47.

8. *California*.—*Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57 (1894).

*Illinois*.—*Hangsleben v. People*, 89 Ill. 164 (1878). See also *Bank of Eau Claire v. Reed*, 232 Ill. 238, 83 N. E. 820 (1908); *Waterbury Nat. Bank v. Reed*, 231 Ill. 246, 83 N. E. 188 (1907); *Reed v. Waterbury Nat. Bank*, 135 Ill. App. 165 (1907) [judgment affirmed, *Waterbury Nat. Bank v. Reed*, 231 Ill. 246, 83 N. E. 188 (1907)].

proper circumstances, examine the records,<sup>9</sup> papers or docket entries<sup>10</sup> on file in a case either *sua sponte*,<sup>11</sup> or at the suggestion of counsel.<sup>12</sup> Facts so ascertained will be taken as proven;<sup>13</sup>—it being sufficient that the record or papers should be produced<sup>14</sup> and identified to the satisfaction of the judge.<sup>15</sup> This may be either on the mere inspection of the presiding justice,<sup>16</sup> a statement which he is content to believe, or, on the contrary, he may, if he sees fit, require that this identification be established by evidence.<sup>17</sup> As a rule, a judge's right to take judicial cognizance of records, papers, etc., is limited to those relating to the case on trial and to facts relied upon by a party.

**§ 683. (*Judicial Knowledge of Results of Law; Judicial Department; Court Records; Papers, etc.*); Own Court; Same Case.**—It will not be necessary to prove to a judge the record or papers in a case before him for trial,<sup>1</sup> whether originally filed in

*Iowa*.—*State v. Schilling*, 14 Iowa 455 (1862).

*Louisiana*.—*Minor v. Stone*, 1 La. Ann. 283 (1846).

*Nebraska*.—*Stewart v. Rosengren*, 92 N. W. 586 (1902).

*Texas*.—*Blum v. Stein*, 68 Tex. 608, 5 S. W. 454 (1887). See also *Edgar v. McDonald*, (Tex. Civ. App. 1908) 106 S. W. 1135.

*England*.—*Craven v. Smith*, L. R. 4 Exch. 146, 38 L. J. Exch. 90, 20 L. T. Rep. N. S. 400, 17 Wkly. Rep. 710 (1869).

9. *Dewey v. St. Albans Trust Co.*, 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84 (1887).

10. *Dewey v. St. Albans Trust Co.*, 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84 (1887); *Armstrong v. Colby*, 47 Vt. 359 (1875).

11. *Denny v. State*, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726 (1895); *Dewey v. St. Albans Trust Co.*, 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84 (1887).

12. *Denny v. State*, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726 (1895); *Cluggish v. Koons*, 15 Ind. App. 599, 43 N. E. 158 (1896).

13. *Neville v. Kenny*, 125 Ala. 149, 28 So. 452, 82 Am. St. Rep. 230 (1899).

14. *Watkins v. Martin*, 69 Ark. 311, 65 S. W. 103, 425 (1901).

15. *Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57 (1894); *Boteler v. State*, 8 Gill & J. (Md.) 359 (1836); *McGuire v. State*, 76 Miss. 504, 25 So. 495 (1898).

16. *Boteler v. State*, 8 Gill & J. (Md.) 359 (1836); *Farrar v. Bates*, 55 Tex. 193 (1881).

17. *Farrar v. Bates*, 55 Tex. 193 (1881).

1. *Florida*.—*McNist v. State*, (Fla. 1904) 36 So. 176.

*Illinois*.—*Bailey v. Kerr*, 180 Ill. 412, 54 N. E. 165 (1899); *Robinson v. Brown*, 82 Ill. 279 (1876). See also *Ferriman v. People*, 128 Ill. App. 230 (1906) (contempt).

*Kansas*.—*State v. Bowen*, 16 Kan. 475 (1876).

*Louisiana*.—*Minor v. Stone*, 1 La. Ann. 283 (1846).

*Missouri*.—*Ollesheimer v. Thompson, etc., Co.*, 44 Mo. App. 172 (1891).

*Texas*.—*Farrar v. Bates*, 55 Tex. 193 (1881).

*United States*.—*Pittel v. Fidelity, etc., Ass'n*, 86 Fed. 255 (1898); *In re Bennett*, 84 Fed. 324 (1897).

his own court or transmitted from another, e. g.,<sup>2</sup> the probate papers relating to a given estate in connection with which the litigation in suit arises.<sup>3</sup> He will, as a rule, judicially notice their existence<sup>4</sup> and any facts which appear on their inspection,<sup>5</sup> either as endorsements of the date of filing,<sup>6</sup> amount of

2. *Boteler v. State*, 8 Gill & J. (Md.) 359 (1836); *Ledbetter v. U. S.*, 108 Fed. 52, 47 C. C. A. 191 (1901) (circuit court of appeals).

3. *Knight v. Hamaker*, 40 Oreg. 424, 67 Pac. 107 (1901).

4. *California*.—*Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57 (1894). See also *Buhman v. Nickels & Brown Bros.*, (App. 1908) 95 Pac. 177.

*Illinois*.—*Taylor v. Adams*, 115 Ill. 570, 4 N. E. 837 (1886).

*Iowa*.—*State v. Postlewait*, 14 Iowa 446 (1862).

*Maryland*.—*Boteler v. State*, 8 Gill & J. (Md.) 359 (1836).

*Nebraska*.—*Stewart v. Rosengren*, (Neb. 1902) 92 N. W. 586. Whether judicial cognizance, even of the record itself, may be required, is uncertain. *Re Osbourne*, 115 Fed. 1 (1902).

5. *California*.—*Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57 (1894). See also *Buhman v. Nickels & Brown Bros.*, (Cal. App. 1908) 95 Pac. 177.

*Illinois*.—*World's Columbian Exposition Co. v. Lehigh*, 94 Ill. App. 433 (1900).

*Iowa*.—*Conlee Lumber Co. v. Meyer*, 74 Iowa 403, 38 N. W. 117 (1888).

*Kansas*.—*State v. Thomas*, (Kan. 1906) 86 Pac. 499; *State v. Stevens*, 56 Kan. 720, 44 Pac. 992 (1896).

*Kentucky*.—*Monticello Nat. Bank v. Bryant*, 13 Bush 419 (1877).

*Louisiana*.—*Pagett v. Curtis*, 15 La. Ann. 451 (1860).

*Minnesota*.—*Rees v. Lowenstein*, 39 Minn. 401, 40 N. W. 370 (1888).

*Mississippi*.—*McGuire v. State*, 76 Miss. 504, 25 So. 495 (1898).

*Missouri*.—*State v. Ulrich*, 110 Mo. 350, 19 S. W. 656 (1892).

*Nebraska*.—*George v. State*, 59 Neb. 163, 80 N. W. 486 (1899).

*New York*.—*Farmers' L. & T. Co. v. Hotel Brunswick Co.*, 42 N. Y. Suppl. 693, 12 App. Div. 628 (1896).

*Oregon*.—*Knight v. Hamaker*, 40 Or. 424, 67 Pac. 107 (1901).

*South Dakota*.—*Searls v. Knapp*, 5 S. D. 325, 58 N. W. 807, 49 Am. St. Rep. 873 (1894).

*Texas*.—*Richardson v. State*, (Tex. Cr. App. 1905) 85 S. W. 282 (former trial); *Blum v. Stein*, 68 Tex. 608, 5 S. W. 454 (1887).

*Utah*.—*Warren v. Robinson*, 21 Utah 429, 61 Pac. 28 (1900).

*Washington*.—*State v. Jones*, 20 Wash. 576, 56 Pac. 369 (1899).

*Wisconsin*.—*Brucker v. State*, 19 Wis. 539 (1865).

*United States*.—*Wilson v. Calculagraph Co.*, 153 Fed. 961, 83 C. C. A. 77 (1907); *In re Bennett*, 84 Fed. 324 (1897).

*England*.—*Craven v. Smith*, L. R. 4 Exch. 146, 38 L. J. Exch. 90, 20 L. T. Rep. (N. S.) 400, 17 Wkly. Rep. 710 (1869). A trial court will take judicial notice of the *remittitur* from the supreme court. *State v. Hunter*, 82 S. C. 153, 63 S. E. 685 (1909).

6. *Arkansas*.—*Yell v. Lane*, 41 Ark. 53 (1883).

*California*.—*Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.*, 114 Cal. 100, 45 Pac. 1047 (1896).

*Louisiana*.—*Wegmann's Succession*, 110 La. 930, 34 So. 878 (1902) (filed too late).

*Missouri*.—*Chapman v. Currie*, 51 Mo. App. 40 (1892).

*New York*.—*Fellers v. Lee*, 2 Barb. (N. Y.) 488 (1848).

*Pennsylvania*.—*Withers v. Gillespy*, 7 Serg. & R. (Pa.) 10 (1821).

claim,<sup>7</sup> and the like. The judge will know judicially any fact that can be gathered from the face of the record or papers,<sup>8</sup> e. g., defects on the record.<sup>9</sup>

*Acts in pais concerning a cause* cannot be noticed by the court though done in the clerk's office.<sup>10</sup>

*Former Action.*—He may in this way ascertain from inspection any facts which may appear from the papers regarding the former action in the case of any court,<sup>11</sup> judge,<sup>12</sup> magistrate<sup>13</sup> or

7. *Chicago, etc., R. Co. v. Minard*, 20 Ill. 9 (1858).

8. *California*.—*Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57 (1894) (barred by statute of limitations).

*Illinois*.—*McNulta v. Lockridge*, 32 Ill. App. 86 [affirmed in 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362] (1889) (appointment of receiver).

*Kansas*.—*State v. Kesner*, (Kan. 1905) 82 Pac. 720.

*Louisiana*.—*Baron v. Baum*, 44 La. Ann. 295, 10 So. 766 (1892) (want of parties).

*Nebraska*.—*George v. State*, 59 Neb. 163, 80 N. W. 486 (1899) (former jeopardy).

*South Dakota*.—*McClain v. Williams*, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287, 289 (1897) (case is pending); *Searls v. Knapp*, 5 S. D. 325, 58 N. W. 807, 49 Am. St. Rep. 873 (1894) (barred by statute of limitations).

*Texas*.—*Blum v. Stein*, 68 Tex. 608 (1887) (payment of money into court).

*Washington*.—*Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649 (1901) (discharge of joint debtor).

9. *State v. Ulrich*, 110 Mo. 350, 19 S. W. 656 (1892); *Searls v. Knapp*, 5 S. D. 325, 58 N. W. 807, 49 Am. St. Rep. 873 (1894).

10. *Foster v. Chicago, etc., R. Co.*, 10 Tex. Civ. App. 476, 31 S. W. 529 (1895).

11. *California*.—*Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57 (1894).

*Iowa*.—*Haaren v. Mould* 122 N. W. 921 (1909) (liquor injunction).

*Kansas*.—*State v. Bowen*, 16 Kan. 475, (1876) (new trial on plea of former jeopardy).

*Kentucky*.—*Louisville, etc., R. Co. v. Com.*, 4 Ky. L. Rep. 627 (1883).

*Louisiana*.—*Pagett v. Curtis*, 15 La. Ann. 451 (1860) (order).

*Missouri*.—*State v. Ulrich*, 110 Mo. 350, 19 S. W. 656 (1892).

*Nebraska*.—*George v. State*, 59 Neb. 163, 80 N. W. 486 (1899)

*New York*.—*Farmers' L. & T. Co. v. Hotel Brunswick Co.*, 42 N. Y. Suppl. 693, 12 App. Div. 628 (1896). See also *In re Ordway*, 196 N. Y. 95, 89 N. E. 474 (1909) [order reversed, 115 N. Y. Suppl. 817, 131 App. Div. 339].

*Texas*.—*Johnson v. W. H. Goolsby Lumber Co.*, (Civ. App. 1909) 121 S. W. 883 (attachment).

*Utah*.—*State v. Bates*, 22 Utah 65, 61 Pac. 905, 83 Am. St. Rep. 768 (1900).

*Washington*.—*Doremus v. Root*, 23 Wash. 710, 63 Pac. 572 (1901) (judgment acquitting co-defendant); *State v. Jones*, 20 Wash. 576, 56 Pac. 369 (1899).

12. *Baily v. Kerr*, 180 Ill. 412, 54 N. E. 165 (1899); *State v. Ulrich*, 110 Mo. 350, 19 S. W. 656 (1892); *In re Bennett*, 84 Fed. 324, 327 (1897). See also *State v. Bennett*, 114 Cal. 56, 45 Pac. 1013 (1896).

13. *State v. Stevens*, 56 Kan. 720, 44 Pac. 992 (1896); *Bristol v. Fischel*, 81 Mo. App. 367 (1899).

board.<sup>14</sup> A judge may use at a subsequent hearing of a case, facts which he learned at a prior hearing of it.<sup>15</sup>

An appellate court will usually take notice of the record appearing on its files of a former appeal in the same case;<sup>16</sup>—so far as to notice the existence of the earlier proceeding and what was done in the premises,<sup>17</sup> the legal relation of the parties at different times<sup>18</sup> and their good faith,<sup>19</sup> the identity of the subject-matter, and the like. But the evidence taken in the case as it appeared on the former occasion cannot be used in the appeal then for hearing.<sup>20</sup>

**§ 684. (*Judicial Knowledge of Results of Law; Judicial Department; Court Records, Papers, etc.; Own Court*); Other Cases.**—Among the primary objects which the community seeks to attain by establishing courts is justice without violence. The right of the parties to conduct their litigation according to their respective skill or knowledge is necessarily subordinate to this

14. St. Louis, etc., R. Co. v. Martin, 29 Kan. 750 (1883) (county commissioners).

County commissioners may properly take judicial notice of the action taken in a former hearing regarding the layout of a particular highway but cannot be compelled to do so. McKaig v. Jordan, (Ind. 1909) 87 N. E. 974.

15. State v. Richardson, (Or. 1906) 85 Pac. 225.

16. Arkansas.—Gaus v. Holland, 37 Ark. 483 (1881).

Indiana.—Hancock v. Diamond Plate Glass Co., (Ind. App. 1905) 75 N. E. 659; Mississinewa, etc., Co. v. Andrews, 28 Ind. App. 496, 63 N. E. 231 (1902); Cluggish v. Coons, 15 Ind. App. 599, 43 N. E. 158 (1896).

Iowa.—Poole v. Seney, 70 Iowa 275, 24 N. W. 520 (1886).

Louisiana.—Bell v. Williams, 10 La. 514 (1837).

Minnesota.—Thornton v. Webb, 13 Minn. 498 (1868).

Missouri.—Dawson v. Dawson, 29 Mo. App. 521 (1888).

South Dakota.—McClain v. Williams, 10 S. D. 332, 73 N. W. 72 (1897).

Texas.—Wood v. Cahill, 21 Tex. Civ. App. 38, 50 S. W. 1071 (1899). An appellate court notices judicially only those matters that the trial court is obliged to notice. Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 103 Pac. 833 (1909).

17. McNish v. State, (Fla. 1904) 36 So. 176. An appellate court may examine a former opinion rendered in the same case in order to determine what matters were considered in it. McKinnon v. Johnson, 57 Fla. 120, 48 So. 910 (1909). The supreme court should take judicial notice of its own orders and decrees made on a former hearing in the same case. State v. Hunter, 82 S. C. 153, 63 S. E. 685 (1909).

18. Baze v. Island City Mfg. Co., (Tex. Civ. App. 1906) 94 S. W. 460; Avocato v. Dell' Ara, (Tex. Civ. App. 1904) 84 S. W. 444; Hennessy v. Tacoma Smelting & Refining Co., (Wash. 1904) 129 Fed. 40.

19. Gay v. Gay, (Cal. 1905) 79 Pac. 885.

20. Cleveland, etc., R. Co. v. Wymant, 134 Ind. 681, 691, 34 N. E. 569 (1893). See also Fry v. Chicot County, 37 Ark. 117 (1881).



main object; but, in its appropriate sphere of operation, this right of the parties is supreme. It has on the whole been deemed better calculated to advance the interests of society in the attainment of justice that parties should conduct litigation, to a very large extent, in their own way with the incidental blunders and failures in reaching the truth, than that the judge should act as *magister litis* and constantly intervene in a controlling manner with facts or suggestions.<sup>1</sup> The line of thought survives from the periods of legal evolution when procedure was *combative*; the duties of the judge being to see fair play in the fight made by the parties, i. e., that the rules prescribed for the contest were duly observed. So far as the rule is justified at all in a more scientific age seeking *truth* as of the highest utility, it is upon purely practical grounds.<sup>2</sup> As the judge is not at liberty to interject into a case, except as witness, facts of which he is possessed,<sup>3</sup> it follows that he cannot search the records or files of his court in other cases in order to give one or other of the parties the benefit of the facts so ascertained,<sup>4</sup> or judicially know an act which is of record in his court

1. A judge may insist, however, upon calling a witness which the parties do not see fit to call. *Selph v. State*, 22 Fla. 537, 548 (1886); *Fulerton v. Fordyce*, 144 Mo. 519, 44 S. W. 1053 (1898) (evidence of a physician as to an examination previously made by order of court); *Coulson v. Disborough*, 2 Q. B. 316, 318 (1894). He may direct that necessary proof be furnished. *Hoskins v. State*, 11 Ga. 92, 97 (1852). The judge may also make these orders when sitting without a jury. *Badische A. & S. Fabrik v. Levinstein*, L. R. 24 Ch. D. 156, 167 (1883). The judge may put additional questions to a witness produced by a party. *Littleton v. Clayton*, 77 Ala. 571, 575 (1884); *Sparks v. State*, 59 Ala. 82, 87 (1877).

To same effect see:

*Iowa*.—*Haaren v. Mould*, 122 N. W. 921 (1909).

*Kentucky*.—*Brashears v. Frazier*, 33 Ky. L. Rep. 662, 110 S. W. 826 (1908).

*New Jersey*.—*City of Paterson v.*

*East Jersey Water Co.*, (Ch. 1908) 70 Atl. 472.

*Texas*.—*Dupree v. State*, (Cr. App. 1909) 120 S. W. 871, 875; *Elmore v. Rugley*, (Civ. App. 1908) 107 S. W. 151 (institution of suit).

*Washington*.—*Pacific Iron & Steel Works v. Goerig*, 104 Pac. 151 (1909).

*West Virginia*.—*Pickens v. Coal River Boom & Timber Co.*, 65 S. E. 865 (1909).

2. Compare remarks of Lord Esher, M. R., in *Coulson v. Disborough*, 2 Q. B. 316, 318.

3. *Supra*, § 574.

4. *Arkansas*.—*Hall v. Cole*, 71 Ark. 601, 76 S. W. 1076 (1903).

*California*.—*Lake Merced Water Co. v. Cowles*, 31 Cal. 214 (1866) (pending of petition to condemn land).

*Florida*.—*McNish v. State*, (Fla. 1904) 36 So. 176.

*Iowa*.—*Baker v. Mygatt*, 14 Iowa 131 (1862) (affidavit filed).

*Nebraska*.—*Allison v. Fidelity Mut. Fire Ins. Co.*, (Neb. 1905) 104 N. W. 753. "We apprehend that the

even though it be one which has been done by himself.<sup>5</sup> Courts, therefore, whether of probate<sup>6</sup> or acting according to the course of the common law, do not take judicial cognizance of the records of the court in other cases,<sup>7</sup> even though they concern the same subject matter<sup>8</sup> or are connected with it in some other manner.<sup>9</sup> Even where it is between the same parties,<sup>10</sup> or, as in bankruptcy proceedings,<sup>11</sup> *quasi in rem*,<sup>12</sup> another action in the same court is not judicially noticed. There are certain exceptions to the rule, in which, however, the reasons upon which it is based failed to apply.

*Exceptions; (1) Notoriety.*—Where the fact is one of notoriety, judicial cognizance may be taken.<sup>13</sup>

court could not under any circumstances take judicial notice of the fact, except it were for mere calendar purposes." *Lake Merced Water Co. v. Cowles*, 31 Cal. 215 (1866).

5. *Streeter v. Streeter*, 43 Ill. 155 (1867).

6. *Daniel v. Bellamy*, 91 N. C. 78 (1884).

7. *Arkansas*.—*Gibson v. Buckner*, 65 Ark. 84, 44 S. W. 1034 (1898).

*California*.—*Ralphs v. Hensler*, 97 Cal. 296, 32 Pac. 243 (1893).

*Colorado*.—*Downing v. Howlett*, 6 Colo. App. 291, 40 Pac. 505 (1895).

*Illinois*.—*Streeter v. Streeter*, 43 Ill. 155 (1867).

*Iowa*.—*Lawless v. Stamp*, 108 Iowa 601, 79 N. W. 365 (1899); *Granger v. Griffin*, 73 Iowa 759, 43 N. W. 297 (1889).

*Kansas*.—*State v. Bowen*, 16 Kan. 475 (1876).

*Kentucky*.—*National Bank of Monticello v. Bryant*, 13 Bush 419 (1877).

*Maryland*.—*Anderson v. Cecil*, 86 Md. 490, 38 Atl. 1074 (1897).

*Missouri*.—*Spurlock v. Missouri Pac. R. Co.*, 76 Mo. 67 (1882).

*North Carolina*.—*Daniel v. Bellamy*, 91 N. C. 78 (1884).

*South Dakota*.—*Grace v. Ballau*, 4 S. D. 333, 56 N. W. 1075 (1893).

*Texas*.—*Goodwin v. Harrison*, 28 Tex. Civ. App. 7, 66 S. W. 308 (1902).

*Wisconsin*.—*McCormick v. Hern- don*, 67 Wis. 648, 31 N. W. 303 (1887).

8. *Banks v. Burnam*, 61 Mo. 76 (1875) (contract, rescission, and specific performance).

9. *Com. v. Hill*, 11 Cush. (Mass.) 137 (1853); *In re Bennett*, 84 Fed. 324 (1897).

10. *Murphy v. Citizens' Bank*, (Ark. 1907) 100 S. W. 894. But see, to the contrary, *Estudillo v. Security Loan & Trust Co.*, 149 Cal. 556, 87 Pac. 19 (1906). A trial court will not judicially notice the record in another cause, though it be between the same parties and in the same suit. *Lownsdale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833 (1909).

11. *Hunter v. Lissner*, 1 Ga. App. 1, 58 S. E. 54 (1907).

12. *Ollschlager's Estate*, (Or. 1907) 89 Pac. 1049 (administration).

13. *Arkansas*.—*Allen v. Swope*, 64 Ark. 576, 44 S. W. 78 (1898); *Davies v. Hunt*, 37 Ark. 574 (1881).

*California*.—*Gambert v. Hart*, 44 Cal. 542, 549 (1872).

*Indian Territory*.—*Crawford v. Duckworth*, 3 Ind. Ter. 10, 53 S. W. 465 (1899).

*Louisiana*.—*Mower v. Kemp*, 42 La. Ann. 1007, 8 So. 830 (1890).

*Maryland*.—*Story v. Ulman*, 88 Md. 244, 41 Atl. 120 (1898).

*Exceptions; (2) Actions in Rem.*—In actions involving adjudications *in rem*, as a status of citizenship,<sup>14</sup> bankruptcy,<sup>15</sup> dedication,<sup>16</sup> prize,<sup>17</sup> the validity of a patent,<sup>18</sup> or that certain premises are licensed,<sup>19</sup> the judge has a freer hand in this respect. The reason is that the social rather than the personal element of litigation predominates in this class of action. The primary object of ascertaining the truth is not sought by giving the parties entire control of the litigation, but the rights of the community, as a whole, are deemed paramount. Under these circumstances judicial cognizance may be taken of records, papers, etc., on file in other cases in the same court.<sup>20</sup>

*Federal Courts.*—It is natural, therefore, that the federal judges experience little difficulty in taking judicial cognizance of the records, papers, etc., of their courts in other cases,<sup>21</sup> though such a course is not at all times required.<sup>22</sup> Nor, in case of the circuit court of appeals, permissible.<sup>23</sup> Such also is the rule in the supreme court of the United States.<sup>24</sup>

*Texas.*—Hatch v. Dunn, 11 Tex. 708 (1854).

*United States.*—Re Durrant, 84 Fed. 314 (1897).

14. Crawford v. Duckworth, 3 Indian Terr. 10, 53 S. W. 465 (1899) (defendant declared not to be a citizen of the Cherokee nation). A court will judicially know that it has disbarred an attorney. Danforth v. Egan, (S. D. 1909) 119 N. W. 1021.

15. Baily v. Kerr, 180 Ill. 412, 54 N. E. 165 (1899); *In re Osborne*, 115 Fed. 1, 52 C. C. A. 595 (1902).

16. Story v. Ulman, 88 Md. 244, 41 Atl. 120 (1898) (street).

But see, as to condemnation proceedings, where the court declined to notice a petition pending in the same court to condemn the same land. Lake Merced W. Co. v. Cowles, 31 Cal. 215 (1866).

17. The Minna, 17 Fed. Cas. No. 9,634 (1863).

18. Cushman Paper-Box Mach. Co. v. Goddard, 95 Fed. 664, 37 C. C. A. 221 (1899).

The state of the art . . . may be shown by the court's records in other cases. Cushman P. B. M. Co. v. Goddard, 37 C. C. A. 221, 95 Fed. 664

(1899); Cushman, etc., Co. v. Goddard, 95 Fed. 664 (1899).

19. People v. Board of Excise, 17 Misc. (N. Y.) 98, 40 N. Y. St. 741 (1896).

20. Story v. Ulman, 88 Md. 244, 41 Atl. 120 (1898).

21. Pitkin v. Cowen, 91 Fed. 599 (1899) (appointment of a receiver); Pittel v. Fidelity, etc., Ins. Co., 86 Fed. 255, 30 C. C. A. 21 (1898) (*res adjudicata*); *In re Durrant*, 84 Fed. 314 (1897); Louisville Trust Co. v. Cincinnati, 76 Fed. 296, 318, 22 C. C. A. 334 (appointment of a receiver) (1896). See also Bohart v. Hull, 2 Indian Terr. 45, 47 S. W. 306 (1898).

That the court sits at different places within the district is not material. Bohart v. Hull, 2 Indian Terr. 45, 47 S. W. 306 (1898).

22. *In re Osborne*, 115 Fed. 1, 52 C. C. A. 595 (1902).

23. *In re Manderson*, 51 Fed. 501, 2 C. C. A. 490 (1892); Fitzgerald v. Evans, 49 Fed. 426, 1 C. C. A. 307 (1892).

24. *In re Boardman*, 169 U. S. 39, 18 S. Ct. 291, 42 L. ed. 653 (1898); Craemer v. Washington, 168 U. S.

*Exceptions; (3) Questions of Administration.*—For a similar reason, the rule excluding judicial cognizance of the court's records in other cases fails also to apply when the question is not as to the rights of a party but as to the proper administration of justice;—for example, as to whether an indictment is pending against a jurymen.<sup>25</sup> No rule, moreover, is violated where the judge examines the records of his court at the suggestion of a party for the ascertainment of a fact upon which the latter relies. This is entirely justified as an exercise of the judge's administrative function. So where a judge is required either to reverse or to modify a decree, he may examine other proceedings between the parties for the sake of gaining light whereby to exercise an administrative power.<sup>26</sup>

**§ 685. (Judicial Knowledge of Results of Law; Judicial Department; Court Records, Papers, etc.; Own Court); Supplementary Proceedings.**—Supplementary proceedings follow, in the matter of judicial cognizance, the rule just stated. The judge, in trying them, takes notice of other records, papers, etc., of his court, or declines to do so, in accordance with whether the supplementary proceedings are a continuation of the original litigation or are, on the contrary, separate and complete in themselves. If the subsequent proceedings are a continuation of the original action, as is frequently the case in garnishment, or trustee proceedings,<sup>1</sup> contempt proceedings,<sup>2</sup> or actions against stockholders under judgments against the corporation,<sup>3</sup> the judge judicially notices the

124, 18 S. Ct. 1, 42 L. ed. 407 (1897); Aspen Min., etc., Co. v. Billings, 150 U. S. 31, 14 S. Ct. 4, 37 L. ed. 986 (1893).

25. State v. Jackson, 35 La. Ann. 769 (1883).

26. *In re Transfer Penalty Cases*, 92 N. Y. Suppl. 322 (1905).

1. *Iowa*.—Kenosha Stove Co. v. Shedd, 82 Iowa 540, 48 N. W. 933 (1891).

*Minnesota*.—S. E. Olson Co. v. Brady, 76 Minn. 8, 78 N. W. 864 (1899).

*Missouri*.—Dinkins v. Crunden-Martin Woodenware Co., 99 Mo. App. 310, 73 S. W. 246 (1903).

*Texas*.—Daze v. Island City Mfg. Co., (Tex. Civ. App. 1906) 94 S. W.

460; Kelly v. Gibbs, 84 Tex. 143, 19 S. W. 380, 563 (1892).

*Wisconsin*.—Mace v. Roberts, 97 Wis. 199, 72 N. W. 866 (1897).

2. Lester v. People, 150 Ill. 408, 37 N. E. 1004 (1894); Ferguson v. Wheeler, (Iowa 1904) 101 N. W. 638. In proceedings for violating an injunction before the issuing court, it may notice the injunction decree. Bunting v. Powers, (Iowa 1909) 120 N. W. 679; Ochampaugh v. Powers, (Iowa 1909) 120 N. W. 680.

3. Pease v. Underwriters' Union, 1 Ill. App. 287 (1878); Ollesheimer v. Thompson Mfg. Co., 44 Mo. App. 172 (1890).

record in the principal action and evidence to prove it may be rejected.<sup>4</sup> If, on the other hand, proceedings,<sup>5</sup> even in garnishment,<sup>6</sup> are in their nature independent, judicial cognizance is not taken of the record in the earlier suit.

**§ 686. (*Judicial Knowledge of Results of Law; Judicial Department; Court Records, Papers, etc.*); Other Courts.**—For still stronger reasons, courts do not take judicial notice of the records, papers, etc., of other courts;<sup>1</sup>—unless such knowledge is required by statute.<sup>2</sup> The rule is the same, even though the earlier proceeding was held before the judge himself.<sup>3</sup> If such a statutory requirement as to judicial knowledge exists, a state court will officially notice the record, etc., of a federal court in the state.<sup>4</sup> Otherwise this cognizance is not taken of the records of the national courts;<sup>5</sup>—including their proceedings in bankruptcy.<sup>6</sup> Conversely, federal courts do not take notice of the records of the state courts of their own state,<sup>7</sup> nor of those of other federal courts, including those of bankruptcy.<sup>8</sup>

**§ 687. (*Judicial Knowledge of Results of Law; Judicial Department; Court Records, Papers, etc.; Other Courts*); Sister State or Foreign Country.**—Courts do not judicially know

4. *Spengler v. Kaufman*, 43 Mo. App. 5 (1890). *Haaren v. Mould*, (Iowa 1909) 122 N. W. 921.

5. *Anderson v. Cecil*, 86 Md. 490, 38 Atl. 1074 (1898); *State v. Hudson County Electric Co.*, 61 N. J. L. 114, 38 Atl. 818 (1897) (contempt).

6. *Pease v. Underwriters' Union*, 1 Ill. App. 387 (1878); *O. L. Packard Mach. Co. v. Law*, 100 Wis. 644, 76 N. W. 596 (1898).

1. *Hall v. Cole*, 71 Ark. 601, 76 S. W. 1067 (1903); *People v. Dela Guerra*, 24 Cal. 73 (1864); *Jones v. Jones*, 45 Md. 144 (1876); *State v. District Court*, 18 Nev. 286, 3 Pac. 417 (1884).

2. *Ohm v. San Francisco*, (Cal. 1890) 25 Pac. 155.

3. *State v. Edwards*, 19 Mo. 674 (1854).

4. *Ohm v. San Francisco*, (Cal. 1890) 25 Pac. 155.

5. *Vassault v. Seitz*, 31 Cal. 225 (1866).

6. *Georgia*.—*Kent v. Downing*, 44 Ga. 116 (1871).

*Kentucky*.—*Davis v. Smallgood*, 3 Ky. L. Rep. 539 (1882).

*Massachusetts*.—*Cutter v. Evans*, 115 Mass. 27 (1874).

*Missouri*.—*Haber v. Klauberg*, 3 Mo. App. 342 (1877).

*United States*.—*Eyster v. Gaff*, 91 U. S. 521, 23 L. ed. 403 (1875); *Doe v. Childress*, 21 Wall. 642, 22 L. ed. 549 (1874).

7. *Stewart v. Masterson*, 131 U. S. 151, 9 S. Ct. 682, 33 L. ed. 114 (1888).

8. *Eyster v. Gaff*, 91 U. S. 521, 23 L. ed. 403 (1875). In a plenary action in a Circuit Court by a trustee in bankruptcy, the court cannot take judicial notice of matters of record in the district court in the bankruptcy proceedings. *McDonald v. Clearwater Shortline Ry. Co.*, 164 Fed. 1007 (1908).

of the proceedings in the courts outside their jurisdiction.<sup>1</sup> Occasionally famous litigation may become a matter of notoriety; and, therefore, of common knowledge.

**§ 688. (*Judicial Knowledge of Results of Law; Judicial Department*); Signatures and Seals; National Courts.**— The seal of a court of admiralty<sup>1</sup> or of vice admiralty,<sup>2</sup> being of international jurisdiction and recognized by the executive department of the nation will be judicially noticed by all courts. The seal of the superior court at Westminster need not be proved in an English court.<sup>3</sup> A judge will judicially know the signature of another judge who is a member of a national court; and may, by statute, be required to do so.<sup>4</sup>

**§ 689. (*Judicial Knowledge of Results of Law; Judicial Department; Signatures and Seals*); State Courts.**— No proof need be offered of the genuine character of the seals of domestic tribunals. A court notices judicially its own seal. While state courts in the American Union require no proof of the official seals of federal courts,<sup>1</sup> so, conversely, in a federal tribunal the seal of

1. *Cumberland Telephone & Telegraph Co. v. St. Louis, I. M. & S. Ry. Co.*, (La. 1906) 41 So. 492.

1. *Thompson v. Stewart*, 3 Conn. 171, 181, 8 Am. Dec. 168 (1819); *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475 (1831); *Crondson v. Leonard*, 4 Cranch (U. S.) 435, 2 L. ed. 670 (1808); *Rose v. Himely*, 4 Cranch (U. S.) 41, 2 L. ed. 608 (1808); *Church v. Hubbard*, 2 Cranch (U. S.) 187, 2 L. ed. 249 (1804); *Green v. Waller*, 2 Ld. Raym. 891 (1703); *The Maria*, 1 Rob. Adm. 287 (1799). As to the seals of courts of admiralty, the ecclesiastical courts or of the great sessions of Wales, see *Kempton v. Cross*, Cas. temp. Hardw. 108 (1869); *Curtis v. March*, 28 L. J. Exch. 36 (1858); *Green v. Waller*, 2 Ld. Raym. 893 (1701); *Olive v. Gwin*, 2 Sid. 145, Hardres 118 (1658).

2. *Yeaton v. Fry*, 5 Cranch (U. S.) 335, 3 L. ed. 117 (1809).

3. *Tooker v. Beaufort, Dk. of Say*. 297 (1859).

4. Where a judge is required to take judicial note of a signature of another judge, he must take cognizance of the latter's signature affixed by means of a stamp. *Blades v. Laurence*, L. R., 9 Q. B. 374 (1874).

1. *Womack v. Dearman*, 7 Port. (Ala.) 513 (1838); *Adams v. Way*, 33 Conn. 419 (1866); *Dwight v. Splane*, 11 Rob. (La.) 487 (1845); *Delafield v. Hand*, 3 Johns. (N. Y.) 310, 313 (1808). "It will not be denied that the constitution of the United States and the laws of congress passed in pursuance thereof, will be judicially recognized by the courts of this state. The several courts of the United States are called into existence by act of congress under the constitution, and their powers and duties specifically defined by statute; such courts, therefore, together with their seals, will also be judicially recognized." *Adams v. Way*, 33 Conn. 419 (1866).

a state court<sup>2</sup> or of other federal courts<sup>3</sup> will be noticed. But the private seal of a judge<sup>4</sup> or clerk or the official seal of a foreign municipal court<sup>5</sup> must be proved. The signature, however, of any judge who is judicially known to the court,<sup>6</sup> even in case of a justice of the peace,<sup>7</sup> or of the court officers or officials of the judge's own court or of any other court officers in the state exercising judicial functions within the state,<sup>8</sup> or even acting in an official capacity,<sup>9</sup> require no proof. Thus, the signature of the clerk<sup>10</sup> or one of his deputies<sup>11</sup> acting in their official capacity will be

2. "Circuit and district courts of the United States certainly cannot be considered foreign in any sense of the term, either in respect to the state courts in which they sit, or as respects the circuit or district court of another circuit or district. On the contrary, they are domestic tribunals, whose proceedings all other courts of the country are bound to respect, when authenticated by the certificate of the clerk under the seal of the court, the rule being that the circuit court of one circuit or the district court of one district is presumed to know the seal of the circuit or district court of another circuit or district, in the same manner as each court within a state is presumed to know and recognize the seal of any other court within the same state." *Turnbull v. Payson*, 95 U. S. 418 (1877).

3. *Turnbull v. Payson*, 95 U. S. 418 (1877).

4. *Barrett v. Nav. Co. v. Shower*, 8 Dowl. P. C. 173 (1840).

5. *Delafield v. Hand*, 3 Johns. (N. Y.) 310 (1808). See also *Collins v. Mathew*, 5 East 473 (1804); *Henry v. Adey*, 3 East 221, 4 Esp. 220 (1803).

6. *Dwight v. Splane*, 11 Rob. (La.) 487 (1845); *Despau v. Swindler*, 3 Mart. (N. S.) (La.) 705 (1825); *People v. Bloedel*, 16 N. Y. Suppl. 837 (1891).

7. *Despau v. Swindler*, 3 Mart. N. S. (La.) 705 (1825). While a court will take judicial notice of who

are justices of the peace, where a warrant is signed with the name of a justice of the peace, without his initials of office, the court cannot take judicial notice that the signature is that of a justice of the peace, since it cannot judicially know that there is but one person by that name. *Reach v. Quinn*, (Ala. 1909) 48 So. 540.

8. *Alderson v. Bell*, 9 Cal. 315 (1858); *Hipes v. State*, 73 Ind. 39 (1880); *State v. Postlewait*, 14 Iowa 446 (1862); *Wood v. Fitz*, 10 Mart. (La.) 196 (1821).

9. *Wood v. Fitz*, 10 Mart. 196 (1821).

The administrative nature of the entire assumption is shown by the fact that the signature of a party to an acceptance of service is, it is said, judicially known. *Tischner v. Rutledge*, 35 Wash. 285, 77 Pac. 388 (1904).

10. *Illinois*.—*Dyer v. Last*, 51 Ill. 179 (1869).

*Indiana*.—*Mountjoy v. State*, 78 Ind. 172 (1881).

*Minnesota*.—*Sherrerd v. Frazer*, 6 Minn. 572 (1861).

*South Dakota*.—*State v. Kinney*, 113 N. W. 77 (1907).

*Texas*.—*Goodwin v. Harrison*, 28 Tex. Civ. App. 7, 66 S. W. 308 (1902).

*West Virginia*.—*Central Land Co. v. Calhoun*, 16 W. Va. 361 (1880).

11. *Himmelmamm v. Hoadley*, 44 Cal. 213 (1872); *State v. Barrett*, 40 Minn. 65, 41 N. W. 459 (1889).

noticed;—even though the designation of the office be omitted,<sup>12</sup> or is incorrectly stated<sup>13</sup> or the name or designation of the office be supplied by initials<sup>14</sup> or some other abbreviation.<sup>15</sup>

**§ 690. (*Judicial Knowledge of Results of Law; Judicial Department; Signatures and Seals*); Notaries Public.**—The official signature and seal of a notary public<sup>1</sup> have been treated as matters of judicial knowledge;—i. e., of administrative assumption.

12. *Dyer v. Last*, 51 Ill. 179 (1869); *Marsee v. Middleborough Town, etc., Co.*, 65 S. W. 118, 23 Ky. L. Rep. 1258 (1901); *State v. Barrett*, 40 Minn. 65, 41 N. W. 459 (1889) (deputy clerk signing merely as “deputy”); *Central Land Co. v. Calhoun*, 16 W. Va. 361 (1880).

13. *State v. Barrett*, 40 Minn. 65, 41 N. W. 459 (1889) (deputy signing as “clerk”).

14. *Marsee v. Middleborough Town,*

*etc., Co.*, 65 S. W. 118, 23 Ky. L. Rep. 1258 (1901).

15. *Buell v. State*, 72 Ind. 523 (1880).

1. *Pardee v. Schanzlin*, (Cal. App. 1906) 86 Pac. 812; *McDonald v. People*, 123 Ill. App. 346 [*affirmed* in 222 Ill. 235, 78 N. E. 609] (1906); *Black v. Minneapolis & St. L. R. Co.*, (Iowa 1903) 96 N. W. 924; *Brown Mfg. Co. v. Gilpin*, 120 Mo. App. 130, 96 S. W. 669 (1906).



## CHAPTER IX.

### KNOWLEDGE; COMMON.

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§ 691. **Common Knowledge.**—Common knowledge is general knowledge. It is the knowledge that every one has.<sup>1</sup> The subject, as has been intimated, has no special relation to the law of evidence.<sup>2</sup> A trial at law takes the world as a whole precisely as it finds it. With only a small portion of its happenings does the law of evidence purport to deal. These it calls the *res gestæ*.<sup>3</sup> As

1. "All men know them and therefore they need not be proved." South & N. Ala. R. R. Co. v. Wood, 74 Ala. 449 (1883).

2. *Neville v. Kenney*, 125 Ala. 149, 28 So. 452, 454 (1899). "In seeking to ascertain the unknown from the known, a judicial tribunal is called on to use, apply, reflect upon, and compare a great body of facts and ideas of which it is already in posses-

sion, and of which no particle of 'evidence,' strictly so called, is ever formally presented in court. And then, in addition, it has to be put in possession of new material. It is this necessity, that of furnishing new matter, which gives occasion for rules of evidence." Thayer, *Prelim. Treat.*, 270.

3. *Supra*, § 47.

to them disputes may arise; questions of the truth about facts, as to the powers of observation, habits of veracity, and the like, of those who undertake to prove these *res gestæ* facts to the tribunal. To such facts alone does the necessity for proof attach; and only with proof does the law of evidence concern itself. Judges, counsel and witnesses submitting the evidence to the tribunal, and the tribunal itself in deciding upon it must make a familiar, unconscious and generally unnoted use of a large number of other facts, the existence of which is not in dispute.<sup>4</sup> Witnesses must address the court in *language*, the meaning of which is assumed to be understood. They must draw common inferences from observation, the accuracy of which no one disputes;<sup>5</sup> allusions are constantly made to systems of coinage, tables of length, capacity, area and the like, to historical events, geographical features, and so forth, which no one fails to appreciate. Only by assuming the reality and correctness of common knowledge can the settlement of what the *res gestæ* are and what they mean in terms either of fact or law, possibly be reached within any reasonable limits of time. Indeed, the requirement of substantive law, that reason must be employed by all branches of the tribunal exercising administrative or judicial functions,<sup>6</sup> is in reality in itself equivalent to and involves a permission and insistence, that the common knowledge of the community should be used equally both by judge and jury. Reasoning, for example, involves the use of *terms*. Physical facts of all descriptions are thus necessarily placed at the disposal of courts. That form of reasoning known as inference<sup>7</sup> demands, when applied to moral conduct or the logical or probative relevancy<sup>8</sup> of one fact to the existence of another a presupposition that certain general propositions of experience are known to every one connected with the trial. The same forensic necessity introduces into a trial a large number of *deliberative* facts.<sup>9</sup> To reach a just conclusion, for example, as to the relative probability of two conflicting stories involves a careful adjustment, often almost intuitively conducted, of facts into the environment, of time, space and causation, which they must have had, if the truth regarding them

4. "The administration of justice becomes possible only by assuming that certain things have been regularly and definitely settled, and are so to remain." *State v. Wagner*, 61 Me. 178 (1873).

5. *Infra*, §§ 1837 *et seq.*

6. *Supra*, §§ 385 *et seq.*

7. *Infra*, §§ 1797 *et seq.*

8. *Supra*, § 59.

9. *Supra*, § 52.

has been told. Again, correct reasoning as to the credibility of witnesses involves knowledge of the more complicated psychological phenomena—the motives which actuate conduct,—the passions which blind, the prejudices that mislead. The common knowledge of mankind in general, and of the community in particular, both as to the physical and the psychological realms of nature, must therefore be at the disposal of the tribunal in the gathering, sifting and weighing process which is a necessary preliminary to the ascertainment of truth.<sup>10</sup>

**§ 692. (*Common Knowledge*); A Vital Atmosphere.**—Neither a trial nor an appellate court can adequately discharge their appropriate functions without constantly drawing upon their common or general knowledge. At every stage of the trial constant use is made of facts which no one disputes because everybody knows. Otherwise, the investigation would instantly and automatically stop. It is this great mass of undisputed fact which constitutes the vital element in which all parts of the complex machinery discharge their respective functions. The unknown fact—the truth of the disputed proposition—is determined by the use of known terms in language of recognized meaning. The relevancy and value of the evidentiary facts is dependent, as a rule, upon the truth of well-known propositions of experience. A large number of facts, assumed to be in accordance with the general understanding as to them, are used in supplementing, testing, explaining or otherwise affecting the facts testified to by the witnesses. The illustrations, analogies or arguments of counsel, the charge of the court, the deliberations of the jury rest for their force on an accepted basis of common experience, what is supposed to be generally known. This is, as it were, the atmosphere in which a trial necessarily takes place. Without it, no forensic contest could be carried to any definite result.<sup>1</sup>

10. "Whereabout in the law does the doctrine of judicial notice belong? Wherever the process of reasoning has a place, and that is everywhere. Not peculiarly in the law of evidence. It does, indeed, find in the region of evidence a frequent and conspicuous application; but the habit of regarding this topic as a mere title in the law of evidence obscures the true concep-

tion of both subjects. That habit is quite modern." Thayer, *Prelim. Treat.*, p. 278.

1. "The law, being a human contrivance and outgrowth, resting, as if by gravity, on human nature, human experience, and the principles that regulate human thoughts, takes all these things for granted." Thayer, *Prelim. Treat.*, 516.



**§ 693. (*Common Knowledge*); Administrative Advantages.—**

Were the forensic use of common knowledge not necessary, it should be adopted and given force and extension by reason of the marked advantages which it places within the reach of the administrative powers of a presiding judge. Few of the administrative duties of such a magistrate are more impressive, especially for the expediting of trials, than the necessity of seeing that any case before him keeps constantly, as it were, turning upon its hinge. That is, attention should be focused at all times on proof of the constituent facts or set of such facts as to which the parties are in dispute. The jury should at no time be allowed to digress to proof of facts which all persons know to be true, or as to which the parties do not care to enter into a contest. Whether the reason for lack of dispute be waiver<sup>1</sup> or common knowledge (so far as these may be distinguished) a presiding judge may, with propriety hasten to place the uncontroverted fact beyond the possibility of exerting a confusing influence on the real dispute between the parties. In this consideration, lies much of the forensic value of this use of common knowledge. However varied facts of usual experience may be in other particulars, they present the common feature that the only question with regard to them is one of "looking it up." They are not disputations, about which a difference of opinion may reasonably exist. The truth of the matter is definitely settled, one way or the other. Indeed it is this element which leads a judge to feel that time would be wasted were strict proof required in many cases where judicial cognizance is said to be taken, i. e., where use is made of the tribunal's general or common knowledge. As a method of expediting trials<sup>2</sup> and sustaining meritorious causes in an appellate court<sup>3</sup> the advantages of steadily extending the forensic use of common knowledge are obvious. The province of the jury, orderly administration and preservation of the rights of the parties alike require that the judge should be the mouthpiece of the mixed tribunal. Facts which the judge rightly regards as commonly known go to the jury as established, without further proof, and the judge may charge the jury to that effect.<sup>4</sup> But the jury must also make con-

1. *Infra*, § 869.

2. *Supra*, §§ 544 *et seq.*

3. *Campbell v. Wood*, 116 Mo. 196, 22 S. W. 796 (1893); *Hunter v. New York, etc., R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246 (1889).

4. *People v. Mayes*, 113 Cal. 618, 45 Pac. 860 (1896); *State v. Laffer*, 38 Iowa 422 (1874).

stant use of the knowledge of the community at large. Such knowledge the jury not only may but should use in reaching a decision upon the evidence;<sup>5</sup>—drawing, as it were, from the stock of general knowledge,<sup>6</sup> gained by observation<sup>7</sup> and experience.<sup>8</sup> This is especially appropriate, as it is the distinctive function of the jury to apply to the case the standards by which the community regulates its conduct.<sup>9</sup>

**§ 694. (*Common Knowledge*); General Propositions of Experience.**—The community has certain axioms upon which many of its conclusions are predicated and by which, as by a standard, it estimates the propriety of conduct. To these axioms, usually *sub silentio* appeal is constantly being made, by all connected with a trial. These results of common experience are the constant guide of the jury at all stages of the trial; in judging of the credibility of the witnesses,<sup>1</sup> the probability of their story,<sup>2</sup> as to the effect and bearing of the individual facts adduced in evidence.<sup>3</sup> The relevancy and probative force of evidence, that which makes it evidence, the force of every argument, that which makes it an

5. *Craver v. Hornburg*, 26 Kan. 94 (1881); *McGarrahan v. New York*, etc., R. Co., 171 Mass. 211, 220, 50 N. E. 611 (1898).

6. *Green v. Chicago*, 97 Ill. 370 (1881); *McGarrahan v. R. Co.*, 171 Mass. 211, 50 N. E. 610 (1898).

7. *Huntress v. Boston*, etc., R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600 (1890).

8. *Jenney Electric Co. v. Branham*, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395 (1896); *Manning v. Ry. Co.*, 166 Mass. 230, 44 N. E. 135 (1896) (that the trolley stick is not torn from the conductor's hands unless there is carelessness). *Parks v. Boston*, 15 Pick. (Mass.) 198, 199, 209 (1834); *State v. Lingle*, 128 Mo. 528, 31 S. W. 20 (1895); *Huntress v. Boston*, etc., R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600 (1890); *Willis v. Lance*, 28 Or. 371, 43 Pac. 384, 487 (1896).

9. *Leary v. Fitchburg R. Co.*, 173 Mass. 373, 53 N. E. 817 (1899) (alighting from cars); *Lamaroux v. Ry. Co.*, 169 Mass. 338, 47 N. E. 1009

(1897) (usual conduct at railroad crossing); *Lillibridge v. McCann*, 117 Mich. 84, 75 N. W. 288 (1898) (danger of sleeping on straw with a lighted pipe); *Illinois Central R. Co. v. Greaves*, 75 Miss. 360, 22 So. 792 (1897); *Willis v. Lance*, 28 Or. 371, 43 Pac. 487 (1896) (wind-record).

1. *Jenney Electric Co. v. Branham*, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395 (1896); *Schmidt v. Ins. Co.*, 1 Gray (Mass.) 129 (1854); *Wharton v. State*, 45 Tex. 2, 4 (1876).

2. *R. v. Sutton*, 4 M. & S. 523, 537, 542 (1816).

3. *Stevens v. State*, 3 Ark. 66 (1840); *Green v. Chicago*, 97 Ill. 370 (1881); *McGarrahan v. New York*, etc., R. Co., 171 Mass. 211, 50 N. E. 611 (1898); *Lillibridge v. McCann*, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381 (1898); *Whitney v. U. S.*, 167 U. S. 529, 546, 17 Sup. 857 (1896) (that pasturage on public unfenced lands is slight evidence of possession); *Head v. Hargrave*, 105 U. S. 45, 26 L. ed. 1028 (1881).

argument, and available for the use of counsel,<sup>4</sup> rests on some such basis of experience, a proposition of general knowledge known to the jury, and which constitutes the major premise of the syllogism upon which logical reasoning is based. When the evidence is submitted as a whole these postulates of general experience are the final test which the jury will apply in its act of judging as to the truth of the propositions in issue.<sup>5</sup> This portion of common knowledge of the community stands therefore in a general way, to the probative or constituent facts in the relation of the major to the minor premises of the syllogism. The function of evidence is merely to produce to the tribunal a minor premise. This is that which is apparent on the surface of a trial. The major premise is, however, absolutely essential and, for this, resort is mainly had to the common knowledge of the jury.<sup>6</sup> The differences between the parties are usually as to the existence of the minor premise. The major is frequently axiomatic, disputed by no one.

**§ 695. What Knowledge Is Common.**—The test of what knowledge is common is not furnished by any individual judge or any particular jury. Neither of these judicial tribunals may ever have heard of the fact claimed to be “commonly known.” Their ascertainment may require a long course of laborious investigation. Common knowledge covers such facts of notoriety and general acceptance as the ideal judge and jury *should* know;—the knowledge each would have if he were a perfect representative of the community.<sup>1</sup> The tribunal, both court and jury,<sup>2</sup> will as-

4. *State v. Lingle*, 128 Mo. 528, 31 S. W. 20 (1894); *State v. Marsh*, 70 Vt. 288, 40 Atl. 837 (1898) (inquest methods).

5. *McGarrahan v. New York, etc.*, R. Co., 171 Mass. 211, 50 N. E. 611 (1898); *Parks v. Boston*, 15 Pick. (Mass.) 198 (1834).

6. *Supra*, § 694.

1. Undoubtedly this definition fails to cover all cases where the court assumes a fact to be true without evidence. In such instances *waiver*, plays, at times, an important part. Where counsel are not prepared to admit *eo nomine*, the existence of a fact, which in reality they do not con-

trovert, much the same result is attained by failing to produce evidence against the positive claim of the party relying on the fact. The court feels justified as an administrative matter, in assuming it to be true, not because it is a fact of common knowledge, but because it is practically conceded. The desire of a court on appeal to save a case deemed meritorious from reversal on account of a technical failure of proof has had an effect in the same direction.

2. *Com. v. Peckham*, 2 Gray (Mass.) 514 (1854) (gin intoxicating); *Murdock v. Sumner*, 22 Pick. (Mass.) 156 (1839); *Spengler v. Williams*, 67

sume such facts to be true, without evidence,<sup>3</sup> unless and until the judge demands that proof be furnished as to them. To such facts, the observations of Lord Ellenborough in *Peltier's Case* (28 State Trials, 616) (1803), speaking of an admission that Napoleon Bonaparte was Chief Consul and France and England at peace on a certain date, may well be applied. "They were capable of easy proof if they had not been admitted. Their notoriety seems to render the actual proof very unnecessary."

**§ 696. (*What Knowledge is Common*); Knowledge as Affected by Jurisdiction.**— Courts of general jurisdiction do not treat as matters of common knowledge facts of merely local notoriety. Within limits not well defined, and following, in part, the analogy of the court's knowledge of law,<sup>1</sup> it is, as a rule, rather the community *for* which than the community *in* which the judge is sitting which determines the range of the facts which he will treat as common knowledge. A court of general jurisdiction will not regard it as commonly known that there are banks in a certain

Miss. 1, 6 So. 613 (1889) (attractiveness to children of loosely piled lumber).

3. *Alabama*.— *Gordon v. Tweedy*, 74 Ala. 232, 41 Am. Rep. 813 (1883).

*Connecticut*.— *State v. Main*, 69 Com. 123, 37 Alt. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623 (1897).

*Illinois*.— *City of Chicago v. Duffy*, 117 Ill. App. 261 (1904); *Secrist v. Petty*, 109 Ill. 188 (1883).

*Indiana*.— *State v. Downs*, 148 Ind. 324, 47 N. E. 670 (1897).

*Kansas*.— *Sun Ins. Office v. Western Woolen Mill Co.*, (Kan. 1905) 82 Pac. 513.

*Nebraska*.— *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, 93 Am. St. Rep. 431 (1901).

*United States*.— *King v. Gallun*, 109 U. S. 99, 3 S. Ct. 85, 27 L. ed. 870 (1883).

*England*.— *Crawcour v. Salter*, 18 Ch. D. 30, 51 L. J. Ch. 495, 45 L. T. Rep. N. S. 62, 30 Wkly. Rep. 21 (1881); *Ex p. Powell*, 1 Ch. D. 501, 45 L. J. Bankr. 100, 34 L. T. Rep.

N. S. 224, 24 Wkly. Rep. 378 (1875); *Lumley v. Gye*, 2 E. & B. 216, 267, 17 Jur. 827, 22 L. J. Q. B. 463, 1 Wkly. Rep. 432, 75 E. C. L. 216 (1853). All things which are or should be well known in the community. *Chicago v. Duffy*, 117 Ill. App. 261 (1904). Such things as all persons of ordinary intelligence are presumed to know need not be proved. *State v. Dunn*, 221 Mo. 530, 120 S. W. 1179 (1909).

Judicial knowledge has been said to be superior as a means of establishing facts. It stands for proof and so displaces evidence. *State v. Main*, 69 Conn. 123, 136, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623 (1897). "Jurors are not to be presumed to be ignorant of what everybody else knows." *Com. v. Peckham*, 2 Gray 514, per Metcalf, J. The court notices, without more "the usual and normal state of things." *Ryder v. Womburel*, L. R. 4 Ex. 32 (necessaries for an infant).

1. *Supra*, § 583.

town,<sup>2</sup> a railroad fenced at a given spot,<sup>3</sup> or that a particular tract of land must be irrigated to raise crops on it.<sup>4</sup> The judge of such a court will not know local conditions as to agriculture, the state of the weather in a particular neighborhood, what prices the inhabitants get for their crops.<sup>5</sup> Neither will he know as to the mail service,<sup>6</sup> and the like, in a small community. The judge of a local court with equal propriety might regard as commonly known facts of the same class because the local community, for which he is acting, is thoroughly familiar with them. The state court itself will regard as matters of common knowledge precisely similar facts when known through the state,<sup>7</sup> or generally known throughout a large city in which it is sitting.<sup>8</sup>

The same considerations naturally have a bearing upon actual knowledge, or belief, on the part of the judge which, in turn, operates in deciding whether, in any particular case, it is safer to require evidence of a fact.

**§ 697. (*What Knowledge is Common*); Restricted Communities.**—On the contrary, facts may be regarded as commonly known even by a judge of general jurisdiction;—provided they are so known and understood in a limited community with which the judge is specially familiar and, for which, in a real sense, he may be regarded as sitting. Thus, the legal profession is, to a certain extent, the community of all judges. It is not necessary to prove to a judge facts of a technical nature notorious in the legal profession. In the same way courts dealing customarily with special subjects, as maritime or patent cases, regard as generally known facts commonly agreed upon among persons experienced in the particular branch in which the presiding judge is himself expert. In this connection, these persons constitute the judge's "community."

2. *Bartholomew v. Everett First Nat. Bank*, 18 Wash. 683, 52 Pac. 239 (1898).

3. *Texas Cent. R. Co. v. Childress*, 64 Tex. 346 (1885).

4. *Slattery v. Harley*, 58 Neb. 575, 79 N. W. 151 (1899); *McGhee Irr. Ditch Co. v. Hudson*, 85 Tex. 587, 22 S. W. 398 (1893).

5. *McCormick Harvesting Mach. Co. v. Jacobson*, 77 Iowa 582, 42 N. W. 499 (1889).

6. *Ferrier v. Storer*, 63 Iowa 484,

19 N. W. 288, 50 Am. Rep. 752 (1884).

7. *Prescott Irr. Co. v. Flathers*, 20 Wash. 454, 55 Pac. 635 (1899) (sage brush land requires irrigation in order to grow crops).

8. *Morel v. Stearns*, 37 Misc. (N. Y.) 486, 75 N. Y. Suppl. 1082 (1902) (course of mail in New York city); *Walker v. Walker*, 3 Abb. N. Cas. (N. Y.) 12 (1877) (fall in real estate prices in New York city).

**§ 698. (*What Knowledge is Common*); Potential Knowledge.**

— The average community, in addition to facts directly known has a certain knowledge as to the reach of the knowable, especially along scientific, historical or technical lines, and knows where reliable information concerning them is stored. As to these facts, about which no dispute exists which are definitely settled, in a particular way, the easy and sensible thing for a court to do is what any intelligent person would do in his private affairs;—“look it up” in an encyclopædia, atlas, scientific treatise or other work of standard authority. The knowledge so acquired is deemed common knowledge. In other words, regarding many facts, generally known and accepted by the community, its knowledge is rather potential than actual.<sup>1</sup> The thing which really is notorious is not the fact itself but the source of information as to it. If a date is called for, or information sought as to changes of the moon, the average member of the community knows that he has merely to go to the almanac and find out. If he desires to know the population of his town, he consults the census table. For historical events, he resorts to the general or local history or the encyclopædia. If he wishes to know the location of a place or the meaning of a word, he examines the geography or the dictionary. In any dispute not judicial, between members of the community, the result of such a reference would at once be accepted as final. In any scientific system of forensic evidence the same proceeding should be possible. It cannot be doubted that upon logical grounds the statement found in the almanac, census table, history, dictionary, geography, etc., is a probative fact. It is made by a person, or persons, of adequate knowledge, with no motive to misrepresent. The statement has remained unchallenged by those familiar with or interested in the subject-matter. In most instances, the further peculiarity is presented that this is not only a legitimate but a *necessary* method of proving the facts in question. A witness of special skill — an “expert” so-called<sup>2</sup> — assuming that it were reasonable and possible to require and feasible to secure his attendance, could merely verify the authority of the books referred to or, in case of a conflict of authority, state an “opinion” as to which of two views is

1. Scientific terms.— If a person desires to know the meaning of a scientific term, he looks it up in an appropriate treatise. The administrative

power of the presiding judge enables him to do the same. *State v. Wilhite*, (Iowa 1907) 109 N. W. 730.

2. *Infra*, § 1805.

correct. It is a marked peculiarity of the English law of evidence that any *proof* of many facts of common knowledge, other than by this expensive method of expert testimony is practically impossible of attainment. What stands in the way of receiving as evidence a relevant and necessary statement of the treatise itself, is the "rule" against hearsay.<sup>3</sup> The declarant, i. e., the writer of the printed statement, is not under oath and subject to cross-examination. The elements of relevancy and necessity essential to constitute, in most cases, an exception to the hearsay rule, and usually sufficient for that purpose,<sup>4</sup> are here presented. It would be obviously fairer to the litigants that the treatises, almanacs, official reports, tables and other documents should, so far as practicable, be introduced in evidence, that the element of surprise may be minimized or eliminated. No such exception has, however, been established. In view of the fundamental principle of judicial administration that a party shall be entitled to introduce the best evidence of a fact practically within his power,<sup>5</sup> the expedient has been adopted of circumventing the operation of the hearsay rule by treating certain classes of these facts as within the scope of judicial cognizance. The court examines the recognized source of information and assumes, as an administrative matter, the fact there stated to be correct. This course is made easier by the circumstance that the facts so ascertained are not among the *res gestæ*.<sup>6</sup>

§ 699. A. General Notoriety.—It has been suggested that the use of common knowledge of fact should be limited to matters of general notoriety,<sup>1</sup> and that care be employed to guard against laxity in determining what facts shall be deemed notorious.<sup>2</sup> Every reasonable doubt as to whether sufficient notoriety exists should, it is said, be resolved in the negative.<sup>3</sup> The general administrative rule, as will be made plain by the cases hereafter

3. *Infra*, §§ 2698 *et seq.*

4. *Infra*, §§ 2762 *et seq.*

5. *Supra*, § 334.

6. *Supra*, § 47.

1. There is a prudent limitation to be put upon this principle so as to confine it to matters of a general and public nature or such as do not concern individuals or local communities. The facts must be of such age or duration as to have become established as

part of the common knowledge of well-informed persons, at least." *Georgia, etc., R. R. v. Gaines*, 88 Ala. 377 (1889); *Morris v. Edwards*, 1 Ohio, 189 (1823).

2. *Brown v. Piper*, 91 U. S. 37, 43 (1875).

3. *Timson v. Manufacturers' etc. Co.*, 220 Mo. 580, 117 N. Y. Suppl. 30 (1909).

cited, is, however, well settled;<sup>4</sup>—that where a fact collaterally or deliberately relevant is notorious in the court's general or restricted community no proof of it need be offered.

**§ 700. (A. General Notoriety); Classes of Facts so Established; Res Gestæ.**—As elsewhere stated<sup>1</sup> use may be made of common knowledge in the establishment of facts which are outside the necessity for strict proof. Where the fact in question is one of the *res gestæ*,<sup>2</sup> or a probative one necessary to proof of the *res gestæ*,<sup>3</sup> *a fortiori* where it is a constituent fact, either party is entitled to insist within the limits prescribed by reason, that proof shall be furnished as to its existence. It is not, therefore, established by the use of common knowledge. Thus it cannot be taken for granted, by the use of such information, that a party has performed his contract,<sup>4</sup> that a destroyed painting was indecent,<sup>5</sup> that to hold certain political views in a certain county at a given time was dangerous to life and property,<sup>6</sup> that

4. *Illinois*.—Pierce v. Coryn, 139 Ill. App. 445 (1908).

*Missouri*.—Reineman v. Larkin, 222 Mo. 156, 121 S. W. 307 (1909); Timson v. Manufacturers' Etc. Co., 220 Mo. 580, 119 S. W. 565 (1909).

*New Jersey*.—Connett v. United Hatters of N. A. (Ch. 1909) 74 Alt. 188 (Strike in large city).

*New York*.—In re Clement, 117 N. Y. Suppl. 30, 132 App. Div. 598 (1909).

*United States*.—Town of Fletcher v. Hickman, 165 Fed. 403, 91 C. C. A. 353 (1908).

1. *Supra*, § 693.

2. *Supra*, § 47.

*Georgia*.—Moore v. State, 126 Ga. 414, 55 S. E. 327 (1906) (former county prohibited sale of liquor).

*Iowa*.—State v. Blydenburg, (Iowa 1907) 112 N. W. 634.

*Kentucky*.—Guinn v. Cumberland County Court, 28 Ky. L. Rep. 759, 90 S. W. 274 (1906).

*Maine*.—Chase v. Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744 (1885).

*New Hampshire*.—Huntress v. Boston, etc., R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600 (1890).

*New York*.—Reynolds v. New York Cent., etc., R. Co., 58 N. Y. 248 (1874); Johnson v. Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375 (1859). But see

*United States*.—Minnesota v. Barber, 136 U. S. 313 (1890). On a criminal proceeding for receiving stolen cotton, the court will not dispense with proof that cotton is a thing of value. Wright v. State, 1 Ga. App. 158, 57 S. E. 1050 (1907). "A matter which could legitimately be the subject of inquiry in a court could not well be said to be so well established and to have acquired such notoriety as to come within the judicial knowledge of the court." Chicago, etc., R. R. v. Champion, (Ind. 1892) 32 N. E. 874. But see also Com. v. Peckham, 2 Gray (Mass.) 514 (1854) (gin) (intoxicating quality of certain liquor).

3. *Supra*, § 51.

4. Tunnison v. Field, 21 Ill. 108 (1859).

5. Shiverick v. Gunning Co., 58 Neb. 29, 78 N. W. 460 (1899).

6. "This fact ought to have been proved, and not been thus assumed by the court as a historical fact, of which



any other disputed material fact existed.<sup>7</sup> A judge cannot be asked to know local conditions without proof for the purpose of deciding whether a local ordinance is, or is not, unreasonable.<sup>8</sup> To say, as is sometimes done, that a party cannot take issue on a fact contrary to what the judge feels to be the common knowledge of the community,<sup>9</sup> seems to be of doubtful correctness. Though courts have shown themselves restive at being called upon to hear evidence to establish a fact which they thought they knew did not exist,<sup>10</sup> the true rule would be to the effect that the court cannot use, as a matter of common knowledge, a fact involved in the issue;—i. e., a *res gestæ* or constituent fact. Subject to the requirement of the use of reason,<sup>11</sup> it seems to be the clear right of a party to show the truth of a proposition of fact which the court believes is generally known to be untrue. If the litigant is willing to assume that burden, with all the logical difficulties it imposes, it is within his right so to contend and to offer evi-

the court could take judicial notice." *Simmons v. Trumbo*, 9 W. Va. 358 (1876).

7. *McKinnon v. Bliss*, 21 N. Y. 206 (1860); *Gregory v. Baugh*, 4 Rand. (Va.) 611 (1827).

See also, to the same effect, *Hill v. Hoefer* (Cal. App. 1908), 96 Pac. 116; *Hill v. Barner* (Cal. App. 1908), 96 Pac. 111; *Town of Windfall City v. State*, 172 Ind. 302, 88 N. E. 505 (1909); (newspaper has circulation).

**Criminal cases.**—The administrative importance of the observance of this rule is especially marked in criminal prosecutions. Thus, for example, on such an issue it will not be known, as a matter of common knowledge, that an axe is a deadly weapon. *Bush v. State*, (Tex. Cr. App. 1908), 107 S. W. 348.

The court will not judicially know the solvency of a party. *State v. Clements* (Mont. 1908), 95 Pac. 845.

8. *City of St. Louis v. St. Louis Theatre Co.*, 202 Mo. 690, 100 S. W. 627 (1907).

9. *Board of Commissioners v. Burford*, 93 Ind. 383 (1883); *Cooke v. Tallman*, 40 Iowa 133 (1874); *Attorney-General v. Foote*, 11 Wis. 14, 78

Am. Dec. 689 (1860). See also *U. S. v. Green*, 113 Fed. 683 (1902). Judicial notice has, moreover, been spoken of as a species of evidence. *Gay v. City of Eugene* (Or. 1909), 100 Pac. 306. It has even been claimed that judicial notice is superior to evidence as it stands for proof and fulfils the object which evidence is designed to fulfil and makes proof unnecessary. *Beardsley v. Irving*, 81 Conn. 489, 71 Atl. 580 (1909).

10. *Stanley v. McElrath*, (Cal. 1889) 22 Pac. 673; *Board of Commissioners v. Burford*, 93 Ind. 383 (1883); *Com. v. Marzynski*, 149 Mass. 68, 72, 21 N. E. 228 (1889); *Com. v. Crowley*, 145 Mass. 430, 14 N. E. 459 (1888); *Com. v. Peckham*, 2 Gray 514 (1854); *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. 80, 84, 85 (1890). Judicial notice is said to be merely a rule of evidence; and, if facts judicially noticed are disputable, the other party may rebut them. *Timson v. Manufacturers' Coal & Coke Co.*, 220 Mo. 580, 119 S. W. 565 (1909).

11. *Supra*, § 385.

dence to substantiate his contention. The court cannot deprive him of it by declaring the matter to be one within the scope of common knowledge;—declining to hear evidence on the subject and summarily rejecting the contention. Human experience fails to confirm the view that the generally accepted opinions or even universally assumed facts are invariably in accordance with the reality of things. While each community has nothing else to go by, it may well concede to the litigant the right of seeking to establish that the received view is erroneous. It is not within the function of the presiding justice to so far control a party's right to prove his case or disprove that of his antagonist, as to make any fact in the *res gestæ* beyond the domain of allegation and proof. It may be eminently proper to place the burden of evidence<sup>12</sup> upon the party who seeks to controvert a fact of common knowledge.

*Actions in Rem.*—The same rule in the use of common knowledge to establish facts in the *res gestæ* applies to actions *in rem*, so far as relates to the claim of any party to the proceeding. In like manner, in actions of interpleader<sup>13</sup> and other proceedings *quasi in rem*, or for possession of a fund a party is entitled to submit evidence in substantiation of all the material or constituent allegations of the right or liability on which he relies.

**§ 701. (A. General Notoriety; Classes of Facts so Established); Facts of Optional Admissibility.**—If, on the other hand, the fact in question be one of optional probative relevancy,<sup>1</sup> which the judge may reject or not, as he sees fit, he may, as a necessary consequence, require or dispense with strict proof of it at his option. In other words, he may allow general knowledge to take the place of proof, if he deems it good administration to do so.

**§ 702. B. What Facts are Covered by the Rule.**—"Courts will not pretend to be more ignorant than the rest of mankind."<sup>1</sup>

12. *Infra*, §§ 967 *et seq.*

13. *Smith v. Grand Lodge A. O. U. W. of Missouri*, 124 Mo. App. 181, 101 S. W. 662 (1907).

**Patents.**—As a rule, the *res gestæ* of a patent right cannot be established by way of common or judicial knowledge. Where neither the pleadings nor proof in a suit for infringement of a patent bring into the record the prior art, the court cannot take ju-

dicial notice of it on the question of the validity of the patent, except as to matters of general knowledge. *American Sulphite Pulp Co. v. De Grasse Paper Co.*, (N. Y. 1907) 157 Fed. 660 [decree reversed (C. C.) 151 Fed. 47 (1907)].

1. *Infra*, §§ 1748 *et seq.*

1. *Fisher v. Jansen*, 30 Ill. App. 91 (1888).

Speaking broadly, the entire range of human knowledge commonly accepted as true in the community for which the court sits is regarded by it as generally known and its correctness is assumed in dealing with the *res gestæ* which are proved to the tribunal.<sup>2</sup> The actual decisions as to common knowledge, certain of which are shortly to be stated, are merely illustrative and impose no limitation upon either the theoretical or actual scope of the very comprehensive procedural rule, which receives the entire range of human knowledge as an aid to the deliberations of the courts. An attempt to classify human knowledge in this connection must necessarily be in a sense arbitrary. It falls naturally, however, into certain broad divisions, distinct as a whole, though often indistinct in outline of boundary from cognate classes. Such are facts relating to (1) nature; (2) science; (3) geography; (4) human experience; (5) social life; (6) history; (7) business.

**2. Alabama.**—Wetzler v. Kelly, 83 Ala. 440, 3 So. 747 (1887).

**California.**—Baker v. Hope, 49 Cal. 598 (1875).

**Colorado.**—Griffith v. Denver Consol. Tramway Co., 14 Colo. App. 504, 61 Pac. 46, 48 (1900).

**Connecticut.**—Wordin's Appeal, 71 Conn. 531, 42 Atl. 659, 71 Am. St. Rep. 219 (1899).

**District of Columbia.**—Dye v. Virginia Midland R. Co., 20 D. C. 63 (1891).

**Georgia.**—Wight v. Wolff, 112 Ga. 169, 37 S. E. 395 (1900).

**Illinois.**—Chicago, etc., R. Co. v. Warner, 108 Ill. 538 (1884).

**Indiana.**—Jamieson v. Indiana Natural Gas, etc., Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652 (1891).

**Kentucky.**—Burns v. Ingersoll, 6 Ky. L. Rep. 742 (1885).

**Louisiana.**—Youree v. Vicksburg, etc., R. Co., 110 La. 791, 34 So. 779 (1903).

**Maine.**—White v. Phoenix Ins. Co., 83 Me. 279, 22 Atl. 167 (1891).

**Massachusetts.**—Com. v. Pear, 183 Mass. 242, 66 N. E. 719 (1903).

**Michigan.**—Gilbert v. Flint, etc., R. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592 (1883).

**Minnesota.**—Betcher v. Capital F. Ins. Co., 78 Minn. 240, 80 N. W. 971 (1899).

**Mississippi.**—Spengler v. Williams, 67 Miss. 1, 6 So. 613 (1889).

**Missouri.**—State v. Hayes, 78 Mo. 307 (1883).

**Nebraska.**—State v. Savage, 65 Neb. 714, 91 N. W. 716 (1902).

**New Jersey.**—Ware v. Chew, 43 N. J. Eq. 493, 11 Atl. 746 (1887).

**New York.**—Howard v. Moot, 64 N. Y. 262 [affirming 2 Hun 475, 5 Thomps. & C. 89] (1876).

**Oregon.**—Walsh v. Oregon R., etc., Co., 10 Or. 250 (1881).

**Texas.**—Smith v. Townsend, Dall. Dib. 569 (1844).

**Virginia.**—Thomas v. Com., 90 Va. 92, 17 S. E. 788 (1893).

**Washington.**—Bowman v. Spokane First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870 (1894).

**United States.**—Minnesota v. Barber, 136 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455 (1890).

**England.**—Henry v. Cole, 2 Ld. Raym. 811, 7 Mod. 103 (1702).

§ 703. (*B. What Facts are Covered by the Rule*); (1) **Nature.**—Notorious facts regarding the order of nature need not be proved. The natural order of events, so far as invariable,<sup>1</sup> and obvious to common apprehension are commonly known.<sup>2</sup> Of this nature is the succession of the seasons.<sup>3</sup>

In other words, the physical world, the operation of the established laws of nature,<sup>4</sup> including the application, in a familiar form, of combustion,<sup>5</sup> force,<sup>6</sup> gravitation,<sup>7</sup> momentum,<sup>8</sup> are not proper subjects of special knowledge;—or, as is usually said, to be proved by expert testimony.

Regularly recurring and approximately uniform succession of *weather* conditions, as heavy rains at a particular season of the

1. *Seufferle v. MacFarland*, 28 App. Cas. (D. C.) 94 (1906); *Rex v. Luffe*, 8 East 193, 9 Rev. Rep. 406 (1807). "The natural laws of which courts take judicial notice are such as are of uniform occurrence and invariable in their action." *Chicago, etc., R. R. v. Champion*, (Ind. 1892) 32 N. E. 874 (motion of a freight car under given conditions).

The effect of placing obstructions in streams, so far as uniform, will be commonly known. *Tewksbury v. Schulenberg*, 41 Wis. 584 (1877) (dams).

2. *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274, 292 (1872); *Burwell v. Brodie*, 134 N. C. 540, 47 S. E. 47 (1904) (planting time).

3. *Tomlinson v. Greenfield*, 31 Ark. 557 (1876); *Ross v. Boswell*, 60 Ind. 235 (1877); *Abel v. Alexander*, 45 Ind. 523 (1874); *Raridan v. Central Iowa R. Co.*, 69 Iowa 527 (1886). See also *Barber Asphalt Pav. Co. v. City of Wabash* (Ind. App. 1909), 86 N. E. 1034; *First Nat. Bank v. Rogers* (Okla. 1909), 103 Pac. 582 (succession of seasons).

**Agricultural seasons**, not being fixed by dates, cannot be judicially known with precision. *Gove v. Downer*, 59 Vt. 139, 7 Atl. 463 (1886) (pasture season).

4. *Cooper v. Mills County*, 69 Iowa 350, 28 N. W. 633 (1886) (action of

currents). Judicial notice must be taken of the primary physical laws. *Rome Ry. & Light Co. v. Keel*, 3 Ga. App. 769, 60 S. E. 468 (1908).

5. *Boothby v. Lacasse*, 94 Me. 392, 47 Atl. 916 (1900) (fire); *Welch v. Franklin Ins. Co.*, 23 W. Va. 288 (1883).

6. *Alabama*.—*Golson v. State*, 124 Ala. 8, 26 So. 975 (1899) (bullet); *Holmes v. State*, 100 Ala. 80, 14 So. 864 (1893) (hoe as a dangerous weapon).

*California*.—*Richardson v. Eureka*, 96 Cal. 443, 31 Pac. 458 (1892) (settling of building).

*Iowa*.—*Weane v. Keokuk, etc., R. Co.*, 45 Iowa 246 (1876).

*Michigan*.—*Passmore v. Passmore*, 60 Mich. 463, 27 N. W. 601 (1886).

*Mississippi*.—*Majors v. State*, (1904) 35 So. 825.

*Texas*.—*San Antonio & A. P. R. Co. v. Mertink*, (Tex. Civ. App. 1907) 102 S. W. 153 [*reversed* in 105 S. W. 485] (suction of rapidly moving body).

*Missouri*.—*Winters v. Hannibal, etc., R. Co.*, 39 Mo. 468 (1867).

7. *Paducah St. R. Co. v. Graham*, 15 Ky. L. Rep. 748 (1894) (fall from car).

8. *Chicago, etc., R. Co. v. Lewandowski*, 190 Ill. 301, 60 N. E. 497 (1901) (train of cars).

year,<sup>9</sup> may be a subject of common knowledge. But mere maxims of personal experience—as that a foggy night is followed by a foggy morning<sup>10</sup>—must be established by proof.

The operation of natural laws, fairly invariable in their action, may, as in case of the action of water in running streams, under varied common conditions,<sup>11</sup> be facts of notoriety.

**§ 704. (B. What Facts are Covered by the Rule; [1] Nature); Divisions of Time.**—The divisions of time into days, weeks, months, years and the like;<sup>1</sup> of days into hours, minutes and seconds,<sup>2</sup> the duration of these periods, respectively, and their order of succession, the order of the months,<sup>3</sup> the coincidence of particular days of the month with days of the week,<sup>4</sup> or of the days of the week with those of the month,<sup>5</sup> or of the days, either

9. *Elser v. Village of Gross Point*, 223 Ill. 230, 79 N. E. 27 (1906).

10. *Texas & N. O. R. Co. v. Langham*, (Tex. Civ. App. 1906) 95 S. W. 686.

11. *Morton v. Oregon Short Line Ry. Co.*, 48 Or. 444, 87 Pac. 151, 7 L. R. A. (N. S.) 344 (1906) (freshet). It need not be proved that when the specific gravity of a log becomes greater than that of water, it sinks to the bottom; or that if the stream has any considerable current, the log is apt to become embedded in the bottom. *Whitman v. Muskegon Log Lifting & Operating Co.*, 152 Mich. 645, 116 N. W. 614, 15 Detroit Leg. N. 383 (1908).

1. *Alabama*.—*Koch v. State*, 115 Ala. 99, 22 So. 471 (1896).

*Indiana*.—*Williamson v. Brandenberg*, 6 Ind. App. 97, 32 N. E. 1022 (1892).

*Iowa*.—*McIntosh v. Lee*, 57 Iowa 356, 10 N. W. 895 (1881).

*Louisiana*.—*Whaley v. Houston*, 12 La. Ann. 585 (1857).

*Maine*.—*Bar Harbor First Nat. Bank v. Kingsley*, 84 Me. 111, 24 Atl. 794 (1891).

*Maryland*.—*Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415 (1881).

*Minnesota*.—*Webb v. Kennedy*, 20 Minn. 419 (1874).

*New York*.—*Cohn v. Kahn*, 14 Misc. 255, 35 N. Y. Suppl. 829 (1895).

*Pennsylvania*.—*Hautsch v. Levan*, 1 Woodw. 456 (1869).

2. *Hedderich v. State*, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768 (1884); *Safford v. Douglas*, 4 Edw. (N. Y.) 537 (1844) (fractions of a day judicially noticed).

Judicial cognizance is not taken of the hours of the day in England. *Collier v. Nokes*, 2 C. & K. 1012, 5 Exch. 275, 61 E. C. L. 1012 (1849).

3. *Hoyle v. Lord Cornwallis*, 1 Str. 387 (1720); *Harvey v. Broad*, 2 Salk. 626 (1704).

4. *Ryer v. Prudential Ins. Co.*, 95 N. Y. Suppl. 1158, 110 App. Div. 897 (1905); *Rice v. Mead*, 22 How. Pr. (N. Y.) 445 (1862). See also *Dime Deposit, etc., Bank v. Arnold*, 6 Lack. Leg. N. (Pa.) 210, 7 North. Co. Rep. (Pa.) 281, 14 York Leg. Rec. (Pa.) 101 (1898). See also *Beardsley v. Irving*, 81 Conn. 489, 71 Atl. 580 (1909); *Hanson v. Shackelton*, 4 Dowl. 48 (1835) (certain day of month falls on Sunday).

5. *Alabama*.—*Brennan v. Vogt*, 97 Ala. 647, 11 So. 893 (1893).

*Florida*.—*Dawkins v. Smithwick*, 4 Fla. 158 (1851).

*Georgia*.—*Dorough v. Equitable Mortg. Co.*, 118 Ga. 178, 45 S. E. 22 (1903).

of the month or week to a given event such as a term of court<sup>6</sup> are commonly, "judicially," known.

*Difference of time* caused by differences in longitude<sup>7</sup> will be regarded as commonly known.

*Term Time or Vacation.*—Coupled with judicial knowledge of the times legally appointed for holding sessions of court,<sup>8</sup> the judge knows without proof on what day of the week or month a given day of a particular term has occurred or will hereafter occur;<sup>9</sup> and, *vice versa*, on what term of court a particular month<sup>10</sup> or day of the month,<sup>11</sup> falls. By consequence it knows whether an act done on a particular day was done in term time or in vacation.<sup>12</sup>

**§ 705. (B. What Facts are Covered by the Rule; [1] Nature); Properties of Matter.**—A court, *suo motu*, will know whatever everyone, as a rule, knows about the characteristic properties of material substances, in solid, liquid,<sup>1</sup> gaseous, etheric or

*Indiana.*—Swales v. Grubbs, 126 Ind. 106, 25 N. E. 877 (1890).

*Iowa.*—McIntosh v. Lee, 57 Iowa 356, 10 N. W. 895 (1881).

*Maine.*—Bar Harbor First Nat. Bank v. Kingsley, 84 Me. 111, 24 Atl. 794 (1891).

*Maryland.*—Philadelphia, etc., Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415 (1881).

*Mississippi.*—Morgan v. Burrow, (1894) 16 So. 432.

*Missouri.*—Jordan v. Chicago, etc., R. Co., 92 Mo. App. 84 (1902).

*New Jersey.*—Reed v. Wilson, 41 N. J. L. 29 (1879).

*New York.*—Ryer v. Prudential Ins. Co., 85 N. Y. App. Div. 7, 82 N. Y. Suppl. 971 (1903).

*Ohio.*—Warren v. Fountain Square Theatre Co., 5 Ohio S. & C. Pl. Dec. 559, 7 Ohio N. P. 538 (1900).

*Pennsylvania.*—Wilson v. Van Leer, 127 Pa. St. 371, 17 Atl. 1097, 14 Am. St. Rep. 854 (1889).

*England.*—Hanson v. Shackelton, 4 Dowl. P. C. 48, 1 H. & W. 542 (1835).

6. Bethune v. Hale, 45 Ala. 522 (1871).

What are legal days will be judicially known to the court, though, in

part, as facts established by law. Schlingmann v. Fiedler, 3 Mo. App. 577 (1877).

7. Curtis v. March, 3 H. & N. 866, 4 Jur. (N. S.) 1112, 28 L. J. Exch. 36 (1858). The longitude of a particular place, as east or west of Greenwich, Eng., and its consequent difference in time, will be known as a matter of common knowledge. Curtis v. March, 28 L. J. Ex. 36 (1858) per Pollock, C. B.

8. *Supra*, § 670.

9. Lewis v. Wintrobe, 76 Ind. 13 (1881).

10. Durre v. Brown, 7 Ind. App. 127, 34 N. E. 577 (1893).

11. Rodgers v. State, 50 Ala. 102 (1874); Taylor v. Canaday, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20 (1900); Barnwell v. Marion, 58 S. C. 459, 36 S. E. 818 (1900).

12. Van Duzer v. Towne, 12 Colo. App. 4, 55 Pac. 13 (1898); Buckles v. Kentucky Northern Bank, 63 Ill. 268 (1872); Williams v. Hubbard, 1 Mich. 446 (1850); Hadley v. Bernero, 97 Mo. App. 314, 71 S. W. 451 (1902).

1. Hughes v. Muscatine County, 44 Iowa 672 (1876) (buoyancy of water).

electrical<sup>2</sup> forms. In many instances this knowledge is merely knowing the names of things in general use. It is recognizing the connotations of a specified class of objects.

§ 706. (*B. What Facts are Covered by the Rule; [1] Nature; Properties of Matter*); Solid.—Regarding solids, the court will notice facts with which the community is familiar;—as that certain substances are opaque,<sup>1</sup> durable<sup>2</sup> or calculated to control the movements of gases.<sup>3</sup> The court will know that other solid substances like dynamite<sup>4</sup> are dangerous by reason of their liability to create an explosion.<sup>5</sup> So it need not be proved to the

“Certain witnesses were permitted, against plaintiff’s objection, to express in their evidence an opinion as to the immediate cause of the falling of the bridge, that it was caused by the water and ice raising the bents, whereby the stringers were displaced. It appears to us that this is not a matter of which experts should be permitted to testify. It would follow as a natural consequence, that if the ice was raised by the water, and the bents were so constructed that they rested upon the ice, or rather the ice could not rise without raising the bents, the bridge would be elevated by the ice. The effect of the force of the water was well understood by the jury, and could have been determined without the aid of experts. They should have had the facts as to the construction of the bridge, the character of the ice, the rise of the water, etc., presented in evidence, and then have been permitted to find the effects produced by the physical conditions found by them to have had existence. They required no opinion of experts to enable them to determine whether water and ice, under given conditions, would or would not raise the bents of the bridge. This question they could well determine upon being informed of all the facts. The evidence under consideration was erroneously admitted.” *Hughes v.*

*Muscatine Co.*, 44 Iowa 672–676 (1876).

2. *Electricity*.—That an electrically charged light wire is dangerous when it contacts with a telephone wire need not be proved. *Central Union Telephone Co. v. City of Conneaut*, 167 Fed. 274 (1909). Certain of the more obvious properties of electricity employed in usual ways are matters of common knowledge.

1. *Ware v. Chew*, 43 N. J. Eq. 493, 11 Atl. 746 (1887) (brick wall).

2. *Worden’s Appeal*, 71 Conn. 531, 42 Atl. 659, 71 Am. St. Rep. 219 (1899) (asphalt); *Newlin v. St. Louis & S. F. R. Co.*, 222 Mo. 375, 121 S. W. 125 (1909) (rotting of wood).

3. *Willis v. Lance*, 28 Or. 371, 43 Pac. 483, 487 (1896) (deflect currents of air).

4. *Fitzsimons, etc., Co. v. Braun*, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421 [*affirming* 94 Ill. App. 533] (1902).

5. But facts of limited acceptance, as that certain solids, under exceptional circumstances, develop unusual properties, as liability to explosion (*Cherokee, etc., Coal, etc., Co. v. Wilson*, 47 Kan. 460, 28 Pac. 178 [1891] [fire dust], or to inflict serious injury (*Harris v. Cameron*, 81 Wis. 239, 51 N. W. 437 [1892] [air gun]) must be proved.

court that substances like tobacco,<sup>6</sup> with the various forms of which the court is familiar,<sup>7</sup> are injurious to health by reason of their effects on the human system.

**§ 707. (B. What Facts are Covered by the Rule; [1] Nature; Properties of Matter); Liquid.**—No proof need be offered of the well-known qualities of common forms of matter in a liquid state. Thus, unless the legislature has declared otherwise,<sup>1</sup> courts will know that coal oil is inflammable,<sup>2</sup> but not that an inflammable quality attaches to other substances not commonly so regarded, especially where the fact is strenuously controverted as one of the *res gestæ*.<sup>3</sup> The court will not require evidence that sea water is calculated to damage dry goods.<sup>4</sup> In the same way, a court requires no evidence that sulphuric<sup>5</sup> or other acids are corrosive; nor need proof be offered that certain liquids packed in bottles are subject to effervescence and that this fact removes danger of bursting.<sup>6</sup>

**§ 708. (B. What Facts are Covered by the Rule; [1] Nature; Properties of Matter; Liquid); Intoxicating Liquors.**—Hotly contested differences of opinion have arisen as to the court's

6. *State v. Johnson*, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405 (1893).

The injurious nature of cigarettes is not known by the supreme court of the United States. *Austin v. Tennessee*, 179 U. S. 343, 21 S. Ct. 122, 45 L. ed. 224 (1900). It is known to the Supreme Court of Tennessee. *Austin v. State*, 101 Tenn. 563, 48 S. W. 305, 70 Am. St. Rep. 703, 50 L. R. A. 478 (1898).

7. *Com. v. Marzyuski*, 149 Mass. 68, 21 N. E. 228 (1889) (cigars and tobacco are not "drugs and medicines"); *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636 (1885) (cigars); *Austin v. Tennessee*, 179 U. S. 343, 21 S. Ct. 132, 45 L. ed. 224 [*affirming* 101 Tenn. 563, 48 S. W. 305, 70 Am. St. Rep. 703, 50 L. R. A. 478] (1900).

1. *Wood v. North Western Ins. Co.*, 46 N. Y. 421 (1871).

2. *State v. Hayes*, 78 Mo. 307 (1883); *Bennett v. North British*,

etc., *Ins. Co.*, 8 Daly (N. Y.) 471 (1879). The court knows that crude oil is of an inflammable nature. *Texas & N. O. R. Co. v. Bellar*, (Tex. Civ. App. 1908) 112 S. W. 323. The judge knows equally well, that the temperature is important in determining the amount of coal oil which would evaporate or soak into an article on which it is poured. *State v. Nordall*, 38 Mont. 327, 99 Pac. 960 (1909).

3. *Mosley v. Vermont Mut. F. Ins. Co.*, 55 Vt. 142 (1882) (gin and turpentine avoiding a contract of fire insurance).

4. *Bradford v. Cunard Steamship Co.*, 147 Mass. 55, 16 N. E. 719 (1888).

5. *State v. Nerzinger*, 220 Mo. 36, 119 S. W. 379 (1909).

6. *Buckley v. Garden City Co.*, 111 N. Y. Supp. 23, 127 App. Div. 52 (1908).



knowledge, judicial or common, of the intoxicating quality of various alcoholic beverages.<sup>1</sup> The complicating circumstance is usually presented that the question most frequently arises in criminal cases, or in civil cases involving a statutory penalty or forfeiture, either in express terms or indirectly by refusing a vendor payment for articles of monetary value sold and delivered to the defendant. In all such connections the inertia of the court<sup>2</sup> may, very properly, be greatly increased, even where the fact is not one of the *res gestæ*,<sup>3</sup> as it most frequently is.<sup>4</sup> For example, the fact that certain malt liquors, such as ale,<sup>5</sup> lager beer<sup>6</sup> or porter<sup>7</sup> possess intoxicating quality is too commonly known to require proof;—unless the fact be a *res gestæ* or constituent one. But the judge cannot take as being commonly known the fact that all malt liquors are intoxicating.<sup>8</sup>

**§ 709. (B. What Facts are Covered by the Rule; [1] Nature; Properties of Matter; Liquid; Intoxicating Liquors); Judicial Knowledge.**—On the other hand, the legislature in attempting to prohibit the sale of intoxicating liquors has frequently

1. See *Lemly v. State*, 69 Miss. 628, 20 L. R. A. 645, and note (1892). For an illuminating and valuable treatise on this subject reference may be had to JOYCE ON INTOXICATING LIQUORS.

2. *Infra*, § 1016.

3. *Supra*, § 47.

4. The contrary has been held. *Peterson v. State*, 63 Neb. 251, 88 N. W. 549 (1901); *Maier v. State*, 2 Tex. Civ. App. 296 (1893); *U. S. v. Ducournau*, 54 Fed. 138 (1891).

5. *Wiles v. State*, 33 Ind. 206 (1870); *People v. Hawley*, 3 Mich. 330 (1854); *Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049 (1889); *Killip v. McKay*, 13 N. Y. St. 5 (1888); *Rau v. People*, 63 N. Y. 277 (1875); *Johnston v. State*, 23 Ohio St. 556 (1873). To the contrary, see *State v. Biddle*, 54 N. H. 379 (1874). See *Garst v. State*, 68 Ind. 101 (1879); *Shaw v. State*, 56 Ind. 188 (1877); *Haines v. Hanrahan*, 105 Mass. 480 (1870); *State v. Lemp*, 16 Mo. 389 (1852); *Barnes v. State*,

(Tex.) 44 S. W. 491 (1898); *State v. Barron*, 37 Vt. 57 (1864).

6. That lager beer is a malt liquor has been treated as a subject for common knowledge. "The government might almost as well be required to prove that gin or whiskey or brandy is a strong liquor as to prove that lager beer is a malt liquor." *State v. Goyette*, 11 R. I. 592 (1877). See also *Adler v. State*, 55 Ala. 16, 23 (1876).

7. *Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669 (1889); *Nevin v. Ladue*, 3 Den. (N. Y.) 437 (1846).

8. *Eaves v. State*, 113 Ga. 749, 39 S. E. 318 (1901); *State v. Sioux Falls Brewing Co.*, 5 S. D. 39, 45, 58 N. W. 1 (1894). Where the statute regulating the sale of intoxicating liquor fails to enumerate "beer" the court may very properly decline to take judicial knowledge of its intoxicating quality. *Dallas Brewery v. Holmes Bros.*, (Tex. Civ. App. 1908), 112 S. W. 122.

seen fit to declare, either in express terms or by necessary implication or statutory construction, that certain malt liquors, e. g., ale<sup>1</sup> or lager beer, shall be taken as intoxicating. Under these conditions the intoxicating quality of such beverages is taken from the list of matters of common knowledge and transferred to that of judicial, properly so called.

*Federal Courts.*—Federal courts, taking judicial notice of the matters of law known to the state courts of the same jurisdiction,<sup>2</sup> have found it easy to take the same judicial knowledge of notorious facts of common knowledge. Thus, where the court of Hawaii has treated the fact that okolihoa beverage made from the ti root is a highly intoxicating spirituous liquor, to be a matter of judicial knowledge, a federal court sitting for Hawaii will not require proof of it.<sup>3</sup>

*In general,* where a statute enumerates any liquors, distilled, fermented,<sup>4</sup> malt,<sup>5</sup> or vinous, as among those the sale of which

1. *State v. Wadsworth*, 30 Conn. 55 (1861).

2. *Supra*, §§ 584 *et seq.*

3. *The Kawaiiani*, 63 C. C. A. 347, 128 Fed. 879 (1904). "In respect to the nature of the liquor in question, it appeared without conflict in the evidence that it is the product of the ti root grown in the Hawaiian Islands, and known as 'okolihoa,' and so well known there that the Supreme Court of the Republic of Hawaii, in deciding the case of a defendant convicted of the offense of distilling spirituous liquor without a license, in violation of a certain section of the Session Laws of the Republic of 1892, spoke of it as 'a well-known spirituous liquor of great strength, and very intoxicating.' *Rep. Ha. v. Akoni*, 11 Hawaii 53. In that case the liquor itself was produced before the jury for examination, just as the liquor in question here was produced before the court, and examined by the witnesses, one at least of whom testified that it was okolihoa. In *Commonwealth v. Peckham*, 2 Gray, 514, the court held that an allegation, in an indictment, of an unlawful sale of intoxicating liquor, is supported by

proof of a sale of gin, without proof that gin is intoxicating, saying: 'Jurors are not presumed to be ignorant of what everybody else knows, and they are allowed to act upon matters within their general knowledge without any testimony on those matters. Now, everybody who knows what gin is knows not only that it is a liquor, but also that it is intoxicating. And it might as well have been objected that the jury could not find that gin was a liquor, without evidence that it was not a solid substance, as that they could not find that it was intoxicating, without testimony to show it to be so. No juror can be supposed to be so ignorant as not to know what gin is. Proof, therefore, that the defendant sold gin, is proof that he sold intoxicating liquor. If what he sold was not intoxicating liquor, it was not gin.' " *The Kawaiiani*, 63 C. C. A. 347, 349 (1904).

4. *State v. Frederickson*, 101 Me. 37, 63 Atl. 535 (1907) (cider); *State v. Lemp*, 16 Mo. 389 (1852) (beer). Where "beer" is enumerated as an intoxicating liquor it has been held that if the accused

is prohibited as intoxicating, the intoxicating quality of such a liquor is made a direct result of a law which the court is called upon to enforce.<sup>6</sup> Knowledge of it is, therefore, judicial.<sup>7</sup> The

claims that he has sold a kind of beer which is not intoxicating the burden of evidence is on him to show such to be the fact. *State v. Cloughly*, 73 Iowa 626, 35 N. W. 652 (1887). The knowledge as to the intoxicating quality of *cider* is, under such circumstances judicial.

*Iowa*.—*State v. Hutchinson*, 72 Iowa 561, 34 N. W. 421 (1887).

*Maine*.—*State v. Roach*, 75 Me. 123 (1883); *State v. McNamara*, 69 Me. 133 (1879).

*Massachusetts*.—*Com. v. McGrath*, 185 Mass. 1, 69 N. E. 340 (1904); *Com. v. Brothers*, 158 Mass. 200, 206, 33 N. E. 386 (1893); *Com. v. Dean*, 14 Gray (Mass.) 99 (1859).

*Michigan*.—*People v. Kinney*, 124 Mich. 486, 83 N. W. 147 (1900); *People v. Adams*, 95 Mich. 541, 55 N. W. 461 (1893).

*Vermont*.—*State v. Thornburn*, 75 Vt. 18, 52 Atl. 1039 (1903); *State v. Waite*, 72 Vt. 108, 47 Atl. 397 (1900). See also *State v. Spaulding*, 61 Vt. 505, 17 Atl. 844 (1889).

5. *Connecticut*.—*State v. Brown*, 51 Conn. 1 (1883); *State v. Wadsworth*, 30 Conn. 55 (1861).

*Indiana*.—*Douglas v. State*, 21 Ind. App. 302, 52 N. E. 238 (1898); *Walsh v. State*, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664 (1890).

*Massachusetts*.—*Com. v. Snow*, 133 Mass. 575 (1882); *Com. v. Anthes*, 12 Gray (Mass.) 29 (1858) (lager beer).

*Missouri*.—*State v. Watts*, 101 Mo. App. 658, 74 S. W. 377 (1903).

*Rhode Island*.—*State v. Morehead*, 22 R. I. 272, 47 Atl. 545 (1901); *State v. Rush*, 13 R. I. 198 (1883).

6. *Supra*, § 637.

7. *Com. v. Timothy*, 8 Gray (Mass.) 480 (1857). "The statute provides that the words 'intoxicating liquors' as used therein, 'shall be construed to mean alcohol, wine, beer, spirit-

uous, vinous and malt liquors, and all intoxicating liquors, whatever.' Alcohol is therefore an intoxicating liquor, regardless of the fact that the quantity drank at any one time would not have that effect. It is immaterial, in a statutory sense, what effect alcohol may have on the human system; it is an intoxicating liquor. However much it may be diluted, it must remain an intoxicant when used as a beverage. That is to say the statute provides that alcohol is an intoxicant whenever and however used as a beverage; and no matter how it may be diluted or disguised it so remains simply because the statute so declares. The liquor in question contained alcohol, and therefore it, as a matter of law, was intoxicating." *State v. Certain Intoxicating Liquors*, 76 Iowa 243, 41 N. W. 6, 2 L. R. A. 408 (1888), per Seevers, J., quoted in *Joyce on Intoxicating Liquors*. "When it appears that a liquor comes within the scope of the forbidden enumeration, that moment its intoxicating character becomes fixed by law and its non-intoxicating character, as a matter of fact, becomes entirely immaterial with respect to the application of the statute." *State v. Frederickson*, 101 Me. 37, 63 Atl. 535 (1907), per Spear, J.

Evidence as to the intoxicating quality of an enumerated liquor is irrelevant and inadmissible. *State v. Wittmar*, 12 Mo. 407 (1849).

The same result is reached where a general class of liquors is declared to be intoxicating with exceptions which do not cover the liquor in question. *Wiles v. State*, 33 Ind. 206 (1870); *State v. Lager Beer*, 68 N. H. 377, 39 Atl. 255 (1894); *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384 (1886).

same idea is put into a slightly different form by the Supreme Court of Alabama; "When a prohibition statute names, designates, or enumerates the kinds, classes, or species of beverages or liquors against which its provisions are directed, then there is no room for further inquiry into the scope of such a statute. When it clearly appears that a given article, liquor, or beverage comes within the scope of the forbidden enumeration and is intoxicating, its properties become immaterial to courts and juries because fixed by the law-making power of the state."<sup>8</sup> The effect of such a statutory provision may even be to create judicial knowledge *contrary* to common;—as where a statute provides that a smaller percentage of alcohol than suffices to constitute an intoxicating liquor according to common understanding shall be so regarded as a matter of law.<sup>9</sup>

**§ 710. (*B. What Facts are Covered by the Rule; [1] Nature; Properties of Matter; Liquid; Intoxicating Liquors*); Alcohol.**—It is known beyond question that alcohol itself is intoxicating. It has been held to be so in certain states,<sup>1</sup> in part because so defined by statute,<sup>2</sup> while its intoxicating quality has been refused the status of a fact of common knowledge in other jurisdictions.<sup>3</sup> No evidence need be offered that alcohol is a

8. *Marks v. State*, (Ala. 1909), 864, 867, per Mayfield, J.

9. These statutes may lawfully define "intoxicating liquors" as "any liquor or mixture of liquors which shall contain more than two per cent by weight of alcohol." *State v. Gravelin*, 16 R. I. 407, 16 Atl. 914 (1889); *State v. Guinness*, 16 R. I. 401, 16 Atl. 910 (1889). See *State v. McKenna*, 16 R. I. 398, 17 Atl. 51 (1889).

1. *Snider v. State*, 81 Ga. 753, 7 S. E. 631, 12 Am. St. 350 (1888); *State v. Intoxicating Liquors*, 76 Iowa 243, 41 N. W. 6, 2 L. R. A. 408 (1888); *Greiner-Kelley Drug Co. v. Truett*, (Tex. Civ. App. 1903) 75 S. W. 536; *Sebastian v. State*, 44 Tex. Cr. 508, 72 S. W. 849 (1903). And see *Winn v. State*, 43 Ark. 151 (1884); *State v. Witt*, 39 Ark. 216 (1882); *State v. Martin*, 34 Ark. 340 (1879); *Bennett v. People*, 30

Ill. 389 (1863); *Lemly v. State*, 70 Miss. 241, 12 So. 22, 20 L. R. A. 645 (1892). "The weight of the authorities seems to be to the effect that, unless otherwise made by the language or provisions of the statute, it [alcohol] will be included in the terms 'spirituous' and 'intoxicating' liquors." *Marks v. State*, (Ala. 1909) 48 So. 864, per Mayfield, J.

2. *State v. Intoxicating Liquors*, 76 Iowa 243, 41 N. W. 6 (1888).

3. *Winn v. State*, 43 Ark. 151 (1884); *Bennett v. People*, 30 Ill. 389 (1863); *State v. Witt*, 39 Ark. 216 (1882); *State v. Martin*, 34 Ark. 340, 341 (1879). The same rule has been laid down in Mississippi. "Alcohol is an ingredient or quality of vinous and spirituous liquors of all kinds, but alcohol, specially, is neither one nor the other. It is a distinct thing. It is the intoxicating principle of vinous and spirituous liquors but is

spirituous liquor.<sup>4</sup> It is "a volatile organic body, a limpid colorless liquid, hot and pungent to the taste, having a slight, but not offensive, scent. It has but one source, fermentation, and is extracted from its by-products by distillation; its purity and strength depending upon the degree of perfection or completeness of distillation."<sup>5</sup> Alcohol is universally known to be the intoxicating element in all intoxicating liquors in common use, whatever may be their differences in other particulars.<sup>6</sup> Proof of such a fact is, therefore, unnecessary, and evidence to establish it is inadmissible.<sup>7</sup>

**§ 711. (*B. What Facts are Covered by the Rule; [1] Nature; Properties of Matter; Liquid; Intoxicating Liquors*); Distilled Liquors.**—What liquors are spirituous or distilled is a matter of common knowledge. Indeed, in many cases, so much is connoted by the very name. For this reason, it is not necessary to prove that whiskey,<sup>1</sup> rum,<sup>2</sup> brandy<sup>3</sup> and gin<sup>4</sup> are spirituous.

not such liquor in the contemplation of the statutes." *Lemly v. State*, 70 Miss. 241, 12 So. 22, 20 L. R. A. 654 (1892), per Campbell, J., quoted in *Joyce on Intoxicating Liquors*.

4. *Snider v. State*, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350 (1888).

5. *Marks v. State*, (Ala. 1909) 48 So. 864, per Mayfield, J. Alcohol is, "a volatile organic body constantly formed during the fermentation of the vegetable juices, containing sugar in solution. In popular language, it is the intoxicating principle of fermented liquor. It is exclusively produced by the process of fermentation." *Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. 570, 571 (1888), quoted in *Joyce on Intoxicating Liquors*. "Alcohol, this essential element in all spirituous liquor, is a limpid colorless fluid. To the taste it is hot and pungent, and it has a slight and not disagreeable scent. It has but one source—the fermentation of sugar and saccharine matter. It comes through fermentation of substances that contain sugar proper, or that contain starch, which may be turned into sugar. All substances that contain either sugar or

starch, or both, will produce it by fermentation. It is a mistake to suppose, as many persons do, that it is really produced by distillation. It is produced only by fermentation, and the process of distillation simply serves to separate the spirit—the alcohol from the mixture, whatever it may be, in which it exists." *State v. Giersch*, 98 N. C. 720, 723, 724, 4 S. E. 193 (1887), per Merrimon, J.

6. *Com. v. Morgan*, 149 Mass. 314, 316, 21 N. E. 369 (1889).

7. *Snider v. State*, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350 (1888). See *Sebastian v. State*, 44 Tex. Cr. 508, 72 S. W. 849 (1902).

1. *Alabama*.—*Wall v. State*, 78 Ala. 417 (1885). See also *Marks v. State*, (Ala. 1909) 48 So. 864.

*Arkansas*.—*Edgar v. State*, 37 Ark. 219 (1881).

*Florida*.—*Frese v. State*, 23 Fla. 267, 2 So. 1 (1887).

*Georgia*.—*Hodge v. State*, 116 Ga. 852, 43 S. E. 255 (1902).

*Indiana*.—*Schlicht v. State*, 56 Ind. 173 (1877); *Eagan v. State*, 53 Ind. 162 (1876); *Carmon v. State*, 18 Ind. 450 (1862).

Being spirituous, they are also intoxicating. As a rule, the intoxicating quality of distilled liquors, as brandy,<sup>5</sup> gin,<sup>6</sup> rum,<sup>7</sup> whiskey<sup>8</sup> need not be established by evidence.

*Massachusetts*.—Com. v. Morgan, 149 Mass. 314, 21 N. E. 369 (1889).

*Missouri*.—State v. Williamson, 21 Mo. 496 (1855).

*Nebraska*.—Peterson v. State, 63 Neb. 251, 88 N. W. 549 (1901).

*Texas*.—Aston v. State, (Cr. App. 1899) 49 S. W. 385.

*United States*.—U. S. v. Ash, 75 Fed. 651 (1896).

No evidence need be produced as to the spirituous nature of whiskey. *Freiberg v. State*, 94 Ala. 91, 10 So. 703 (1891); *Netso v. State*, 24 Fla. 363, 5 So. 8, 1 L. R. A. 825 (1888); *Fears v. State*, 125 Ga. 740, 54 S. E. 661 (1906); *Hodge v. State*, 116 Ga. 852, 43 S. E. 255 (1902). This is a matter of the common knowledge of the meaning of words. *Infra*, § 762. The term whiskey has but a single meaning and it denotes a spirituous beverage. *Frese v. State*, 23 Fla. 267, 2 So. 1 (1887).

2. *State v. Wadsworth*, 30 Conn. 55 (1861); *State v. Mooty*, 3 Hill (S. C.) 187 (1836). See also U. S. v. Angell, 11 Fed. 34 (1881).

3. *State v. Tisdale*, 54 Minn. 105, 55 S. W. 903 (1893); *State v. Munger*, 15 Vt. 290 (1843).

4. *State v. Wadsworth*, 30 Conn. 55 (1861). "Everybody, who knows what gin is, knows not only that it is a liquor, but also that it is intoxicating." Com. v. Peckham, 2 Gray (Mass.) 514 (1854).

5. *Connecticut*.—State v. Wadsworth, 30 Conn. 55 (1861).

*Georgia*.—Bradley v. State, 121 Ga. 201, 48 S. E. 981 (1904).

*Indiana*.—Fenton v. State, 100 Ind. 598 (1884).

*Kansas*.—Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284 (1881).

*Minnesota*.—State v. Tisdale, 54 Minn. 105, 55 N. W. 903 (1893) (California brandy).

*New York*.—Blatz v. Rohrbach, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669 (1889); *Rau v. People*, 63 N. Y. 277 (1875).

*Texas*.—Dallas Brewery v. Holmes Bros., (Civ. App. 1908) 112 S. W. 122.

*Vermont*.—State v. Munger, 15 Vt. 290 (1843).

*Virginia*.—Thomas v. Com., 90 Va. 92, 94, 17 S. E. 788 (1893) (apple brandy).

The use of a prefix does not affect the general knowledge of the community. If the liquor is "brandy" at all, it is intoxicating. *Howell v. State*, 124 Ga. 698, 52 S. E. 649 (1905) (peach brandy); *Fenton v. State*, 100 Ind. 598 (1884) (blackberry); *State v. Tisdale*, 54 Minn. 105, 55 N. W. 903 (1893) (French; California or any other); *Thomas v. Com.*, 90 Va. 92, 17 S. E. 788 (1894) (apple brandy). The addition of fruit is known not to affect the intoxicating quality of the liquor itself. *Ryall v. State*, 78 Ala. 410 (1884); *Musick v. State*, 51 Ark. 165, 10 S. W. 225 (1888) (cherries); *Rabe v. State*, 39 Ark. 204 (1882); *Pet-terway v. State*, 36 Tex. Cr. R. 97, 35 S. W. 646 (1896).

6. *Connecticut*.—State v. Wadsworth, 30 Conn. 55 (1861).

*Kansas*.—Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284 (1881).

*Massachusetts*.—Com. v. Peckham, 2 Gray (Mass.) 514 (1854).

*New York*.—Blatz v. Rohrbach, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669 (1889); *Rau v. People*, 63 N. Y. 277 (1875).

*Vermont*.—State v. Munger, 15 Vt. 290 (1843); *Hoagland v. Canfield*, (N. Y. 1908) 160 Fed. 146. See also *Dallas Brewery v. Holmes Bros.*, (Tex. Civ. App. 1908) 112 S. W. 122.

*Mixed beverages* may possess, in the common knowledge of the community, an intoxicating quality. Of this nature is a "whiskey

The testimony of a skilled witness is not required. The inference of an ordinary observer is sufficient. *Com. v. Timothy*, 8 Gray (Mass.) 480 (1857).

7. *State v. Wadsworth*, 30 Conn. 55 (1861); *State v. Munger*, 15 Vt. 290 (1843).

8. *Alabama*.—*Freiberg v. State*, 94 Ala. 91, 10 So. 703 (1891); *Freiberg v. State*, 94 Ala. 91, 10 So. 703 (1891).

*Arkansas*.—*Edgar v. State*, 37 Ark. 219 (1881).

*Florida*.—*Netso v. State*, 24 Fla. 363, 5 So. 8, 1 L. R. A. 825 (1888); *Frese v. State*, 23 Fla. 267, 2 So. 1 (1887).

*Georgia*.—*Fears v. State*, 125 Ga. 740, 54 S. E. 661 (1906) (corn whiskey is spirituous); *Hodge v. State*, 116 Ga. 852, 43 S. E. 255 (1902); *Kinnebrew v. State*, 80 Ga. 232 (1887). See also *Bradley v. State*, 121 Ga. 201, 48 S. E. 981 (1904).

*Indiana*.—*State v. Jones*, 3 Ind. App. 121, 29 N. E. 274 (1891); *Schlicht v. State*, 56 Ind. 173 (1877); *Eagan v. State*, 53 Ind. 162 (1876). See also *Carmon v. State*, 18 Ind. 450 (1862).

*Kansas*.—*State v. Hickman*, 54 Kan. 225, 38 Pac. 256 (1894); *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284 (1881).

*Massachusetts*.—*Commonwealth v. Curran*, 119 Mass. 206 (1875).

*Missouri*.—*State v. Williamson*, 21 Mo. 496 (1855).

*Nebraska*.—*Peterson v. State*, 63 Neb. 251, 88 N. W. 549 (1901).

*Nevada*.—*State v. Murphy*, 23 Nev. 390, 48 Pac. 628 (1897).

*New Hampshire*.—*State v. York*, 74 N. H. 125, 65 Atl. 685 (1907).

*New York*.—*Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669 (1889); *Rau v. People*, 63 N. Y. 277 (1875).

*Texas*.—*Wilcoxson v. State*, (Tex.

Cr. App. 1906) 91 S. W. 581; *Douthitt v. State*, (Cr. App. 1901) 61 S. W. 404; *Maddox v. State*, (Cr. App. 1900) 55 S. W. 832; *Aston v. State*, (Cr. App. 1899) 49 S. W. 385. See also *Smith v. State*, 56 Tex. Cr. R. 501, 120 S. W. 881 (1909); *Dallas Brewery v. Holmes Bros.*, (Civ. App. 1908) 112 S. W. 122.

*Wisconsin*.—*Briffitt v. State*, 58 Wis. 39, 16 N. W. 39, 46 Am. Rep. 621 (1883).

*United States*.—*U. S. v. Ash*, 75 Fed. 651 (1896).

It is not a drug. *Gault v. State*, 34 Ga. 533 (1866). Judicial notice may be taken that whiskey is a spirituous, alcoholic, and intoxicating liquor. *O'Connell v. State*, 5 Ga. App. 234, 62 S. E. 1007 (1908). The court will take judicial knowledge that such well known beverages as whiskey, brandy, gin and the like are intoxicating. *Dallas Brewery v. Holmes Bros.*, (Tex. Civ. App. 1908) 112 S. W. 122.

"**Spirituous liquor**" is that which is in whole or in part composed of alcohol, extracted by distillation, such as whiskey, brandy, or rum; these being regarded as spirituous and intoxicating liquors, without the necessity of proof. *Marks v. State*, (Ala. 1909) 48 So. 864. All varieties of whiskey are commonly known to be intoxicating. *Edgar v. State*, 37 Ark. 219 (1881); *Fears v. State*, 125 Ga. 740, 54 S. E. 661 (1906) (corn whiskey); *Schlicht v. State*, 56 Ind. 173 (1877); *Carmon v. State*, 18 Ind. 450 (1862); *State v. Williamson*, 21 Mo. 496 (1855). "This court will neither stultify itself nor impeach its own veracity by telling you [the jury] that it has not judicial knowledge that the liquor commonly known as 'whisky' is an intoxicating liquor or that the drink commonly called a whisky cocktail is an intoxicating drink. On the contrary the court as-

cocktail.”<sup>9</sup> Mixed beverages not in common use will not be taken to be intoxicating as claimed without proof. A judge, for example, does not judicially know the intoxicating nature of “metheglin” or mead.<sup>10</sup>

**§ 712. (B. What Facts are Covered by the Rule; [1] Nature; Properties of Matter; Liquid; Intoxicating Liquors); Fermented Liquors.**—Cider<sup>1</sup> and beer<sup>2</sup> are well known to be fer-

sumes judicial knowledge that both are intoxicating.” *United States v. Ash*, 75 Fed. 651, 652 (1896), per Delaney, J.

9. *Galloway v. State*, 23 Tex. App. 398, 5 S. W. 246 (1887); *U. S. v. Ash*, 75 Fed. 651 (1896). See also *State v. Pigg*, (Kan. 1908) 97 Pac. 859 (Manhattan cocktail).

10. *Marks v. State*, (Ala. 1909) 48 So. 864.

1. *State v. McLafferty*, 47 Kan. 140, 27 Pac. 843 (1891); *State v. Schaefer*, 44 Kan. 90, 24 Pac. 92 (1890); *State v. Crawley*, 75 Miss. 919, 23 So. 625 (1898); *Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. 570 (1888). Cider is not a spirituous, vinous or malt liquor. *Feldman v. Morrison*, 1 Ill. App. 460 (1877). “Cider is neither produced by distillation nor by fermentation, and although liable to fermentation, and when subjected to distillation, it is capable of producing a spirituous liquor, yet the ultimate product is no more like cider than rum is like the juice of sugar cane from which it is manufactured, neither is cider the result of any process of fermentation whatever, nor is it in any proper sense a mixture of any liquor other than water, which is common to all spirituous liquors, wines, ale, porter, beer, and all drinks of like nature.” *State v. Oliver*, 26 W. Va. 422, 53 Am. Rep. 79, n. (1885), per Woods, J., quoted in *Joyce on Intoxicating Liquors*. “In a popular sense, the term ‘cider’ includes the expressed juice of apples, either fermented or unfermented, and hence the terms ‘sweet cider’ and ‘hard cider’ are

in popular use to distinguish between the juice of the apple before and after fermentation. In strictness, the juice of the apple before fermentation is simply apple juice, and it is only by fermentation that it becomes cider; and when the word ‘cider’ alone is used in law or commerce, it is commonly understood to mean the fermented juice of apples.” *Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. 570, 571 (1888), per Caldwell, J.

As a *res gestae fact*, the question of the spirituous or vinous nature of particular cider sold may properly be left to the jury as a matter of evidence. *Com. v. Reyburg*, 122 Pa. St. 299, 16 Atl. 351, 2 L. R. A. 415 (1888). So of its intoxicating quality. *Hewitt v. People*, 89 Ill. App. 367 (1899); *State v. Schaefer*, 44 Kan. 90, 24 Pac. 92 (1890) (hard cider); *City of Topeka v. Zufall*, 40 Kan. 47, 19 Pac. 359, 1 L. R. A. 387 (1888) (peach cider); *Com. v. Chapel*, 116 Mass. 7 (1874); *State v. Biddle*, 54 N. H. 379 (1874). In case of “hard” cider, the burden of evidence may well be placed upon the accused. *State v. Schaefer*, 44 Kan. 90, 24 Pac. 92 (1890).

Hard cider is commonly known to be a fermented liquor and to come within the prohibition of the sale of this class of liquors. *State v. Schaefer*, 44 Kan. 90, 24 Pac. 92 (1890); *People v. Foster*, 64 Mich. 715, 31 N. W. 596 (1887); *Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. 570 (1888).

2. *Waller v. State*, 38 Ark. 656 (1882); *State v. Effinger*, 44 Mo.



mented liquors. It is said that there is a presumption of law, meaning probably an assumption of administration, that fermented liquors are intoxicating.<sup>3</sup> Undoubtedly certain fermented beverages, cider<sup>4</sup> and the like, are known to the courts as to other intelligent members of the community, to be capable of producing intoxication, under certain conditions. But whether cider, without further designation, is intoxicating is a matter of doubt. No alcoholic content being implied in the term itself, and the actual amount being constantly subject to change, the percentage of alcohol must be established by evidence.<sup>5</sup> Ordinary cider has been held to contain over one per cent.,<sup>6</sup> and "hard cider" is intoxicating, as a matter of common knowledge.<sup>7</sup>

**§ 713. (B. What Facts are Covered by the Rule; [1] Nature; Properties of Matter; Liquid; Intoxicating Liquors); Malt Liquors.**—What liquors are commonly designated as malt liquors is well known to the court. No proof need, therefore, be offered that ale,<sup>1</sup> and beer,<sup>2</sup> specifically, including lager beer,<sup>3</sup> fall

App. 81 (1891); *People v. O'Reilly*, 129 App. Div. 522, 114 N. Y. Suppl. 258 (1908); *Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669 (1889).

3. *State v. Volmer*, 6 Kan. 371 (1870). See also *State v. Spaulding*, 61 Vt. 505, 17 Atl. 844 (1889).

4. *Illinois*.—*Hewitt v. People*, 87 Ill. App. 367 [*affirmed* in 186 Ill. 336, 57 N. E. 1077] (1899); *Feldman v. Morrison*, 1 Ill. App. 460 (1877).

*Iowa*.—*State v. Valure*, 95 Iowa 401, 64 N. W. 280 (1895); *State v. Hutchinson*, 72 Iowa 561, 34 N. W. 421 (1887).

*Kansas*.—*State v. McLafferty*, 47 Kan. 140, 27 Pac. 843 (1891); *Topeka v. Zufall*, 40 Kan. 47, 19 Pac. 359, 1 L. R. A. 387 (1888) (peach cider).

*New Hampshire*.—*State v. Biddle*, 54 N. H. 379 (1874).

5. *Illinois*.—*Feldman v. Morrison*, 1 Ill. App. 460 (1877); *State v. Hutchinson*, 72 Iowa 561, 34 N. W. 421 (1887).

*Kansas*.—*Topeka v. Zufall*, 40 Kan. 47 (1888).

*Maine*.—*State v. Page*, 66 Me. 418 (1876).

*Massachusetts*.—*Com. v. Chappel*, 116 Mass. 7 (1874); *Com. v. Dean*, 14 Gray 69 (1859).

*New Hampshire*.—*State v. Biddle*, 54 N. H. 379 (1874).

*Mississippi*.—*State v. Crawley*, 75 Miss. 919, 23 So. 625 (1898).

*Pennsylvania*.—*Commonwealth v. Reyburg*, 122 Pa. St. 299 (1889).

6. *Com. v. McGarth*, 185 Mass. 1, 69 N. E. 340 (1904).

7. *Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. 570 (1888).

1. *Wiles v. State*, 33 Ind. 206 (1870). See also *State v. Gill*, 89 Minn. 502, 95 N. W. 449 (1903).

Malt liquor is commonly known to be a general term for an alcoholic beverage produced merely by the fermentation of malt as opposed to those obtained by the distillation of malt or mash. *Marks v. State*, (Ala. 1909) 48 So. 864 [*citing Allred v. State*, 89 Ala. 112, 8 So. 56 (1889); *Mayfield's Dig.* 463; *Tinker's Case*, 90 Ala. 647, 8 So. 814 (1889)]; *Allred v. State*, 89 Ala. 112, 8 So. 56 (1889); *Adler v. State*, 55 Ala. 16 (1876);

within this class. The intoxicating quality of certain malt liquors has frequently proved a *res gestæ* fact, beyond the scope of the use of knowledge, whether judicial or common. The cir-

*Sarlls v. U. S.*, 152 U. S. 570, 572, 14 Sup. Ct. 720, 38 L. Ed. 556 (1893); *U. S. v. Ducournau*, 54 Fed. 138 (1891). But a court cannot know, as a matter of common knowledge that all malt liquors are intoxicating. *Eaves v. State*, 113 Ga. 749, 39 S. E. 318 (1901); *Shaw v. State*, 56 Ind. 188 (1877).

Porter is commonly known in the community to be a malt liquor. In certain courts it is also notorious that it is capable of producing intoxication. *Blatz v. Rohrbach*, 116 N. Y. 540, 22 N. E. 1049, 6 L. R. A. 669 (1889).

2. *Indiana*.—*Welsh v. State*, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664 (1890); *Stout v. State*, 96 Ind. 407 (1884); *Myers v. State*, 93 Ind. 251 (1883).

3. *Kansas*.—*State v. Teissedre*, 30 Kan. 476, 2 Pac. 650 (1883).

*Kentucky*.—*Locke v. Com.*, 74 S. W. 654, 25 Ky. L. Rep. 76 (1903); *Pedigo v. Com.*, 70 S. W. 659, 24 Ky. L. Rep. 1029 (1902).

*Nebraska*.—*Peterson v. State*, 63 Neb. 251, 88 N. W. 549 (1901).

*New Jersey*.—*Murphy v. Montclair Tp.*, 39 N. J. L. 673 (1877) (malt).

*North Dakota*.—*State v. Currie*, 8 N. D. 545, 80 N. W. 475 (1899).

*Texas*.—*Maier v. State*, 2 Tex. Civ. App. 296, 21 S. W. 974 (1893).

*Wisconsin*.—*Briffitt v. State*, 58 Wis. 39, 16 N. W. 39, 46 Am. Rep. 621 (1883).

*United States*.—*U. S. v. Ducournau*, 54 Fed. 138 (1891). The practice is the same in the federal courts. *United States v. Ducournau*, 54 Fed. 138 (1891).

Other courts have declined to take, as commonly known, the malt character of a term so all inclusive as "beer" without conditioning prefix. *Netso v. State*, 24 Fla. 363, 5 So.

8, 1 L. R. A. 825 (1880); *Hansberg v. People*, 120 Ill. 21, 8 N. E. 857, 6 Am. Rep. 549 (1886); *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26 (1883); *State v. Sioux Falls Brewing Co.*, 5 S. D. 39, 58 N. W. 1, 26 L. R. A. 138 (1894). Judges have even declined to rule, in any case, as to what liquors may properly be classed as malt. *Eaves v. State*, 113 Ga. 749, 39 S. E. 318 (1901); *Shaw v. State*, 56 Ind. 188 (1877); *State v. Starr*, 67 Me. 242 (1877); *Barnes v. State* (Tex. Cr. App. 1898), 44 S. W. 491.

3. *Tinker v. State*, 90 Ala. 647, 8 So. 855 (1901); *Watson v. State*, 55 Ala. 158 (1876); *Waller v. State*, 38 Ark. 656 (1882); *Netso v. State*, 24 Fla. 363, 5 So. 8, 1 L. R. A. 825 (1888); *State v. Rush*, 13 R. I. 198 (1883); *State v. Goyette*, 11 R. I. 592 (1878). See also *Adler v. State*, 55 Ala. 16 (1876); *State v. Morehead*, 22 R. I. 2782, 47 Atl. 545 (1901). "Lager beer is certainly universally known here as a malt liquor; and it would be as vain and useless to offer evidence that such is its character, as that whisky is a distillation of grain, or wine of fermented juice of the grape, or cider the expressed juice of the apple. The word is now found in the dictionaries commonly used; and from its introduction into this country as a beverage, that it is a malt liquor is known wherever it is drunk, or is an article of commerce. Courts cannot profess ignorance of the meaning of words of popular use, and about the signification of which no intelligent member of the community would hesitate. Evidence that lager beer was a malt liquor was not necessary to support the indictment." *Watson v. State*, 55 Ala. 158 (1876), per Brickell, J., quoted in Joyce on Intoxicating

cumstance has greatly complicated the normal use of common knowledge on the subject. The question has often been left to the jury to decide upon all the evidence in the case.<sup>4</sup> A judge may well be justified in declining to rule regarding the matter as one of knowledge at all,<sup>5</sup> except as gained through evidence. That "beer" is a malt liquor is a matter of common knowledge.<sup>6</sup> But whether "Hop-Jack," "Hop Ale"<sup>7</sup> and similar beverages are or are not intoxicating must be proved.

**§ 714. (B. What Facts are Covered by the Rule; [1] Nature; Properties of Matter; Liquid; Intoxicating Liquors; Malt Liquors); "Beer."**— Obviously, if one is forbidden to sell a given liquor, on the ground, in the legislative mind, that it was intoxicating, it is entirely immaterial should the defendant succeed in showing that the legislature was wrong. The question becomes largely a matter of words when the inquiry as to what liquors the court knows are intoxicating, or not intoxicating, is carried into what is generically called "beer." Standing alone,

Liquors. It need not be proved that lager beer is not a *spirituous* liquor. *Sarlls v. United States*, 152 U. S. 570, 572, 14 Sup. Ct. 720, 38 L. ed. 556 (1893). The contrary that lager beer is a spirituous liquor, has, however, been decided. *State v. Giersch*, 98 N. C. 720, 4 S. E. 193 (1887). Should it be shown that spirits have been mixed with lager beer, the result might well be a "spirituous" liquor. *Tinker v. State*, 90 Ala. 647, 8 So. 855 (1890). See *State v. Brindle*, 28 Iowa 512 (1870).

4. *Connolly v. Atlanta*, 79 Ga. 664, 4 S. E. 263 (1887); *Godfreidson v. People*, 88 Ill. 284 (1878); *Glasscock v. State*, (Tex. Cr. App. 1898) 43 S. W. 989.

To the same effect, see also the following cases:

*Maine*.— *State v. Starr*, 67 Me. 242 (1877).

*Massachusetts*.— *Haines v. Hanraham*, 105 Mass. 480 (1870).

*Michigan*.— *People v. Hawley*, 3 Mich. 330 (1854).

*New York*.— *Blatz v. Rohrbach*,

116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669 (1889).

*Vermont*.— *State v. Barron*, 37 Vt. 57 (1864).

Unless, however, ale has been mixed with spirits, it is not known, as a matter of general knowledge, to be "spirituous." *Walker v. Prescott*, 44 N. H. 511 (1863); *Fleming v. New Brunswick*, 47 N. J. L. 231 (1885). Under the phrase "strong or spirituous liquors" ale of a certain strength has been known to come. *Board of Commissioners v. Freehoff*, 17 How. Prac. (N. Y.) 442 (1859). *Citing Nevin v. Ladue*, 3 Den. 437 (1846). The contrary has been held. *People v. Crilly*, 20 Barb. 246 (1855). See also *Nevin v. Ladue*, 3 Den. 437 (1846), per Strong, J.

5. *Eaves v. State*, 113 Ga. 749, 39 S. C. 318 (1901).

6. *Lambie v. State*, (Ala. 1907) 44 So. 51. See also *People v. O'Reilly*, 114 N. Y. Suppl. 258, 129 App. Div. 522 (1908).

7. *Daniel v. State*, (Ala. 1907) 43 So. 22.

the term "beer" does not designate an intoxicant;<sup>1</sup> though there is strong authority to the contrary effect.<sup>2</sup>

*Statutory Influence.*—Statutes regulating the traffic in intoxicating liquors are frequently so framed as to declare, expressly or by implication, that various grades of beer are intoxicating.<sup>3</sup> Under such circumstances the knowledge of the tribunal is judicial. It has been held that proof or disproof are equally in-

1. *Florida.*—*Netso v. State*, 24 Fla. 363, 5 So. 8 (1888).

*Georgia.*—*Du Vall v. Augusta*, 115 Ga. 813, 42 S. E. 265 (1902).

*Illinois.*—*Hansberg v. People*, 120 Ill. 21, 60 Am. Rep. 549 (1886).

*Massachusetts.*—*Com. v. Hardiman*, 9 Gray (Mass.) 136 (1857).

*Nebraska.*—*Kerkow v. Bauer*, 15 Neb. 150, 155, 18 N. W. 27 (1883).

*New York.*—*Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049 (1889).

*Ohio.*—*State v. Ritzman*, 8 Ohio S. & C. Pl. Dec. 635 (1896).

*Rhode Island.*—*State v. Beswick*, 13 R. I. 211, 220 (1880); *State v. Sioux Falls Brewing Co.*, 5 S. D. 39, 58 N. W. 1, 26 L. R. A. 138 (1894).

2. *Indiana.*—*Dant v. State*, 106 Ind. 79 (1885); *Myers v. State*, 93 Ind. 251 (1883); *Douglas v. State*, 21 Ind. App. 302, 52 N. E. 238 (1898).

*Kansas.*—*State v. Teissedre*, 30 Kan. 476 (1883).

*Minnesota.*—*State v. Dick*, 47 Minn. 375, 50 N. W. 362 (1891).

*Missouri.*—*State v. Effinger*, 44 Mo. App. 81 (1890). See also *State v. Mitchell*, 134 Mo. App. 540, 114 S. W. 1113 (1908).

*Nebraska.*—*Sothman v. State*, 66 Neb. 302, 92 N. W. 303 (1902); *Peterson v. State*, 63 Neb. 251, 88 N. W. 549 (1901).

*New Jersey.*—*Murphy v. Inhabitants, etc.*, 39 N. J. L. 673 (1877).

*New York.*—*Hoagland v. Canfield*, (N. Y. 1908) 160 Fed. 146.

*North Dakota.*—*State v. Currie*, 8 N. D. 545, 80 N. W. 475 (1899).

*Oklahoma.*—*Markinson v. State*, (Okl. Cr. App. 1909) 101 Pac. 353.

*Oregon.*—*State v. Carmody*, (Or. 1907) 91 Pac. 441; s. c., 91 Pac. 446.

*Texas.*—*White v. Manning*, (Tex. Civ. App. 1907) 102 S. W. 1160; *Maier v. State*, 2 Tex. Civ. App. 296, 21 S. W. 974 (1893).

*Wisconsin.*—*Briffitt v. State*, 58 Wis. 39, 46 Am. Rep. 621 (1883).

*United States.*—*United States v. Ducournau*, 54 Fed. 138 (1891). See also *State v. May*, 52 Kan. 53, 34 Pac. 407 (1893); *State v. Jenkins*, 32 Kan. 477, 4 Pac. 809 (1884); *State v. Teissedre*, 30 Kan. 476, 2 Pac. 650 (1883); *People v. Wheelock*, 3 Park. Cr. (N. Y.) 9 (1855). Judicial notice may be taken that an ordinary beer, containing such a percentage of alcohol as, by common knowledge, may produce intoxication when the beer is drunk in such quantities as it may ordinarily be drunk, is an intoxicating liquor. *O'Connell v. State*, 5 Ga. App. 234, 62 S. E. 1007 (1908). When the word "beer" is used, without any qualifying term, the court takes notice that "beer" is a malt liquor, containing sufficient alcohol to produce intoxication. *State v. City Club*, 83 S. C. 509, 65 S. E. 730 (1909).

3. *Indiana.*—*Welsh v. State*, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664 (1890); *Douglas v. State*, 21 Ind. App. 302, 52 N. E. 238 (1898).

*Iowa.*—*State v. Cloughly*, 73 Iowa 626, 35 N. W. 652 (1887).

*Minnesota.*—*State v. Dick*, 47 Minn. 375, 50 N. W. 362 (1891).

*Missouri.*—*State v. Besheer*, 69 Mo. App. 72 (1897); *State v. Houts*, 36 Mo. App. 265 (1889).

*Nebraska.*—*Kerkow v. Bauer*, 15 Neb. 150, 18 N. W. 27 (1883).

admissible<sup>4</sup> in any such case. If the defendant was forbidden to sell a given liquor, the only question is as to whether he has sold it.

*Prefixes to "Beer."*—Where the species of beer is indicated by a prefix, the opportunity for the existence of sufficient notoriety to warrant judicial cognizance is made more probable. Thus, the majority of courts know that "lager beer" is intoxicating,<sup>5</sup> while "hop pop,"<sup>6</sup> "rice beer"<sup>7</sup> and the like<sup>8</sup> are not known to possess that quality.

4. *Com. v. Snow*, 133 Mass. 575 (1882); *Com. v. Bubser*, 14 Gray (Mass.) 83 (1859); *Com. v. Anthes*, 12 Gray (Mass.) 29 (1858); *State v. Thornton*, 63 N. H. 114 (1884).

5. *Infra*, § 715.

6. *People v. Rice*, 103 Mich. 350, 61 N. W. 540 (1894).

7. *Bell v. State*, 91 Ga. 227, 231, 18 S. E. 288 (1892). "Some beverages such as whiskey, brandy, etc., are in such common and notorious use as intoxicants that no proof is requisite to stamp them with this character. But rice beer is comparatively a rare liquor. Whether it will produce intoxication or not ought to be proved." *Bell v. State*, 91 Ga. 227 (1892).

A statute may conclude the question by a direct declaration or the necessary inference arising from a particular collocation of words, in which case the knowledge is judicial. *Supra*, § 637; *Kerkow v. Bauer*, 15 Neb. 150, 155, 18 N. W. 27 (1883).

8. *Connolly v. Atlanta*, 79 Ga. 664, 4 S. E. 263 (1887) (new era beer); *Com. v. Gavin*, 160 Mass. 523, 36 N. E. 484 (1891); *Com. v. O'Kean*, 152 Mass. 584, 26 N. E. 97 (1891) (hop beer); *Com. v. Blos*, 116 Mass. 56 (1874) (Schenck beer); *Howorth v. Minns*, 51 J. P. 7, 56 L. T. Rep. N. S. 316 (1887) (botanic beer).

Similar beverages designated as "beer" to which general knowledge fails to attach, may call for proof of intoxicating quality. *Campbell v. City of Thomasville*, (Ga. 1909) 64

S. E. 815 ("near beer"); *State v. McCafferty*, 63 Me. 223 (1874) ("hop beer"); *People v. Wheelock*, 3 Park Cr. (N. Y.) 9, 15 (1855) ("Dutch beer"). Certain designations, such as "strong" are, it is said, known to indicate an intoxicating liquor. *People v. Hawley*, 3 Mich. 330 (1854); *Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669 (1889); *Board of Commissioners v. Taylor*, 21 N. Y. 173 (1860); *Markle v. Town Council of Akron*, 14 Ohio 586 (1846).

*"Beer" without prefix.*—As is stated earlier in this section, the courts are by no means agreed as to whether "beer" without further designation indicates an intoxicating liquor. *Eaves v. State*, 133 Ga. 749, 39 S. E. 318 (1909). "We do not think there is any presumption of law, that when a man speaks of beer he means a malt liquor, but we think that what he means is a question of fact for the jury. It is matter of common knowledge that there are beverages containing neither malt nor any other intoxicating ingredients which are called beers." *State v. Beswick*, 13 R. I. 211, 43 A. M. Rep. 26, n. (1883), per Durfee, J. This is quite in accordance with principle. To assume the existence of a *res gestæ* fact as one of common knowledge seems an improper exercise of administrative power.

*Georgia.*—*Duvall v. City Council of Augusta*, 115 Ga. 813, 42 S. E. 265 (1902).

"*Strong Beer*" is commonly and sometimes judicially known to be intoxicating.<sup>9</sup>

*Illinois*.—*Hansberg v. People*, 120 Ill. 21, 8 N. E. 21, 60 Am. Rep. 549 (1887).

*Indiana*.—*Klare v. State*, 43 Ind. 483 (1873).

*New York*.—*Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669 (1889).

*South Dakota*.—*State v. Sioux Falls Brew. Co.*, 5 S. D. 39, 58 N. W. 1, 26 L. R. A. 138 (1894).

*Supra*, § 700.

"The court can indulge in no presumption in the case except as to the innocence of the accused, and until it appears by sufficiency of proof that the particular beverage sold was of an intoxicating kind the presumption of innocence controls the case." *Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669 (1889).

On the contrary, "beer" without further designation, is said to be ordinary "bock-beer" or "lager-beer." When the meaning is different a prefix such as "spruce," "root" or the like is attached. *Locke v. Com.*, 25 Ky. L. Rep. 76, 74 S. W. 654 (1903). Rulings have been made to the effect that proof of a sale of "beer" is, as a matter of common knowledge, equivalent to showing the sale of an intoxicating liquor.

*Indiana*.—*Stout v. State*, 96 Ind. 407 (1884).

*Nebraska*.—*Sothman v. State*, 66 Neb. 302, 92 N. W. 303. (1902); *Peterson v. State*, 63 Neb. 251, 88 N. W. 549 (1902); *Kerkow v. Bauer*, 15 Neb. 150, 155, 18 N. W. 27 (1883).

*New York*.—*People v. Wheelock*, 3 Park Cr. R. 9 (1855).

*Oregon*.—*State v. Carmody*, 50 Oreg. 1, 91 Pac. 446 (1908).

*Texas*.—*Maier v. State*, 2 Tex. Civ. App. 296, 21 S. W. 974 (1893).

*Washington*.—*State v. Moran*, 46 Wash. 596, 90 Pac. 1044 (1907).

*Wisconsin*.—*Briffitt v. State*, 58 Wis. 39, 16 N. W. 39, 46 Am. Rep. 621 (1883).

"When, therefore, a witness testifies to the sale or giving away of beer under circumstances which make the sale or giving away of any intoxicating liquor unlawful, the *prima facie* inference is that the beer was of that malted and fermented quality declared by the statute to be an intoxicating liquor, and the court trying the case ought to take judicial notice of the inference which thus arises from the use of the word 'beer' in its primary and general sense." *Myers v. State*, 93 Ind. 251 (1883), per Niblack, J., *quoted in Joyce on Intoxicating Liquors*.

**Judicial knowledge.**—The phraseology of statutes connecting common with judicial knowledge may have a strong or controlling influence in a particular case. *Douglas v. State*, 21 Ind. App. 302, 52 N. E. 238 (1898); *Kerkow v. Bauer*, 15 Neb. 150, 18 N. W. 27 (1883); *Dallas Brewery v. Holmes Bros.*, (Tex. Civ. App. 1908) 112 S. W. 122; *supra*, § 709.

**Res gestæ.**—In other cases, weight should properly be given to the consideration that the fact of the intoxicating quality of a particular liquor may be part of the *res gestæ* and, therefore, beyond the range of common knowledge. *Supra*, § 700. Even where it is said that judicial knowledge is taken of the intoxicating quality of "beer" the right of one accused to disprove this *res gestæ* fact is conceded. *State v. May*, 52 Kan. 53, 34 Pac. 407 (1893); *State v. Jenkins*, 32 Kan. 477, 4 Pac. 809 (1884); *State v. Teissedre*, 30 Kan. 477, 2 Pac. 650 (1883); *State v. Volmer*, 6 Kan. 371 (1870); *State v. Currie*, 8 N. D. 545, 80 N. W. 475 (1899); *Maier v. State*, 2 Tex. Civ. App. 296, 21 S. W. 974 (1893).

9. *People v. Hawley*, 3 Mich. 330 (1854); *Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669 (1889); *Rau v. People*, 63 N. Y. 277 (1875); *Nevin v. Ladue*, 3 Den.

**§ 715. (B. What Facts are Covered by the Rule; [1] Nature; Properties of Matter; Liquid; Intoxicating Liquors; Malt Liquors); Lager Beer.**—A famous battle ground, as to the court's common knowledge and the judge's judicial knowledge regarding the intoxicating quality of various liquors, has been lager beer. In several states it is known, commonly, or judicially, to be intoxicating.<sup>1</sup> In certain other jurisdictions it is not known to possess this quality.<sup>2</sup>

**§ 716. (B. What Facts are Covered by the Rule; [1] Nature; Properties of Matter; Liquid; Intoxicating Liquors; Malt Liquors); Bitters, Tonics, etc.**—Whether compounds into

(N. Y.) 43, 437 (1846); *Markle v. Akron*, 14 Ohio 586 (1846). But see also *Tompkins County v. Taylor*, 21 N. Y. 173 (1860); *Cayuga County v. Freeoff*, 17 How. Pr. (N. Y.) 442 (1859); *People v. Crilley*, 20 Barb. (N. Y.) 246 (1855).

1. *Alabama*.—*Watson v. State*, 55 Ala. 158 (1876).

*Arkansas*.—*Waller v. State*, 38 Ark. 656 (1882).

*Florida*.—*Netso v. State*, 24 Fla. 363, 5 So. 8 (1888).

*Georgia*.—*Cripe v. State*, 4 Ga. App. 832, 62 S. E. 567 (1908).

*New York*.—*Contra*, *People v. Zeiger*, 6 Park. Crim. (N. Y.) 355 (1865); *People v. Hart*, 24 How. Pr. (N. Y.) 289 (1862). See also *People v. O'Reilly*, 194 N. Y. 592, 88 N. E. 1128 (1909) [order affirmed, 114 N. Y. Suppl. 258, 129 App. Div. 522 (1908)].

*North Carolina*.—*State v. Giersch*, 98 N. C. 720, 4 S. E. 193 (1887).

*Rhode Island*.—*State v. Morehead*, 22 R. I. 272, 47 Atl. 545 (1900); *State v. Rush*, 13 R. I. 198 (1881).

*South Dakota*.—*State v. Church*, 6 S. D. 89, 60 N. W. 143 (1894).

*Vermont*.—*State v. Kibling*, 63 Vt. 636, 22 Atl. 613 (1891). But see *Tinker v. State*, 90 Ala. 647 (1890); *Rau v. People*, 63 N. Y. 277 (1875). See also *Smith v. State*, 113 Ga. 758, 39 S. E. 249 (1901).

"We have no more hesitation in

holding that the drink known as 'lager beer' is intoxicating than we should have in holding that 'spruce beer' is not, and we should put both rulings upon the same ground, to wit, that such is the common understanding resulting from common observation." *State v. Church*, 6 S. D. 89, 60 N. W. 143 (1894), per Kellam, J.

**Accused may dispute.**—While the prosecution may, in several jurisdictions, rely upon common knowledge to establish the intoxicating quality of lager beer, the fact so far as it is a *res gestæ* one, may be disputed by the accused. *Supra*, § 700. When evidence to this effect has been introduced by the defendant, the government may prove affirmatively the fact of intoxicating quality. *State v. Volmer*, 6 Kan. 371 (1870).

2. *Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669 (1889); *People v. Schewe*, 29 Hun (N. Y.) 122 (1883); *Rau v. People*, 63 N. Y. 277 (1875). It has been held, as ought properly to be done in case of a *res gestæ* fact (*supra*, § 700), that the intoxicating quality of lager beer is a question of fact for the jury. *Smith v. State*, 113 Ga. 758, 39 S. E. 294 (1901); *Rau v. People*, 63 N. Y. 277 (1875); *People v. Zeiger*, 6 Park Cr. R. (N. Y.) 355 (1865).

which intoxicating liquor or other alcohol-bearing substances enters as an element — tonics, patent medicines, “bitters” and the like, are intoxicating liquors, or otherwise fall within the designation or prohibition of a statute regulating the traffic in intoxicating liquors, is a question for evidence;<sup>1</sup> it is not a matter of judicial or common knowledge.

A reasonable test for distinguishing between medicines and beverages is that announced by the supreme court of Kansas:<sup>2</sup> “The cases before us group themselves into three classes; and the same division is far reaching and of general application. The first embraces what are generally and popularly known as intoxicating liquors, unmixed with any other substances. Thus, in one case the sale of brandy is charged. The second includes articles equally well known, standard articles, and which, while containing alcohol, are never classed as intoxicating beverages. Their uses are culinary, medical, or for the toilet. They are named in the United States dispensatory and other similar standard authorities, the formulæ for their preparation are there given; their uses and character are as well recognized and known by their names as those of a horse, a spade, or an arithmetic. The possibility of a different and occasional use does not change their recognized and established character. A particular spade may be fixed up for a parlor ornament, but the spade does not belong there. So, essence of lemon may contain enough alcohol to produce intoxication, more alcohol proportionately than many kinds of wine or beer. It is possible that a man may get drunk upon it, but it is no intoxicating liquor. Bay rum, cologne, paregoric, tinctures generally, all contain alcohol, but in no fair or reasonable sense are they intoxicating liquors or mixtures thereof. The third class embraces compounds, preparations, in which the alcoholic stimulant is present, which are not of established name and character, which are not found in the United States dispensatory, or other like standard authorities, and which may be purely medicinal in their purpose and effect, or mere substitutes for the usual intoxicating beverages. If not intoxicating liquors they may be

1. *Alabama*.—Allred v. State, 89 Ala. 112, 8 So. 56 (1889).

*Florida*.—Butler v. State, 25 Fla. 347, 6 So. 67 (1889).

*Iowa*.—State v. Gregory, 110 Iowa 624, 82 N. W. 335 (1900).

*Kansas*.—Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284 (1881).

*Texas*.—Johnson v. State, (Cr. App. 1902) 66 S. W. 552.

2. Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284 (1881).



'mixtures thereof' within the scope of the statute. Here belong many of the patent medicines, the bitters, cordials, and tonics of the day. Here also are such compounds as that charged in one of the informations before us, a compound of whiskey, tolu and wild cherry. Now, in reference to these several classes, we think these rules may be laid down: The first class is within and the second without the statute, and the court as matter of law may so declare. It is unnecessary, in charging the sale of whiskey or brandy, etc., to allege that it will produce intoxication; nor will it bring the sale of essence of lemon within the statute to allege that such essence will produce intoxication. The courts will take judicial notice of the uses and character of these articles. You need not prove what bread is, or for what purpose it is used. No more need you, in respect to whiskey or gin on the one hand, or cologne, or bay rum, on the other. They are all articles of established name and character. In reference to the third class, the question is one of fact, and must be referred to a jury. If the compound or preparation be such that the distinctive character and effect of intoxicating liquor are gone, that its use as an intoxicating beverage is practically impossible by reason of the other ingredients, it is not within the statute. The mere presence of alcohol does not necessarily bring the article within the prohibition. The influence of the alcohol may be counteracted by the other elements, and the compound be strictly and fairly only a medicine. On the other hand, if the intoxicating liquor remain as a distinctive force in the compound, and such compound is reasonably liable to be used as an intoxicating beverage, it is within the statute, and this though it contain many other ingredients and ingredients of an independent and beneficial force in counteracting disease or strengthening the system. Intoxicating liquors, or mixtures thereof; this, reasonably construed, means liquors which will intoxicate and which are commonly used as beverages for such purposes, and also many mixtures of such liquors as, retaining their intoxicating qualities, it may fairly be presumed may be used as a beverage and become a substitute for the ordinary intoxicating drinks. Whether any particular compound or preparation of this class is then within or without the statute, is a question of fact, to be established by the testimony and determined by the jury. The courts may not say, as a matter of law that the presence of a certain per cent. of alcohol brings

the compound within the prohibition, or that any particular ingredient does or does not destroy the intoxicating influence of the alcohol, or prevent it from ever becoming an intoxicating beverage. Of course the larger the per cent. of alcohol and the more potent the other ingredients, the more probably does it fall within or without the statute; but in each case the question is one of fact, and to be settled as other questions of fact."

§ 717. (*B. What Facts are Covered by the Rule; [1] Nature; Properties of Matter; Liquids; Intoxicating Liquors; Medicines, etc.*—As thus appears, a court is quite as well able to define, as a matter of common knowledge, what shall constitute a medicine, toilet article or flavoring substance used for culinary purposes as it is to know what are commonly classed as intoxicating liquors or beverages. The proper classification will be assigned to such useful articles although they may also contain sufficient alcohol to be, in point of fact, intoxicating; and may even be used as intoxicating beverages.<sup>1</sup>

*Compounds.*—Where the customary and distinctive use of a compound containing alcohol in intoxicating quantities is not that of a beverage, but is rather its employment for cooking purposes, the court knows, as a matter of notoriety, such a fact.<sup>2</sup> For example, lemon extract is known to contain a larger percentage of alcohol than is to be found in most whiskies.<sup>3</sup> It is, nevertheless, not an intoxicating liquor within the meaning of a prohibitory statute. In like manner, tincture of ginger, though capable of producing intoxication, is commonly known not to be an intoxicating liquor.<sup>4</sup>

*Medicated liquors.*—Attempts at evading the provisions of prohibitory statutes by supplying intoxicating beverages under the thin disguise of medical preparations, has notoriously led to the prohibition by statute of what are termed "medicated liquors." So far as vinous, malt, fermented or distilled liquors

1. Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284 (1881); Mitchell v. Com., 106 Ky. 602, 51 S. W. 17, 21 Ky. L. Rep. 222 (1899) (Jamaica ginger); State v. Muncey, 28 W. Va. 494 (1886) (essence of cinnamon). See also Robers v. State, 4 Ga. App. 207, 60 S. E. 1082 (1908); Mason v. State, 1 Ga. App. 534, 58 S. E. 139 (1907).

2. Holcomb v. People, 49 Ill. App. 73 (1892), per Boggs, J.

3. Walker v. Dailey, 101 Ill. App. 575 (1901); Holcomb v. People, 49 Ill. App. 73 (1892).

4. Bertrand v. State, 73 Miss. 51, 18 So. 545 (1895).

are to be sold under medicinal names the statute prohibitions are intended to apply.<sup>5</sup> The question is one of fact for the jury,<sup>6</sup> rather than for the use of common knowledge. The accused is clearly entitled to submit evidence on the point.<sup>7</sup>

*Percentage of alcohol.*—The tests between genuine medicines and these disguises for intoxicating beverages are several. Prominent among them, is the *percentage* of alcohol present in the compound.<sup>8</sup>

*Non-standard preparations.*—Where the compound in question is one made under a standard formula, given in the United States Dispensatory or other well recognized authority, as an article designed for culinary use or toilet purposes, the common knowledge of the community may well be to the effect that a given use is *bona fide* for these purposes. On the other hand, the preparation of bitters,<sup>9</sup> cordials, tonics and the like, presenting a large content of alcohol in communities where the use of such novel preparations had been unknown prior to the passage of a law prohibiting the direct sale of alcoholic beverages may well be regarded by the community at large as colorable.<sup>10</sup> Should the alcohol be practically *denaturized*, and the preparation no longer attractive as a beverage, a different situation is presented.<sup>11</sup>

*Availability as beverage.*—Above all, the common use of a particular compound, as an alcoholic beverage, may well be regarded as a highly significant circumstance in determining whether its

5. The action of the United States treasury department in taxing a certain combination of alcoholic liquors and other substances as a proprietary *medicinal* preparation is immaterial. *Wall v. State*, 78 Ala. 417 (1885).

6. *Alabama.*—*Wadsworth v. Dunnam*, 98 Ala. 610, 13 So. 597 (1893) (ginseng cordial); *Allred v. State*, 89 Ala. 112, 8 So. 56 (1889).

*Florida.*—*Butler v. State*, 25 Fla. 347, 6 So. 67 (1889) (elixir of orange mint).

*Georgia.*—*Bradley v. State*, 121 Ga. 201, 48 S. E. 981 (1904); *Blankenship v. State*, 93 Ga. 814, 21 S. E. 130 (1893).

*Iowa.*—*State v. Gregory*, 110 Iowa 624, 82 N. W. 335 (1900).

*Kansas.*—*Intoxicating Liquor Cases*, 25 Kan. 751, 57 Am. Rep. 284 (1887).

7. *Com. v. Pease*, 110 Mass. 412 (1872); *State v. Muncey*, 28 W. Va. 494 (1886) (essence of cinnamon).

8. *Foster v. State*, 36 Ark. 253 (1880); *Colwell v. State*, 112 Ga. 75, 37 S. E. 129 (1900).

9. *State v. Wilson*, 80 Mo. 303 (1883); *State v. Lillard*, 78 Mo. 136 (1883).

10. *Mason v. State*, 1 Ga. App. 534, 58 S. E. 139 (1907); *Gault v. State*, 34 Ga. 533 (1866); *Com. v. Ramsdell*, 130 Mass. 68 (1880); *Bertrand v. State*, 73 Miss. 51, 18 So. 545 (1895); *King v. State*, 58 Miss. 737 (1881).

11. *Carl v. State*, 89 Ala. 93, 8 So. 156 (1889).

sale is merely an evasion of law.<sup>12</sup> It has even been said that in a case of notoriety, the use of evidence may be dispensed with, reliance being placed upon common knowledge in the community. Thus, in Kentucky, it is said that, without evidence, it is a matter of common knowledge that Jamaica ginger is an intoxicating liquor, and that it is scarcely more necessary to introduce evidence to prove it than it would be in case of whiskey.<sup>13</sup>

**§ 718. (B. What Facts are Covered by the Rule; [1] Nature; Properties of Matter; Liquid; Intoxicating Liquors); Wines.**—No court will require proof that wines<sup>1</sup> have an intoxicating quality. If they had not, they would not be wines.<sup>2</sup>

**12. Alabama.**—*Wadsworth v. Dunnam*, 98 Ala. 610, 13 So. 597 (1893); *Carl v. State*, 89 Ala. 93, 8 So. 156 (1889).

**Arkansas.**—*Davis v. State*, 50 Ark. 17, 6 S. W. 388 (1887); *Poster v. State*, 36 Ark. 258 (1880).

**District of Columbia.**—*Mackall v. District of Columbia*, 16 App. D. C. 301 (1900).

**Georgia.**—*Bradley v. State*, 121 Ga. 201, 48 S. E. 981 (1904); *Colwell v. State*, 112 Ga. 75, 37 S. E. 129 (1900).

**Iowa.**—*State v. Laffer*, 38 Iowa 422 (1874).

**Massachusetts.**—*Com. v. Ramsdell*, 130 Mass. 68 (1880).

**Kansas.**—*State v. Coulter*, 40 Kan. 87, 19 Pac. 368 (1888); *Intoxicating Liquor Case*, 25 Kan. 751, 37 Am. Rep. 284 (1881).

**Vermont.**—*State v. Kezer*, 74 Vt. 50, 52 Atl. 116 (1902); *Russell v. Sloan*, 33 Vt. 656 (1861).

If the distinctive character of a liquor "as an intoxicating liquor was destroyed that it could not be used as a beverage, and it became in fact a medicine to be used for diseases, and of such a character that it could not in reason, be styled or used as an intoxicating drink, its sale was not a violation of law." *State v. Laffer*, 38 Iowa 422 (1874).

"If the article sold can not be used as an intoxicating drink, it is not

within the prohibition of the statute, although it contains as one of its ingredients some spirituous liquor. The sale of such article is not within the mischief intended to be remedied by the statute, nor within the fair meaning of its language." *Com. v. Ramsdell*, 130 Mass. 68 (1880) per *Morton, J.*, quoted in *Joyce on Intoxicating Liquors*.

**13. Mitchell v. Com.**, 106 Ky. 602, 51 S. W. 17 (1899).

**1. Arkansas.**—*Wolf v. State*, 59 Ark. 297, 27 S. W. 77, 43 Am. St. 34 (1894).

**Florida.**—*Caldwell v. State*, 43 Fla. 545, 30 So. 814 (1901) (wine).

**Iowa.**—*State v. Curley*, 33 Iowa 359 (1871); *State v. Stapp*, 29 Iowa 551 (1870).

**North Carolina.**—*State v. Packer*, 80 N. C. 439 (1879) (port).

**Pennsylvania.**—*Hatfield v. Com.*, 120 Pa. St. 395, 14 Atl. 151 (1888).

**Vermont.**—*Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109 (1897) (Italian sour wine). But see also *Jackson v. State*, 19 Ind. 312 (1862); *State v. Page*, 66 Me. 418 (1876).

**Home-made blackberry wine is not known, judicially, to be intoxicating.** *Loid v. State*, 104 Ga. 726, 30 S. E. 949 (1898).

**2. See also State v. Page**, 66 Me. 418 (1876); *Reyfelt v. State*, 73 Miss. 415, 18 So. 925 (1895).

*A fortiori* it is not a matter generally known that wine is *not* intoxicating.<sup>3</sup> But wines of domestic household manufacture in which no specific amount of alcohol is contained, e. g., blackberry wine,<sup>4</sup> are not commonly known to possess an intoxicating quality.

*Vinous liquors not spirituous.*—As a matter of common knowledge, *vinous* liquors are all those made from the juice of the grape,<sup>5</sup> including, in common acceptation, certain beverages of home manufacture, made by using other fruits than grapes.<sup>6</sup> It follows that no evidence need be offered that wine is not a “spirituous liquor.”<sup>7</sup> According to common knowledge, it is not. “Spirit,” says the Supreme Court of Indiana,<sup>8</sup> “is the name of an inflammable liquor produced by distillation. Wine is the fermented juice of the grape or a preparation of other vegetables by fermentation. We cannot so far confound the signification of these general terms as to call wine a spirituous liquor. We think port wine is not within the purview of the statute.”<sup>9</sup>

*Intoxicating quality of wines.*—It is said above<sup>10</sup> that wines are commonly known to be intoxicating.<sup>11</sup> In case of home-made wines, the question has, however, frequently been left to the

3. Jackson v. State, 19 Ind. 312 (1862).

4. Loid v. State, 104 Ga. 726, 30 S. E. 949 (1898).

5. Allred v. State, 89 Ala. 112, 8 So. 56 (1889); Adler v. State, 55 Ala. 16 (1876). Champagne is commonly known to be a liquor. Kizer v. Randleman, 50 N. C. 428 (1858).

6. Hinton v. State, 132 Ala. 29, 31 So. 563 (1901) (blackberry). Vinous liquor “*ex vi termini*,” means liquor made from fruits or berries by a process of fermentation, when sugar and alcohol are added.” Marks v. State, (Ala. 1909) 48 So. 864, per Mayfield, J. [citing Allred’s Case, 89 Ala. 112, 8 So. 56 (1889); Adler’s Case, 55 Ala. 24 (1876) Hinton v. State, 132 Ala. 29, 31 So. 563 (1905)].

7. Caswell v. State, 2 Humph. (Tenn.) 402 (1841).

8. State v. Moore, 5 Blackf. (Ind.) 118 (1839), per Dewey, J.

9. To the contrary, see State v. Giersch, 98 N. C. 720, 4 S. E. 193 (1887); “Worcester defines wine (1), as, ‘The fermented juice of the grape; a spirituous liquid resulting from the fermentation of grape juice; and (2), ‘The fermented juice of certain fruits resembling in many respects the wine obtained from grapes, but distinguished therefrom by naming the source whence it is derived as ginger-wine, gooseberry-wine, currant-wine, etc.’” Hinton v. State, 132 Ala. 29, 31, 31 So. 563 (1901), per Haralson, J.

10. *Supra* n. 2.

11. Wolf v. State, 59 Ark. 297, 27 S. W. 77, 43 Am. Rep. 34 (1894); Caldwell v. State, 43 Fla. 545, 30 So. 814 (1901); State v. Packer, 80 N. C. 439 (1879), (port wine).

jury;<sup>12</sup>—the alcoholic content of such liquors being by no means standardized. The terms of any particular statute may convert the court's knowledge of the intoxicating quality of wines as a matter of notoriety into the judge's judicial knowledge of the direct results of the law he is to enforce.<sup>13</sup>

*Res Gestæ facts.*—Where the intoxicating quality of a wine is part of the *res gestæ*, the question is one beyond the scope of common knowledge. Evidence as to it should be submitted to the jury.<sup>14</sup> This, for the reasons stated is especially true of domestic or home-made wines.<sup>15</sup> In the same way, the question as to whether a given wine is spirituous, has very properly been regarded as one of fact for the determination of the jury.<sup>16</sup>

**§ 719. (B. What Facts are Covered by the Rule; [I] Nature; Properties of Matter); Gaseous.**—The liability of certain gases, as natural gas, under specified conditions,<sup>1</sup> to explode, as well as the fact that such a gas may safely be conducted in pipes,<sup>2</sup> and that it is generally requisite that some outside agency should bring out the explosive quality,<sup>3</sup> will be treated as matters of common knowledge. So no proof need be offered that oil and gas are uncertain and fugitive.<sup>4</sup>

12. *State v. Page*, 66 Me. 418 (1876).

13. *Morley v. Spurgeon*, 38 Iowa 465 (1874); *Reyfelt v. State*, 73 Miss. 415, 18 So. 925 (1896); *Schwab v. People*, 4 Hun. (N. Y.) 520 (1875); *Hatfield v. Com.*, 120 Pa. St. 395, 14 Atl. 151 (1888); *supra*, § 637.

14. *Loid v. State*, 104 Ga. 726, 30 S. E. 949 (1898) (blackberry wine).

15. "No court so far as we have been able to ascertain, has held, as matter of law, that home-made blackberry wine is intoxicating. The intoxicating qualities of such wine do not appear to be so well known or recognized by the people generally." *Loid v. State*, 104 Ga. 726, 30 S. E. 949 (1898), per Simmons, J., quoted in *Joyce on Intoxicating Liquors*.

16. *State v. Loury*, 74 N. C. 121 (1876) (blackberry wine).

1. *Jamieson v. Indiana Natural Gas, etc., Co.*, 123 Ind. 555, 28 N. E. 76, 12 L. R. A. 652 (1891); *Alex-*

*andria Min., etc., Co. v. Irish*, 16 Ind. App. 534, 44 N. E. 680 (1896). Judicial notice will be taken that gas, unlike oil, cannot be brought to the surface and stored to await a market, but must remain in the ground, and, unless allowed to waste away, taken out only when producer can find a customer. *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 836 (1909).

2. *Indiana, etc., Co. v. Jones*, 14 Ind. App. 55, 42 N. E. 487 (1895); *Alexandria, etc., Co. v. Irish*, 16 Ind. App. 534, 44 N. E. 487 (1896). See also *Indiana, etc., Gas Co. v. State*, 158 Ind. 516, 63 N. E. 220, 222 (1901). That gas pipes always leak is not a subject of judicial cognizance. *Indiana, etc., Co. v. Jones*, 14 Ind. App. 55, 42 N. E. 487 (1895).

3. *McGahan v. Indianapolis, etc., Co.*, 140 Ind. 335, 37 N. E. 601, 29 L. R. A. 355 (1894).

4. *Huggins v. Daly*, 99 Fed. 606, 48 L. R. A. 355 (1900).

*Particular facts* relating to matter in the gaseous form not generally known as that natural gas can percolate through the soil and enter a house in quantity sufficient to cause an explosion,<sup>5</sup> should be proved.

*Etheric and Electrical.*— Courts know the general properties and effects of electricity. The special manner in which it is generated or transported<sup>6</sup> must be proved. Whether electricity has any and, if so, what, curative properties when applied to the human system,<sup>7</sup> is not commonly known to courts. It need not be proved that electricity is dangerous.<sup>8</sup> It is commonly known and recognized as being of this nature.

**§ 720. (B. What Facts are Covered by the Rule); (2) Science.**— The well established and notorious results of scientific research need not be proved to the tribunal. The conclusions of such investigation, so far as definitely settled regarding matters of general interest, are commonly known.<sup>1</sup> Disputed propositions of scientific knowledge, about which learned men may reasonably differ in opinion, must be proved, if their truth is to be available to the party.<sup>2</sup>

**§ 721. (B. What Facts are Covered by the Rule; [2] Science); Uniformity Necessary.**— The laws of nature, whether ultimate or derivative, are commonly known.<sup>1</sup> Thus, no proof

5. *Mississinewa Min. Co. v. Patton*, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203 (1891). That coal mines generate deleterious gases is not a matter of common knowledge. *Timson v. Manufacturers' Coal & Coke Co.*, 220 Mo. 580, 119 S. W. 565 (1909).

6. *City of Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849 (1891); *Taggart v. Newport St. R. Co.*, 16 R. I. 668, 19 Atl. 326 (1885).

7. *Macomber v. State Board of Health*, 28 R. I. 3, 65 Atl. 263 (1906).

8. *Warren v. City Electric Ry Co.*, (Mich. 1905) 12 Detroit Leg. N 415, 104 N. W. 613.

1. *Luke v. Calhoun County*, 52 Ala. 115 (1875); *Poor v. Watson*, 92 Mo. App. 89 (1901); *Cox v. Seyenite Granite Co.*, 39 Mo. App. 424 (1890) (gravitation). See also *Reineman v.*

*Larkin*, 222 Mo. 156, 121 S. W. 307 (1909); *Timson v. Manufacturers' Coal & Coke Co.*, 220 Mo. 580, 119 S. W. 565 (1909).

2. *State v. Fox*, 79 Md. 514, 528, 29 Atl. 601 (1894); *St. Louis Gaslight Co. v. American F. Ins. Co.*, 33 Mo. App. 348 (1889); *Blessing v. John Trageser, etc., Works*, 34 Fed. (U. S.) 753 (1888); *Kaolatype Engraving Co. v. Hoke*, 30 Fed. (U. S.) 444 (1887). See also *Sprinkle v. Bart*, 25 Ind. App. 681, 58 N. E. 862 (1900); *Mississinewa, etc., Co. v. Patton*, 129 Ind. 472, 28 N. E. 1113 (1891); *Northwestern Mfg. Co. v. Chambers*, 58 Mich. 381, 55 Am. R. 693 (1885).

1. *Alabama.*— *Wetzler v. Kelly*, 83 Ala. 440, 3 So. 747 (1887).

*Arkansas.*— *Person v. Wright*, 35 Ark. 169 (1879).

will be asked that cold of a certain degree will arrest the process of decay.<sup>2</sup> But natural laws of a limited and uncertain operation<sup>3</sup> *a fortiori* those whose existence is disputed,<sup>4</sup> must be proved.

**§ 722. (B. What Facts are Covered by the Rule; [2] Science); Mathematical Science.**—The general rules of mathematical science, such as arithmetic,<sup>1</sup> or of their common application in any familiar art, e. g., mensuration,<sup>2</sup> need not be proved.

**§ 723. (B. What Facts are Covered by the Rule; [2] Science); Established Standards; Capacity.**—In part, because established by law and in part because generally known in the community, standard measures of capacity<sup>1</sup> are judicially known.<sup>2</sup>

**§ 724. (B. What Facts are Covered by the Rule; [2] Science; Established Standards); Extension.**—Standard measures of extension are both commonly and judicially known. The court, however, cannot be required to make computations based on these standards, as, for example, to determine the area embraced within certain boundaries.<sup>1</sup>

**§ 725. (B. What Facts are Covered by the Rule; [2] Science; Established Standards); Value.**—The value of the circulating medium is established by laws which the court admin-

*California.*—Mahoney v. Aurrecochea, 51 Cal. 429 (1876).

*Maryland.*—Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. 1 (1832).

*Missouri.*—Garth v. Caldwell, 72 Mo. 622 (1880).

*Texas.*—Barr v. Cardiff, (Civ. App. 1903) 75 S. W. 341.

*United States.*—Lyon v. Marine, 55 Fed. 964, 5 C. C. A. 359 (1893).

2. Brown v. Piper, 91 U. S. 37, 23 L. ed. 200 (1875).

3. **Weather conditions.**—While each separate natural meteorological force would produce, if unconditioned by others an invariable result, their interaction is so complicated that courts are unwilling to regard the vicissitudes of weather, or changes in climate as facts commonly known. Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197 (1892); Dixon v. Niccolls, 39 Ill.

372, 285, 89 Am. Dec. 312 (1866); Haines v. Gibson, 115 Mich. 131, 73 N. W. 126 (ice on April 1st in northern Michigan) (1897).

4. People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269 (1897); Chicago, etc., R. Co. v. Champion, (Ind. Sup. 1892) 32 N. E. 874.

1. Falls v. U. S. Saving, etc., Co., 97 Ala. 417, 13 So. 25, 24 L. R. A. 174 (1892).

2. Scanlan v. San Francisco Ry. Co., (Cal. 1898) 55 Pac. 694.

1. Reid v. McWhinnie, 27 U. C. Q. B. 289 (1868) (a pint is less than five gallons).

2. No proof need be offered that a ten-cent glass of whiskey contains less than three gallons. State v. Blands, 101 Mo. App. 618, 74 S. W. 3 (1903).

1. Tison v. Smith, 8 Tex. 147 (1852).



isters.<sup>1</sup> For this reason, as well as because the fact is notorious, no proof need be offered as to it.<sup>2</sup> In other words, it is a subject both of common and judicial knowledge. The value of paper currency as measured in gold is matter of general knowledge;<sup>3</sup> but the value of bank notes,<sup>4</sup> though actually part of the circulating medium for exchanges, must be proved.<sup>5</sup> The value of small silver coin in circulation—half dollars, quarters,<sup>6</sup> dimes, and

1. *Alabama*.—*Gady v. State*, 83 Ala. 51, 3 So. 429 (1887) (that the paper currency of the United States is *prima facie* of its face value).

*Georgia*.—*Mallory v. State*, 62 Ga. 164 (1878) (“nickels” have a value).

*Illinois*.—*Collins v. People*, 39 Ill. 233 (1866).

*Indiana*.—*McCarty v. State*, 127 Ind. 223, 26 N. E. 665 (1890).

*Kansas*.—*State v. Pigg*, 80 Kan. 481, 103 Pac. 121 (1909).

*Maryland*.—*Chesapeake Bank v. Swain*, 29 Md. 483, 502 (1868).

*Missouri*.—*State v. Moseley*, 38 Mo. 380 (1866); *U. S. v. Fuller*, 4 N. M. 358, 20 Pac. 175 (1889).

*South Carolina*.—*State v. Evans*, 15 Rich. 31 (1867).

*Tennessee*.—*Shaw v. State*, 3 Sneed 86 (1855).

*Texas*.—*Jones v. State*, 39 Tex. Cr. 387, 46 S. W. 250 (1898); *U. S. v. Burns*, 24 Fed. Cas. No. 14,691, 5 McLean 23 (1849) (the 50-cent and 25-cent pieces of the United States coin are identical with the half dollar and quarter dollars, respectively). See also *U. S. v. American Gold Coin*, 24 Fed. Cas. No. 14,439, 1 Woolw. 217 (1868).

*England*.—*Bryant v. Foot*, L. R. 3 Q. B. 497, 9 B. & S. 444, 37 L. J. Q. B. 217, 18 L. T. Rep. N. S. 587, 16 Wkly. Rep. 808 (1868). American courts know judicially that the dollar is the monetary unit in the United States and require no proof of its value or as to that of the other kinds or denominations of the national currency. *McDonald v. State*, 2 Ga. App. 633, 58 S. E. 1067 (1907).

So also, the meaning of the term “greenback” is a matter of common knowledge. *McDonald v. State*, 2 Ga. App. 633, 58 S. E. 1067 (1907).

The general appreciation of the value of money since the time of Richard I is a fact of common knowledge. *Bryant v. Foot*, L. R., 3 Q. B. 497 (1868), per Kelly, C. B.

2. *Grant v. State*, 89 Ga. 393, 15 S. E. 488 (1892); *McCarty v. State*, 127 Ind. 223, 26 N. E. 665 (1890); *Jones v. State*, 39 Tex. Cr. 387, 46 S. W. 250 (1898).

3. *U. S. v. American Gold Coin*, 24 Fed. Cas. No. 14,439. Woolw. 217 (1868). That United States notes “are *prima facie* of a commercial value equal to that imputed by their face” is commonly known. *Gady v. State*, 83 Ala. 51 (1887).

4. *Modawell v. Holmes*, 40 Ala. 391 (1867). Compare *Perrit v. Crouch*, 5 Bush (Ky.) 199 (1868); *Jones v. Fales*, 4 Mass. 245, 252 (1808); *Letcher v. Kennedy*, 3 J. J. Marsh. (Ky.) 701 (1830); *Bell v. Waggener*, 7 T. B. Mon. (Ky.) 524 (1828); *Feemster v. Ringo*, 5 T. B. Mon. (Ky.) 336 (1827). “We are not at liberty to take judicial notice of the value of the paper of the bank at any particular time.” *Feemster v. Ringo*, 5 Mon. (Ky.) 336 (1827).

5. That there was some depreciation, at a given time may be a historical fact which may be regarded as established without proof. *Perrit v. Crouch*, 5 Bush (Ky.) 199 (1868).

6. *Sims v. State*, 1 Ga. App. 776, 57 S. E. 1029 (1907).

even that of smaller coinage<sup>7</sup> is notorious. The equivalents of the circulating medium of the United States in the standard coinage of other countries, such as the British pound,<sup>8</sup> may be taken as known.<sup>9</sup> The court cannot be asked to apply these standards of value to particular commodities<sup>10</sup> or to the value of legal,<sup>11</sup> medical,<sup>12</sup> commercial<sup>13</sup> or other services.<sup>14</sup>

**§ 726. (B. What facts are covered by the Rule; [2] Science; Established Standards); Weight.**—The court notices the established standards of weight, as well as those of measure.<sup>1</sup> It cannot, however, be asked to apply these standards to specific articles;—e. g., as the weight of artificial legs.<sup>2</sup>

**§ 727. (B. What Facts are Covered by the Rule; [2] Science); Facts of the Almanac.**—The almanac is part of the law of England<sup>1</sup> and of other jurisdictions which are governed by the English system of jurisprudence. By this is meant that the facts stated in the almanac are both commonly and judicially known, and that such facts, when relevant,<sup>2</sup> will be assumed to be correctly stated, even without the production of the almanac itself.<sup>3</sup> The court may use the book to refresh its memory; and even where the almanac is introduced in evidence, the act, though unneces-

7. *Barddell v. State*, (Ala. 1906) 39 So. 975 (5-cent piece called a "nickel").

8. *Johnston v. Hedden*, 2 Johns. Cas. (N. Y.) 274 (1801).

9. The value of Canadian currency in money of the United States must be proved in an American court. *Kermott v. Ayer*, 11 Mich. 181 (1863).

10. *Price v. Connecticut Mut. L. Ins. Co.*, 48 Mo. App. 281 (1891) (life insurance policy); *Towne v. St. Anthony, etc., Elevator Co.*, 8 N. D. 200, 77 N. W. 608 (1898) (grain).

11. *Pearson v. Darrington*, 32 Ala. 227 (1858).

12. *Millener v. Driggs*, 10 N. Y. St. 237 (1887).

13. *Seymour v. Marvin*, 11 Barb. (N. Y.) 80 (1851) (commission).

14. But see *Bell v. Barnet*, 2 J. J. Marsh. (Ky.) 516 (1829); *Adams Express Co. v. Hoeing*, 9 Ky. L. Rep. 814 (1888).

1. *Mays v. Jennings*, 4 Humph. (Tenn.) 102 (1843); *Hockin v. Cooke*, 4 T. R. 314 (1791); *Reed v. McWhinnie*, 27 U. C. Q. B. 289 (1868). See also *Putnam v. White*, 76 Me. 551 (1884); *Tison v. Smith*, 8 Tex. 147 (1852).

2. *Garrow v. Barre R. Co.*, (Vt. 1902) 52 Atl. 537.

3. *Nixon v. Freeman*, 5 H. & N. 652 (1860); *Tutton v. Darke*, 5 H. & N. 647, 6 Jur. N. S. 983, 29 L. J. Exch. 271, 2 L. T. Rep. N. S. 361 (1860); *Brough v. Perkins*, 6 Mod. 80, 81 (1703).

An act of Parliament establishes the calendar in England. *Harvey v. Broad*, 6 Mod. 159 (1704).

2. *Dawkins v. Smithwick*, 4 Fla. 158 (1851).

3. *People v. Chee Kee*, 61 Cal. 404 (1882); *Wilson v. Van Leer*, 127 Pa. St. 371, 379, 17 Atl. 1097, 14 Am. St. Rep. 854 (1889).

sary,<sup>4</sup> is not illegal.<sup>5</sup> In other words, the same procedure is followed as if the rising time of the sun or the setting of the moon were a proposition of domestic law, which the court was bound to know. The matter, however, is merely one of scientific fact, which, under the practical conditions of the trial can only be shown by the almanac itself. The time of the rising of the sun is no more a matter of law than is the expectancy of life or any other fact of scientific deduction which is not easily proved in any other way. Nor are facts of the almanac said to be commonly known, because the community, as a whole, actually knows them. It does not know them in the sense that it knows that a man is a biped or that it is dangerous to cross a railroad track without looking for an approaching train. The public merely knows that the laws under which these calculations are made are ascertained and known to certain disinterested and specially qualified persons, as is shown by the circumstance that they have been verified for a long series of years by actual results with which they are in part familiar. This, however, furnishes rather a reason why the fact of the almanac should not be disputed than why they could be said to be *known* to the general community.

The knowledge of these, and similar facts in the case of the average man is *potential*, rather than *actual*. He does not know the fact itself; he merely knows where to find it. The judge, as the executive officer of the court, may examine into the matter

4. "However often departed from as a matter of convenience, the rule is that matters of which judicial notice is taken, including the dates in the almanac, do not require to be put in evidence at all." *Wilson v. Van Leer*, 127 Pa. St. 371 (1889). Counsel may use an almanac, not previously brought to the attention of the court, in a closing argument. *Wilson v. Van Leer*, 127 Pa. St. 371, 17 Atl. 1097, 14 Am. St. Rep. 854 (1889).

5. *State v. Morris*, 47 Conn. 179 (1879); *Lendle v. Robinson*, 53 N. Y. App. Div. 140, 65 N. Y. Suppl. 894 (1900); *Case v. Perew*, 46 Hun (N. Y.) 57 (1887).

*Alabama*.—*Allman v. Owen*, 31 Ala. 167 (1857).

*California*.—*People v. Chee Kee*, 61 Cal. 404 (1882).

*Connecticut*.—*State v. Morris*, 47 Conn. 180 (1879).

*Maryland*.—*Munshower v. State*, 55 Md. 11, 24 (1880).

*New York*.—*Case v. Perew*, 46 Hun 57, 62 (1887).

*Pennsylvania*.—*Wilson v. Van Leer*, 127 Pa. 378, 17 Atl. 1097 (1889).

*England*.—*Tutton v. Darke*, 5 H. & N. 649 (1860); *Brough v. Perkins*, 6 Mod. 81 (1703).

In Georgia the same result is attained by statute. "The almanac in such cases is used, like the statute, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury." *State v. Morris*, 47 Conn. 174 (1879).

or the jury may do the same thing for themselves. No *res gestæ* fact being involved, it is good administration for the expediting of the court's business.

*Judicial Knowledge.*—The divisions of time being recognized and, in a just sense, the result of law, it may properly be said that the facts of the almanac are *judicially* as well as generally known.

**§ 728. (B. What Facts are Covered by the Rule; [2] Science; Facts of the Almanac); Movements of the Heavenly Bodies.**—Facts of the almanac, as commonly used, include observations as to phenomena connected with the movements of the heavenly bodies as viewed from various points on the earth's surface and, in certain cases,—as the ebb and flow of the tides—or the growth of vegetation, to effects produced upon the surface itself. Prominent among these are the time of the rising and setting of the sun;<sup>1</sup> or the same facts regarding the moon.<sup>2</sup> Inferential facts regarding the duration of daylight<sup>3</sup> or moonlight, if any, on a particular day will be taken as being accurate without evidence on the point. In the same sense, a judge knows the dif-

1. *Alabama.*—Louisville, etc., Ry. Co. v. Brinkerhoff, 119 Ala. 606, 24 So. 892 (1898).

*California.*—People v. Chee Kee, 61 Cal. 404 (1882).

*Connecticut.*—State v. Morris, 47 Conn. 179 (1879). See also Beardsley v. Irving, 81 Conn. 489, 71 Atl. 580 (1909).

*Indiana.*—Dayton & W. Traction Co. v. Marshall, (Ind. App. 1905) 75 N. E. 824.

*New York.*—Montenes v. Metropolitan St. R. Co., 77 N. Y. App. Div. 493, 78 N. Y. Suppl. 1059 (1902).

*Ohio.*—Lake Erie, etc., R. Co. v. Hatch, 6 Ohio Cir. Ct. 230, 3 Ohio Cir. Dec. 430 (1892).

The contrary doctrine is held in *England.*—Where the court declines to take judicial cognizance of the time of sunrise. Tutton v. Darke, 5 H. & N. 647, 6 Jur. N. S. 983, 29 L. J. Exch. 271, 2 L. T. Rep. N. S. 361 (1860).

2. *Alabama.*—Mobile, etc., R. Co. v. Ladd, 92 Ala. 287, 9 So. 169 (1890).

*California.*—People v. Mayes, 113 Cal. 618, 45 Pac. 860 (1896).

*Connecticut.*—State v. Morris, 47 Conn. 179 (1879).

*Maryland.*—Munshower v. State, 55 Md. 11, 39 Am. Rep. 414 (1880).

*Michigan.*—De Armond v. Neasmith, 32 Mich. 231 (1875).

*New York.*—Case v. Perew, 46 Hun 57 (1887).

*England.*—Page v. Faucet, Cro. Eliz. 227 (1587).

3. Cincinnati, etc., R. Co. v. Worthington, 30 Ind. App. 663, 65 N. E. 557, 66 N. E. 478 (1902) (3:20 a. m., October 12th, not daylight). It will be known that in the latitude of Illinois 5 o'clock in the afternoon of July 23d is about two hours before sunset. Falkeneau Const. Co. v. Ginley, 131 Ill. App. 399 (1907).

ference between mean high water and mean low water mark at a given point.<sup>4</sup>

*Days, weeks, months, etc.* Courts notice periods within the calendar.<sup>5</sup> They, therefore, take judicial knowledge of times, dates and subdivisions of a year into months, weeks and days.<sup>6</sup> Judges notice, without proof, the number of days in any calendar month.<sup>7</sup> As is seen elsewhere<sup>8</sup> implied in such a knowledge of the facts of the almanac is cognizance as to the coincidence of the days of the week with those of the month, of the days of the month with those of the year and the relation of any day to a fixed date such as the opening of a term of court. Such a discovery by means of an almanac of the coincidence of the days of the week with those of the month has been spoken of as "refreshing the memory" of the court.<sup>9</sup> The phrase, however, scarcely seems felicitous. *Non constat* that the court ever had any memory on the subject whatever. The process more nearly resembles the making actual of knowledge at all times potential.<sup>10</sup>

**§ 729. (B. What Facts are Covered by the Rule; [2] Science); Photography.**—The scientific principles relating to photography,<sup>1</sup> the mechanical and chemical processes employed<sup>2</sup> and the general accuracy of the results,<sup>3</sup> are known to the courts.

4. *Supperle v. MacFarland*, 28 App. Cas. (D. C.) 94 (1906).

**Action of the tides.**—The law notices the high spring tides, which are the fluxes of the sea at those tides which happen at the two equinoctials, the spring tides which happen twice every month at the full and change of the moon, and the neap or ordinary tides, which happen at the change and full of the moon twice in twenty-four hours. *Eichelberger v. Mills Land & Water Co.*, (Cal. App. 1909) 100 Pac. 117.

5. *State v. Williams*, (Nev. 1909) 102 Pac. 974.

6. *McAllister v. State*, (Tex. Cr. App. 1909) 116 S. W. 582.

7. 1 Rol. Ab. 524.

8. *Supra*, § 704.

9. *Beardsley v. Irving*, 81 Conn. 489, 71 Atl. 580 (1909).

10. *Supra*, § 698.

1. *Luke v. Calhoun County*, 52 Ala.

115 (1875); *Cozzens v. Higgins*, 1 Abb. Ct. of App. Dec. 451 (1866).

2. *Luke v. Calhoun Co.*, 52 Ala. 115 (1875).

3. *Luke v. Calhoun County*, 52 Ala. 115 (1875); *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464 (1881); *Udderzook v. Com.*, 76 Pa. St. 340 (1874). "We do not fail to notice, and we may notice judicially, that all civilized communities rely upon photographic pictures for taking and presenting resemblances of persons and animals, of scenery and all natural objects, of buildings and other artificial objects." *Cowley v. People*, 83 N. Y. 464 (1881). "The process (photography) has become one in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses." *Udderzook v. Com.*, 76 Pa. St. 340 (1874).

The accuracy of a properly taken X-ray photograph of the bones of a living body will be judicially known.<sup>4</sup>

§ 730. (*B. What Facts are Covered by the Rule; [2] Science*); *Statistics*.—Commonly received facts revealed by the use of statistics as, census tables,<sup>1</sup> the law of averages,<sup>2</sup> expectancy of life, annuity or mortality tables, present the difficulties of proof characteristic of the other results of scientific research;<sup>3</sup>—and which has already been observed regarding facts of the almanac,<sup>4</sup> and the like. They are, therefore, subjects fairly treated as matters of common knowledge to be acquired by the court, for its own benefit and that of the jury by the exercise of its administrative powers. Certain statistical results, like those set forth in the census tables, are also facts established by a law, which the court is required judicially to know.

§ 731. (*B. What Facts are Covered by the Rule; [2] Science; Statistics*); *Census*.—For reasons given above—(a) because the facts cannot usually be otherwise proved; (b) because they are facts established by or in pursuance of law,<sup>1</sup> courts take judicial notice of the existence and facts stated in the federal census<sup>2</sup> and of any census taken under the law of the state,<sup>3</sup> though covering a limited range.<sup>4</sup> The court will not only notice

4. *Houston & T. C. R. Co. v. Shapard*, (Tex. Civ. App. 1909) 118 S. W. 596. For an illuminating discussion of the general use of photographs in evidence, see 35 L. R. A. 802.

1. *Infra*, § 731.

2. *Infra*, § 732.

3. *Supra*, § 698.

4. *Supra*, § 704.

1. *Supra*, § 637.

2. *California*.—*People v. Williams*, 64 Cal. 87, 27 Pac. 939 (1883).

*Illinois*.—*Chicago, etc., R. Co. v. Baldrige*, 177 Ill. 229, 52 N. E. 263 (1898).

*Indiana*.—*Whitley County v. Garty*, 161 Ind. 464, 68 N. E. 1012 (1903); *State v. Swift*, 69 Ind. 505, 527 (1880).

*Iowa*.—*State v. Braskamp*, 87 Iowa 588, 54 N. W. 532 (1893).

*Missouri*.—*State v. Marion Co. Court*, 128 Mo. 427, 30 S. W. 103 (1895); *State v. Jackson County Ct.*, 89 Mo. 237, 1 S. W. 307 (1886).

*Oregon*.—*Stratton v. Oregon City*, 35 Or. 409, 60 Pac. 905 (1900).

*West Virginia*.—*Welch v. Wetzel County Ct.*, 29 W. Va. 63, 1 S. E. 337 (1886). But see *First Nat. Bank v. Chapman*, 173 U. S. 205, 19 Sup. Ct. 407 (1899).

3. *Huntington v. Cast*, 149 Ind. 255, 48 N. E. 1025 (1898); *Stratton v. Oregon City*, 35 Or. 409, 60 Pac. 905 (1900).

4. *Kokes v. State*, 55 Neb. 691, 76 N. W. 467 (1898) (school district).

the population of the state and its counties,<sup>5</sup> cities,<sup>6</sup> towns<sup>7</sup> and other political divisions, but will know the approximate rate at which the population of these places increases<sup>8</sup> or diminishes. As a fact of notoriety,<sup>9</sup> the courts may know the results reached by the census before their official announcement.<sup>10</sup>

**§ 732. (B. What Facts are Covered by the Rule; [2] Science; Statistics); Mortality Tables.**—The court knows of facts established by mortality tables of recognized authority,<sup>1</sup> as

5. *Infra*, § 743.

6. *Ferritt v. Ellis*, (Iowa 1906) 105 N. W. 993; *City of Ft. Scott v. Elliott*, (Kan. 1903) 74 Pac. 609; *State ex rel. Crow v. Page*, (Mo. App. 1904) 80 S. W. 912; *infra*, § 744. See also *Russell v. Poor*, 133 Mo. App. 723, 119 S. W. 433 (1908) (population of Kansas City, Mo.); *Gannett v. Independent Telephone Co.*, 106 N. Y. Suppl. 3, 55 Misc. Rep. 555 (1907). A court will know that many cities or towns in the state have a population in excess of 5,000. *People v. Earl*, 42 Colo. 238, 94 Pac. 294 (1908).

For some consideration of the effect of census returns in establishing the fact of *age* see 9 L. R. A. (N. S.) 718.

7. *Infra*, § 750. *Ferrel v. Ellis*, (Iowa 1906) 105 N. W. 993; *Page v. McClure*, (Vt. 1906) 64 Atl. 451.

8. *In re* Senate Bill No. 293, 21 Colo. 38, 39 Pac. 522 (1895); *Union College v. New York*, 73 N. Y. Suppl. 51, 65 App. Div. 553 (1901). To be judicially known the average claimed must be under a fixed uniformity, not subject to violent fluctuations. A court, for example, will not judicially know what, on the average, is the percentage of voting population of a State or county who actually vote at annual elections. *Kokes v. State*, 55 Neb. 691, 76 N. W. 467 (1898).

Actual increase above the census figures, if relied on, must be proved. *Adams v. Elwood*, 176 N. Y. 106, 68 N. E. 126 (1903).

9. *Supra*, § 699.

10. *State v. Braskamp*, 87 Iowa 588, 54 N. W. 532 (1893).

1. *Arkansas*.—*Arkansas M. R. Co. v. Griffith*, 63 Ark. 491, 39 S. W. 550 (1897).

*California*.—*Valente v. Sierra Ry. Co.*, (Cal. 1907) 91 Pac. 481; *Townsend v. Briggs*, 99 Cal. 481, 484, 34 Pac. 116 (1893).

*Connecticut*.—*Nelson v. Branford L. & W. Co.*, 75 Conn. 548, 54 Atl. 303 (1903).

*Georgia*.—*Central R. Co. v. Richards*, 62 Ga. 307 (1879).

*Illinois*.—*Joliet v. Blower*, 155 Ill. 414, 40 N. E. 619 (1895).

*Iowa*.—*Kreuger v. Sylvester*, 100 Iowa 647, 69 N. W. 1059 (1897).

*Kansas*.—*Atchison, T. & S. F. R. Co. v. Ryan*, 62 Kan. 682, 64 Pac. 603 (1901).

*Kentucky*.—*Louisville & N. R. Co. v. Kelly*, 100 Ky. 421, 38 S. W. 852 (1897).

*Michigan*.—*Nelson v. R. Co.*, 104 Mich. 582, 62 N. W. 993 (1895).

*Missouri*.—*O'Mellia v. R. Co.*, 115 Mo. 205, 222 (1893).

*New York*.—*People v. Life Ins. Co.*, 78 N. Y. 128 (1879).

*Pennsylvania*.—*Campbell v. York*, 172 Pa. 205, 33 Atl. 879 (1896).

*Tennessee*.—*Railroad Co. v. Ayres*, 84 Tenn. 729 (1886).

*Vermont*.—*Mills v. Catlin*, 22 Vt. 107 (1849).

*Wisconsin*.—*Crouse v. R. Co.*, 102 Wis. 196, 78 N. W. 446 (1899).

*United States*.—*Vicksburg R. Co.*

the Carlisle,<sup>2</sup> American<sup>3</sup> or other standard<sup>4</sup> compilations.<sup>5</sup> It is not essential, as an administrative matter, that preliminary proof should be offered as to the authoritative character of the publication.<sup>6</sup> It follows that the court will know the expectancy of life at a given age,<sup>7</sup> as gathered from these tables.<sup>8</sup>

*v. Putman*, 118 U. S. 554, 7 Sup. 1 (1886).

*England*.—*Rowley v. R. Co.*, L. R. 8 Exch. 226 (1873).

**There is authority to the contrary**, though by a divided court. *Western & A. R. Co. v. Hyer*, 113 Ga. 776, 39 S. E. 446 (1901).

See *infra*, §§ 859c *et seq.*

**2. Georgia**.—*Western & A. R. Co. v. Cox*, 115 Ga. 715, 42 S. E. 74 (1902).

*Nebraska*.—*Friend v. Ingersoll*, 39 Neb. 717, 724, 58 N. W. 281 (1894).

*New Jersey*.—*Camden & A. R. Co. v. Williams*, 61 N. J. L. 646, 40 Atl. 634 (1898).

*Pennsylvania*.—*Steinbrunner v. R. Co.*, 146 Pa. 504, 515, 23 Atl. 239 (1892).

*United States*.—*Lincoln v. Power*, 151 U. S. 436, 441 (1893).

**3. Birmingham M. R. Co. v. Wilmer**, 97 Ala. 165, 170, 11 So. 886 (1892).

**4. Keast v. Santa Ysabel G. M. Co.**, 136 Cal. 256, 68 Pac. 771 (1902); (Farrs tables); *Pearl v. R. Co.*, 115 Iowa 535, 88 N. W. 1078 (1902) (generally accepted as standard); *Seagel v. R. Co.*, 83 Iowa 380, 49 N. W. 990 (1891) (cyclopaedia); *Lancaster v. Lancaster's Trustees*, 78 Ky. 200 (1879) (dower tables). See also *Winn v. Cleveland, C., C. & St. L. Ry. Co.*, 143 Ill. App. 71 (1908) [judgment affirmed, 87 N. E. 954 (1909)] (*Dr. Wigglesworth*).

**5. Whether the court shall require preliminary proof** of the recognized authority of the tables is dependent upon the judge's knowledge on the subject. *Keast v. Santa Ysabel, etc., Co.*, 136 Cal. 256, 68 Pac. 771 (1902). It is not necessary. *Western, etc.,*

*Ry. Co. v. Cox*, 115 Ga. 715 (1902). It has, however, been required. *Camden, etc., Ry. Co. v. Williams*, 61 N. J. L. 646, 40 Atl. 634 (1898). The conditions upon which the results are reached must necessarily be specified. *McKenna v. Gas Co.*, 198 Pa. 31, 47 Atl. 990 (1901).

**6. Valente v. Sierra R. Co.**, (Cal. 1907) 91 Pac. 481.

**7. Alabama**.—*Kansas City, etc., R. Co. v. Phillips*, 98 Ala. 159, 13 So. 65 (1893).

*Arkansas*.—*Arkansas Midland R. Co. v. Griffith*, 63 Ark. 491, 39 S. W. 550 (1897).

*Connecticut*.—*Nelson v. Branford Lighting, etc., Co.*, 75 Conn. 548, 54 Atl. 303 (1903).

*Georgia*.—*Western, etc., R. Co. v. Hyer*, 113 Ga. 776, 39 S. E. 447 (1901).

*Indiana*.—*Indianapolis v. Marold*, 25 Ind. App. 428, 58 N. E. 512 (1900).

*Kentucky*.—*Alexander v. Bradley*, 3 Bush 667 (1868).

*Missouri*.—*Boettger v. Scherpe, etc., Architectural Iron Co.*, 136 Mo. 531, 38 S. W. 298 (1896).

*New York*.—*Davis v. Standish*, 26 Hun 608 (1882).

*West Virginia*.—*Abell v. Penn. Mut. L. Ins. Co.*, 18 W. Va. 400 (1881).

**Statutory provisions to the same effect** have been adopted in North Carolina, North Dakota (Carlisle tables), South Carolina (mortuary table).

**8. Mutual Life Ins. Co. v. Bratt**, 55 Md. 200, 212 (1880); *Kerrigan v. R. Co.*, 194 Pa. 98, 44 Atl. 1069 (1899); *Berg v. R. Co.*, 50 Wis. 427, 7 N. W. 347 (1880).



**§ 733. (B. What Facts are Covered by the Rule; Science; Statistics); Trade Tables.**—The tabulated results of experience or observation in scientific,<sup>1</sup> mechanical<sup>2</sup> or commercial<sup>3</sup> pursuits, or the results of scientific calculations in these and other departments of human activity, as set forth in interest tables,<sup>4</sup> tables of weights,<sup>5</sup> currency<sup>6</sup> and the like need not be proved.<sup>7</sup>

**§ 734. (B. What Facts are Covered by the Rule); (3) Facts of Geography; In General.**—Two main classes of geographical facts<sup>1</sup> are judicially or commonly known;—(a) those which are established by law; (b) those which the community, as a whole, knows as a matter of notoriety.<sup>2</sup> The two classes cannot, in all cases, be separated;—it frequently happening that it is precisely the facts established by law which are most notorious through the community. The most which can, perhaps be said in such cases is that the judge, in these instances of blended sources of knowledge, is justified by a double line of forensic or procedural reasoning in dispensing with proof of the geographical fact so circumstanced.

*Courts, in general*, know the prominent topographical features of the country covered by their immediate jurisdiction,<sup>3</sup> those of the country as a whole,<sup>4</sup> and of the entire world. The court's

1. *Western Assur. Co. v. Mohlmann Co.*, 28 C. C. A. 157, 83 Fed. 811 (1897) (engineering tables). See *infra*, §§ 859c *et seq.*

2. *Garwood v. R. Co.*, 45 Hun 129 (1887) (millwright's tables).

3. *Hatcher v. Dunn*, (Iowa 1896) 66 S. W. 905 (thermometer used in gauging oils); *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55 (1901) (tide tables for Puget Sound).

4. *Gallagher v. Ry. Co.*, 67 Cal. 16, 6 Pac. 869 (1885).

5. *Gallagher v. Ry. Co.*, 67 Cal. 16, 6 Pac. 869 (1885).

6. *Gallagher v. R. Co.*, 67 Cal. 16, 6 Pac. 869 (1885).

7. Fugitive publications of more questionable reliability (*Payson v. Everett*, 12 Minn. 219 [1867] [bank note detector]), will not be used in this way.

1. "Geography," in this connection, will be extended to cover notorious

facts of topography (*infra*, § 739), and to existing facts of prominence and general interest in the social or business life of particular localities, within or without the jurisdiction of the court. *Infra*, § 738. In most instances, the judge's knowledge of geography, like that of most persons in the community, is general and approximate, rather than exact.

2. "Public facts and geographical positions" must be deemed commonly known. *The Appolon*, 9 Wheat. (U. S.) 362, 374 (1824).

3. *Trenier v. Stewart*, 55 Ala. 458 (1876); *Bittle v. Stuart*, 34 Ark. 224 (1879); *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135 (1878); *Bell v. Barnett*, 2 J. J. Marsh. (Ky.) 516 (1829).

4. *U. S. v. La Vengeance*, 3 Dall. (U. S.) 297, 1 L. ed. 610 (1796); *Peyroux v. Howard*, 7 Pet. (U. S.) 324, 8 L. ed. 700 (1833).

vision becomes microscopic in proportion as it comes near to its immediate community.<sup>5</sup>

**§ 735. (*B. What Facts are Covered by the Rule; [3] Facts of Geography*); Nation.**— A court judicially knows, in a general way, the boundaries of the nation and, by consequence, whether certain territory is within or without<sup>1</sup> these lines. The judge of any court knows also the political divisions into which the nation originally was or since has been<sup>2</sup> divided. A state court knows the boundaries of the United States, at least where these coincide with the state lines.<sup>3</sup> In a general way, they know the geographical distribution of the crop areas of the country, e. g., that the great wheat fields of the United States lie west of the Hudson river.<sup>4</sup> All courts will judicially know the location,<sup>5</sup> name<sup>6</sup> and importance, commercially speaking,<sup>7</sup> of the principal

5. "The minuteness of such knowledge is inversely proportioned to the distance, being much more specific and detailed in regard to the territory over which the court has jurisdiction than with respect to foreign lands, or even different states." "The Law of Judicial Notice," 24 Am. Law Reg. (N. S.) 553, 570 (1885). Minuteness of judicial knowledge "is in inverse proportion to the distance." 1 Whart. Evid. § 339. "Courts take judicial notice of facts of current history, of geographical and scientific facts and of facts commonly known to all mankind. This, because courts should not admit themselves more ignorant than the rest of mankind. We might, if enlightened by subject-matter or context in a document held in judgment, assume that the surname of a given Washington was George or a given Lincoln, Abraham—this because the subject-matter or context pointed to George Washington or Abraham Lincoln, but no court has ever arrogated to itself such all-pervading and all-embracing knowledge of the facts of local history as would be assumed in taking judicial notice of the surname of an individual member of a partnership in the practice of law at any particular time in any

given town in the state of Missouri." *Reineman v. Larkin*, 222 Mo. 156, 121 S. W. 307 (1909).

1. *Cooke v. Wilson*, 1 C. B. (N. S.) 153, 163 (1856) (Colony of Victoria not in England). See also *Daly v. Old*, (Utah 1909) 99 Pac. 460 (extent of territory named in contract).

2. "It is a matter of which this court will take judicial notice, that, by law, the country is divided into collection districts for internal revenue purposes, and in some states there are several of these districts with defined geographical boundaries." *U. S. v. Jackson*, 104 U. S. 41 (1881).

3. *Ogden v. Lund*, 11 Tex. 688 (1854).

4. *Loher v. Tyler*, 77 Conn. 104, 58 Atl. 699.

5. *Peyroux v. Howard*, 7 Pet. (U. S.) 324, 342 (1833) (New Orleans within the ebb and flow of the tide).

6. That there is not another city or town of the same name somewhere else, courts hold that they cannot know. Thus, the court in Texas found itself unable to say that "New Orleans," without more, was the name of a city in Louisiana. *Andrews v. Hoxie*, 5 Tex. 171, 182 (1849). An English court, though, of course, well aware that there is a Dublin in Ire-

cities of the nation outside its own particular jurisdiction. Thus, an American state court will not require evidence of the geographical position<sup>8</sup> of prominent American cities outside its own limits, their relation to tide waters<sup>9</sup> and other facts of common knowledge, as the distance between places.<sup>10</sup> The court, however, whether English<sup>11</sup> or American,<sup>12</sup> cannot go so far as to say that it judicially knows that there is not a place of a similar name elsewhere, within or without, its jurisdiction.<sup>13</sup> This is particularly true where the court is asked to know judicially that a place, identified only by name, is in a foreign jurisdiction when a place of the same name is within the jurisdiction of the court.<sup>14</sup> Judges

land declined "to take judicial notice that there is only one Dublin in the world." *Kearney v. King*, 2 B. & Ald. 301 (1819).

7. *Fazakerley v. Wiltshire*, 1 Stra. 462, 469 (1721) (extent of ports).

8. *Dickinson v. Mobile Branch Bank*, 12 Ala. 54 (1847); *Parks v. Jacob Dold Packing Co.*, 6 Misc. (N. Y.) 570, 27 N. Y. Supp. 289 (1894) (Kansas City and Wichita).

A federal court, for this reason and also because of the national jurisdiction of these tribunals, takes similar cognizance. *Orr v. Lacy*, 18 Fed. Cas. No. 10,589, 4 McLean 243 (1847) ("New York city"); *The Sunswick*, 23 Fed. Cas. No. 13,624, 6 Ben. 112 (1872) (Astoria). An United States circuit court sitting in Iowa will judicially know that Asheville, N. C., is more than 100 miles from the place of trial. *Mutual Ben. L. Ins. Co. v. Robinson*, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325 (1893).

9. *Irwin v. Philips*, 5 Cal. 140, 63 Am. Dec. 113 (1855); *Price v. Page*, 24 Mo. 65 (1856). So of the federal courts. *Peyroux v. Howard*, 7 Pet. (U. S.) 324, 8 L. ed. 700 (1833).

10. *Pettit v. State*, 135 Ind. 393, 34 N. E. 1118 (1893) (East Portland, Oregon, to Crawfordville, Indiana, 2,378 miles); *Blumenthal v. Meat Co.*, 12 Wash. 331, 41 Pac. 47 (1895); *Siegbert v. Stiles*, 39 Wis. 533, 536 (1876) (separated only by a

river, crossable in winter, on the ice); *Mutual Ben. L. Ins. Co. v. Robinson*, 7 C. C. A. 444, 58 Fed. 723 (1893) (Dubuque, Iowa, to Asheville, N. C., over 100 miles). See also *Philadelphia, B. & W. R. Co. v. Diffendal*, 109 Md. 494, 72 Atl. 193 (1909) [rehearing *denied*, 109 Md. 494, 72 Atl. 458 (1909)].

11. *Deybel's Case*, 4 B. & Ald. 243, 6 E. C. L. 468 (1821) (Dublin). See also *Kearney v. King*, 2 B. & Ald. 301 (1819); *Humphreys v. Budd*, 9 Dowl. P. C. 1000, 5 Jur. 630 (1841); *Brune v. Thompson*, 2 Q. B. 789, 42 E. C. L. 913, C. & M. 34, 41 E. C. L. 24, 2 G. & D. 34 (1842).

12. *Riggin v. Collier*, 6 Mo. 568 (1840); *Yale v. Ward*, 30 Tex. 17 (1867); *Whitlock v. Castro*, 22 Tex. 108 (1858).

13. Where the place is otherwise sufficiently identified the reason for the rule ceases. The ruling of the Texas court that it could not judicially know that "St. Louis, Mo.," is in the state of Missouri (*Ellis v. Park*, 8 Tex. 205 [1852]), seems indefensible and best explained as an inadvertent following of the earlier cases (*Andrews v. Hoxie*, 5 Tex. 171 [1849]; *Cook v. Crawford*, 4 Tex. 420 [1849]), where no such identification was furnished.

14. *Woodward v. Chicago, etc., R. Co.*, 21 Wis. 309 (1867).

know the prominent geographical features of their country, its great rivers,<sup>15</sup> mountain ranges,<sup>16</sup> lakes, valleys and the like.

§ 736. (*B. What Facts are Covered by the Rule; [3] Facts of Geography*); *State*.— Among geographical facts established by law are the boundaries of a state<sup>1</sup> or territory<sup>2</sup> and those over which it claims to exercise ownership or jurisdiction.<sup>3</sup> The court will thus know whether a certain place,<sup>4</sup> territory defined by statute,<sup>5</sup> great natural features of the country,<sup>6</sup> or division established by a public survey<sup>7</sup> is within or without<sup>8</sup> these boundaries.<sup>9</sup>

15. *Birrell v. Dryer*, 9 App. Cas. 345, 5 Asp. 267, 51 L. T. Rep. (N. S.) 130 (1884) (St. Lawrence river).

The federal courts, in the same way, know judicially what streams are public navigable waters of the United States. *U. S. v. The Montello*, 11 Wall. (U. S.) 411, 20 L. ed. 191 (1870). See also *Lands v. A Cargo of Two Hundred and Twenty-Seven Tons of Coal*, 4 Fed. 478 (1880); *King v. American Transp. Co.*, 14 Fed. Cas. No. 7,787, 1 Flipp. 1 (1859).

At what precise point in its course a river ceases to be navigable, may well fail in that element of notoriety which dispenses with proof. *U. S. v. Rio Grande Dam, etc., Co.*, 174 U. S. 690, 698, 43 L. ed. 1136, 19 S. Ct. 770 (1898).

16. *Price v. Page*, 24 Mo. 65 (1856) (Rocky Mountains).

1. *State v. Dunwell*, 3 R. I. 127 (1855); *Harrold v. Arrington*, 64 Tex. 233 (1885); *Thorson v. Peterson*, 9 Fed. 517, 10 Biss. 530 (1881); *King v. American Transp. Co.*, 14 Fed. Cas. No. 7,787, 1 Flipp. 1 (1859); *Toppan v. Cleveland, etc., R. Co.*, 24 Fed. Cas. No. 14,099, 1 Flipp. 74 (1862). Race Island is in the jurisdiction of Illinois. *Gilbert v. Moline Water Power & Mfg. Co.*, 19 Iowa 319 (1865).

2. *Harvey v. Territory*, 11 Okl. 156, 65 Pac. 837 (1901); *Hoytt v. Russell*, 117 U. S. 401 (1885).

3. *Cummings v. Stone*, 13 Mich. 70 (1864); *Baumann v. Granite Sav.*

*Bank*, 66 Minn. 227, 68 N. W. 1074 (1896); *State v. Dunwell*, 3 R. I. 127 (1855); *Hoyt v. Russell*, 117 U. S. 401, 6 S. Ct. 881, 29 L. ed. 914 (1885); *Thorson v. Peterson*, 9 Fed. 517, 10 Biss. 530 (1881). See also *U. S. v. Beebe*, 2 Dak. 292, 11 N. W. 505 (1880). "The courts are bound to take cognizance of the boundaries in fact claimed by the state." *State v. Dunwell*, 5 R. I. 127 (1855). It is not, however, essential that the *de jure* boundary should be established as a preliminary to the court's judicial knowledge. Under the principle of administrative comity between the different branches of government, elsewhere referred to (*supra*, § 638), *quoad* its courts, the claim of the executive of the State is conclusive. *State v. Dunwell*, 3 R. I. 127 (1855).

4. *Perry v. State*, 113 Ga. 938, 39 S. E. 315 (1901); *Carey v. Reeves*, 46 Kan. 571, 26 Pac. 951 (1891).

5. *King v. Kent*, 29 Ala. 542, 552 (1857).

6. *Cummings v. Stone*, 13 Mich. 70 (1864) (St. Clair river not all in Michigan).

7. *King v. Kent*, 29 Ala. 542 (1857).

8. *Smith v. Flournoy*, 47 Ala. 345 (1872); *Gilbert v. Moline Water-Power, etc., Co.*, 19 Iowa 319 (1865); *Thomas v. Forest City Bank*, 4 Ohio Dec. (Reprint) 32, 1 Clev. L. Rec. 37 (1855); *Conner v. State*, 23 Tex. App. 378, 3 S. W. 189 (1887) (Indian Territory).

9. Where the question whether a

**§ 737. (B. What Facts are Covered by the Rule; [3] Facts of Geography; State); Political Divisions.**—Political divisions of a state as counties, cities, towns, townships as established or even as recognized by law will be judicially known.<sup>1</sup> They may be laid out for election purposes<sup>2</sup> or for the object of more conveniently administering the functions of government,<sup>3</sup> including the collection of revenue,<sup>4</sup> and will be judicially cognized by the courts of the state, but not by those of another.<sup>5</sup> The same is true

given occurrence took place within the limits of a state is part of the *res gestæ*, a question is presented for the finding of the jury acting upon proof furnished by the parties. *U. S. v. Jackalow*, 1 Black (U. S.) 484 (1861).

1. *California*.—*Payne v. Treadwell*, 16 Cal. 220 (1860).

*Illinois*.—*Linck v. Litchfield*, 141 Ill. 469, 31 N. E. 123 (1892).

*Iowa*.—*Baily v. Birkhofer*, 123 Iowa 59, 98 N. W. 594 (1904). See also *State v. Fishel*, (Iowa 1908) 118 N. W. 763.

*Kansas*.—*Kansas City, etc., R. Co. v. Burge*, 40 Kan. 736, 21 Pac. 589 (1889).

*Louisiana*.—*State v. DeBaillon*, 37 La. Ann. 392 (1885).

*Maine*.—*Harvey v. Wayne*, 72 Me. 430 (1881).

*Missouri*.—*State v. Nolle*, 96 Mo. App. 524, 70 S. W. 504 (1902); *Bishop v. Covenant Mut. L. Ins. Co.*, 85 Mo. App. 302 (1900).

*Nebraska*.—*In re Nilson's Estate*, (Neb. 1908) 116 N. W. 971.

*Texas*.—*Hall v. Rushing*, 21 Tex. Civ. App. 631, 54 S. W. 30 (1899).

*United States*.—*U. S. v. Jackson*, 104 U. S. 41, 26 L. ed. 651 (1881); *U. S. v. Johnson*, 26 Fed. Cas. No. 15,488, 2 Sawy. 482 (1873). But see *Anderson v. Com.*, 100 Va. 860, 42 S. E. 865 (1902). The supreme court of Texas has taken judicial cognizance of the fact that the Indian Territory was beyond the jurisdiction of Texas. *Conner v. State*, 23 Tex. Ct. App. 378. It will be judicially known that a given city is within a particu-

lar county. *State v. Meyer*, 135 Iowa 507, 113 N. W. 322 (1907). Judicial notice will be taken of the boundaries of the state and of the counties in it and also of the geographical locations and positions of towns and cities. *Reed v. Territory*, (Okl. Cr. App. 1908) 98 Pac. 583.

In England the courts will take judicial notice of the different counties palatinate, and counties corporate in that country. *R. v. S. Maurice*, 16 Q. B. 908, 20 L. J. M. C. 221 (1851); *Deybel's Case*, 4 B. & A. 248 (1821); 2 Coke's Inst. 557. That a particular colony or place in it, is not in England need not be proved to an English court. *Cooke v. Wilson*, 1 C. B. (N. S.) 153, 26 L. J. C. P. 15 (1856).

2. *U. S. v. Johnson*, 26 Fed. Cas. No. 15,488, 2 Sawy. 482 (1873).

3. *Eastern Judicial Dist. Bd. v. Winnipeg*, 3 Manitoba 537 (1886); *U. S. v. Jackson*, 104 U. S. 41, 26 L. ed. 651 (1881).

4. *U. S. v. Jackson*, 104 U. S. 41, 26 L. ed. 651 (1881).

5. *Yale v. Ward*, 30 Tex. 17 (1867). Though the political division of other states into counties and the like is not part of the *judicial* knowledge of the court, properly so called, the political divisions of a former sovereignty may be noticed. *Hudson v. Webber*, 104 Me. 429, 72 Atl. 184 (1908). It has even been held that a court will take judicial notice of what municipality is the county seat of a given county in another state. *Phillips v. Lindley*, 188 N. Y. 606, 81 N. E. 1173 (1907). It would

of the boundaries of these political divisions, so far as established by public statutes.<sup>6</sup> But the relation of these public boundaries to the line of individual ownership must be proved.<sup>7</sup>

**§ 738. (*B. What Facts are Covered by the Rule; [3] Facts of Geography; State*); Commercial Centers.**—The courts of a state know prominent commercial centers, their location,<sup>1</sup> especially as related to the natural features of the state,<sup>2</sup> and prominent facts concerning them<sup>3</sup> as their manufacturing<sup>4</sup> or other business enterprises.

seem, however, that in strictness, the fact could only be one of notoriety. *i. e.*, of common, rather than of judicial knowledge.

**6. Alabama.**—*Ward v. Janney*, 104 Ala. 122, 16 So. 73 (1893).

**Arkansas.**—*Bittle v. Stuart*, 34 Ark 224 (1879).

**California.**—*De Baker v. Southern California R. Co.*, 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237 (1895).

**Indiana.**—*Louisville, etc., R. Co. v. Hixon*, 101 Ind. 337 (1884).

**Kansas.**—*Kansas City, etc., R. Co. v. Burge*, 40 Kan. 736, 21 Pac. 589 (1889).

**Maine.**—*Ham v. Ham*, 39 Me. 263 (1855).

**Massachusetts.**—*Com. v. Springfield*, 7 Mass. 9 (1810).

**Missouri.**—*State v. Pennington*, 124 Mo. 388, 27 S. W. 1106 (1894).

**New York.**—*Bang v. McAvoy*, 52 N. Y. App. Div. 501, 65 N. Y. Suppl. 467 (1900).

**Oklahoma.**—*Harvey v. Terr.*, 11 Okl. 156, 65 Pac. 837 (1901).

**Texas.**—*Wright v. Hawkins*, 28 Tex. 452 (1866).

**Wisconsin.**—*Houlton v. Chicago, etc., R. Co.*, 86 Wis. 59, 56 N. W. 336 (1893).

**United States.**—*Toppan v. Cleveland, etc., R. Co.*, 24 Fed. Cas. No. 14,099, 1 Flipp. 74 (1862); *King v. American Transp. Co.*, 14 Fed. Cas. No. 7,787, 1 Flipp. 3 (1859). In

*Boston v. State*, 5 Tex. Ct. App. 383, it was held that the court would have judicial knowledge of the territorial extent of the sovereignty and jurisdiction exercised by their own government.

**7. Goodwin v. Scheerer**, 106 Cal. 690, 40 Pac. 18 (1895); *Russell v. Hoyt*, 4 Mont. 412, 2 Pac. 25 (1882); *People v. Kelly*, 20 Hun (N. Y.) 549 (1880); *Edwards v. Davis*, 3 Tex. 321 (1848). "Courts take notice of the local divisions of the state, as into counties, cities, towns, etc., and of the relative position thereof, but not of the precise boundaries and distances. And they are not bound to take judicial notice of the local situation and distances of the different places in counties from each other." *Goodwin v. Appleton*, 22 Me. 453 (1843).

**1. Harmon v. Chicago**, 110 Ill. 400, 51 Am. Rep. 698 (1884) (Chicago situated near bituminous coal fields).

**2. Harmon v. Chicago**, 110 Ill. 400, 51 Am. Rep. 698 (1884) (Chicago river); *State v. Wabash Paper Co.*, 21 Ind. App. 167, 48 N. E. 653, 51 N. E. 949 (1898) (Wabash and Miami rivers). See also *State v. Jones*, 11 Ohio Cir. Dec. 496 (1900).

**3. Ex parte Davidson**, 57 Fed. 883, 887 (1893) (laying out as the site of a city).

**4. Harmon v. Chicago**, 110 Ill. 400, 51 Am. Rep. 698 (1884) (use of bituminous coal in Chicago).

**§ 739. (B. What Facts are Covered by the Rule; [3] Facts of Geography; State); Natural Features.**—The prominent natural features of the state, its great lakes,<sup>1</sup> mountains,<sup>2</sup> lakes, rivers, waterfalls<sup>3</sup> and the like are known to the courts of the forum.

**§ 740. (B. What Facts are Covered by the Rule; [3] Facts of Geography; State); Rivers.**—Prominent among the great geographical features of a state are its rivers. They are, therefore, known in location and nature, to the courts.<sup>1</sup> The navigability of great rivers<sup>2</sup> and other notorious facts<sup>3</sup> concerning

1. *State v. Thomson*, 85 Me. 189 (1892); *People v. Brooks*, 101 Mich. 98, 59 N. W. 444 (Lake St. Clair) (1894); *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420 (Winnipiseogee) (1860); *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447 (1906) (navigability known). *Weeks-Thorn Paper Co. v. Glenside Woolen Mills*, 118 N. Y. Suppl. 1027, 64 Misc. Rep. 205 (1909) (area of lake). "We recollect no decision that the courts are *ex officio* to notice the great lakes, rivers and mountains of the state as parts of it, and lying within its limits, but it can hardly be doubted that the courts would notice, of course, the great geographical features of the state." *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420 (1860). The contention that a Michigan court should not judicially notice "Lake St. Clair" in that state "is not worthy serious consideration." *People v. Brooks*, 101 Mich. 98 (1894). See also *DeBaker v. Southern California R. Co.*, 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237 (1895).

2. *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420 (1860).

3. *Sufferle v. McFarland*, 28 App. Cas. (D. C.) 94 (1906) (falls of the Potomac).

1. *Walker v. Allen*, 72 Ala. 456 (1882) (all rivers in a particular county are of fresh water). *Supperle v. McFarland*, 28 App. Cas. (D. C.) 94 (1906) (Potomac); *State v. South-*

*ern Ry. Co.*, (N. C. 1906) 54 S. E. 294. No part of the Tallapoosa river is in the city of Montgomery. *City Council of Montgomery v. Montgomery, etc., Plankroad*, 31 Ala. 76 (1857). See also *Thosvold v. Bygland*, (Neb. 1908) 116 N. W. 971. It is commonly known that the Arkansas and Poteau rivers bound Ft. Smith on the west. *McKenzie v. Newlon*, 89 Ark. 564, 117 S. W. 553 (1909). The court knows that the Snohomish River flows into Puget Sound. *Vail v. McGuire*, (Wash. 1908) 96 Pac. 1042.

2. *Indiana*.—*Neadrhouser v. State*, 28 Ind. 257 (1867) (Ohio river).

*Kansas*.—*Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330 (1882) (Mississippi). "The courts take judicial notice of such streams, as they form part of the geography of the country and their navigability is known as forming a part of the common public history." *Neadrhouser v. State*, 28 Ind. 257 (1867). "We think that the superior court might take judicial notice that the Connecticut River, above the dam at Holyoke, does not, either by itself or by uniting with other waters, constitute a public highway over which commerce may be carried on with other states or with foreign countries." *Com. v. King*, 150 Mass. 221 (1889). Where a demurrer concedes that a stream is navigable, the court cannot it is said, use its common knowledge to the effect that

these highways of commerce need not be proved. In like manner judges judicially know streams of lesser commercial importance, in their state,<sup>4</sup> their nonnavigability if notorious,<sup>5</sup> and other salient facts as to their nature and position.

it is not. *State v. Norcross*, (Wis. 1907) 112 N. W. 40. Courts in Wisconsin may take "notice of the fact that the capacity of many small navigable streams in this state to float logs and lumber into the larger streams below and to market has been greatly increased by the erection of dams across them." *Tewksbury v. Schulenberg*, 41 Wis. 584 (1877).

*Kentucky*.—*Terrell v. Paducah*, 28 Ky. L. Rep. 1237, 92 S. W. 310 (1906) (Tennessee river); *Bennett v. Bryan*, 1 Ky. L. Rep. 274 (1880).

*Missouri*.—*Heiberger v. Missouri & Kansas Telephone Co.*, 133 Mo. App. 452, 113 S. W. 730 (1908) (Missouri).

*New Hampshire*.—*Com. v. King*, 150 Mass. 221, 224, 22 N. E. 905 (1889) (Connecticut river not navigable at a certain point).

*United States*.—*Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447 (1906). The action of the current in eroding the banks of certain streams, altering channels, or the contour of islands, may be judicially known. *Radford v. Wood*, 83 Neb. 773, 120 N. W. 458 (1909).

That the Rio Grande at a given point ceases to be navigable has been refused the status of a fact of common knowledge. *U. S. v. Rio Grande, etc., Co.*, 174 U. S. 690, 19 S. Ct. 770 (1898).

Where navigability is doubtful, the court will require that the fact be proved by the party to whose contention it belongs. *McKinney v. Northcutt*, 114 Mo. App. 146, 89 S. W. 351 (1905); *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447 (1906). Notice will not necessarily be taken as to the navigability of any stream. *People v. Board of Sup'rs of Whiteside County*, 122 Ill. App. 40 (1905).

3. *Cash v. Clark County*, 7 Ind. 227 (1855) (falls of Ohio river are in Indiana); *Thurman v. Morrison*, 14 B. Monr. (Ky.) 367 (rise and fall in stream); (1853); *Whitney v. Gauche*, 11 La. Ann. 432 (1856) (the Mersey is a tidal river); *Talbot v. Hudson*, 16 Gray (Mass.) 417 (1860) (course of Sudbury and Concord rivers); *Kerns v. Perry*, (Tenn. Ch. App. 1898) 48 S. W. 729 (rise and fall).

4. *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581 (1897) (river partly in Nevada); *Wood v. Fowler*, 26 Kan. 682, 687, 40 Am. Rep. 330 (1882); *Browne v. Scofield*, 8 Barb. (N. Y.) 239 (1850); *Lockwood v. Charleston Bridge Co.*, 60 S. C. 492, 38 S. E. 112, 629 (1900). But whether the court will judicially know that the Chicago river at a particular street is within the municipal domain of the city of Chicago may be questioned. *City of Chicago v. Kubler*, 133 Ill. App. 520 (1907).

5. *Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655 (1876); *Com. v. King*, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536 (1889); *Clark v. Cambridge, etc., Irr., etc., Co.*, 45 Neb. 798, 64 N. W. 239 (1895). In case of streams of no general importance the matter of navigability as of other facts, must be settled by evidence. *Sanders v. Brooks*, 6 Ky. L. Rep. 671 (1885); *De Camp v. Thomson*, 44 N. Y. Suppl. 1014, 16 App. Div. 528 (1897). See also *People v. Faust*, 113 Cal. 172, 45 Pac. 261 (1896); *Louisville, etc., R. Co. v. McAfee*, 15 Ind. App. 442, 43 N. E. 36 (1896).



§ 741. (*B. What Facts are Covered by the Rule; [3] Facts of Geography; State*); Railroads.—Judges are aware, with the rest of the community, of the existence of the principal lines of railroad which are wholly<sup>1</sup> or in part<sup>2</sup> within the state; and will know, if the public does, to what more general railroad “system,” if any, the road belongs.<sup>3</sup> The common knowledge includes locality, course and direction of such a railroad.<sup>4</sup> “Once established, they have remained as fixed and permanent in their course as the rivers themselves.”<sup>5</sup> Unless definitely established by the terms of a public statute, the court will not know the location of a *projected* railroad.<sup>6</sup> What places are on the line of a railroad,<sup>7</sup> have stations on it,<sup>8</sup> or constitute its termini,<sup>9</sup> or railroad centers;<sup>10</sup> through what other localities it must pass in order to connect two given places,<sup>11</sup> what is the distance between two points on a railroad,<sup>12</sup> within what county these points are,<sup>13</sup> their

1. Galveston, etc., R. Co. v. Johnson, (Tex. Civ. App. 1895) 29 S. W. 428.

2. Hobbs v. Memphis, etc., R. Co., 9 Heisk. (Tenn.) 873 (1872); Texas & N. O. Ry. Co. v. Walker, (Tex. Civ. App. 1906) 95 S. W. 743; Miller v. Texas, etc., R. Co., 83 Tex. 518, 18 S. W. 954 (1892). See also Patterson v. Missouri Pac. Ry. Co., (Kan. 1908) 94 Pac. 138. That the Missouri Pacific is a railroad corporation engaged in interstate commerce may well be a fact of judicial knowledge. State v. Missouri Pac. Ry. Co., 212 Mo. 658, 111 S. W. 500 (1908).

3. Missouri Pac. R. Co. v. Graves, 2 Tex. App. Civ. Cas. § 676 (1885).

4. Indianapolis, etc., R. Co. v. Case, 15 Ind. 42 (1860); Worden v. Cole, (Kan. 1906) 86 Pac. 464; Bishop v. Covenant Mut. L. Ins. Co., 85 Mo. App. 302 (1900); Texas Cent. R. Co. v. Marrs, (Tex. Civ. App. 1907) 101 S. W. 1177; Miller v. Texas, etc., R. Co., 83 Tex. 518, 520, 18 S. W. 954 (1892).

Judicial knowledge may reinforce common. Thus, a court will judicially know, in a general way, what lands were conferred upon a railroad by act of Congress as part of its permanent location. Worden v. Cole, (Kan. 1906) 86 Pac. 464.

5. Gulf, etc., R. Co. v. State, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815 (1888).

6. McKeoin v. Northern Pac. R. Co., 45 Fed. 464 (1891).

7. Robert M. Green & Sons v. Lineville Drug Co., (Ala. 1907) 43 So. 216.

8. St. Louis, etc., R. Co. v. Magness, 68 Ark. 289, 57 S. W. 933 (1900); Indianapolis, etc., R. Co. v. Stephens, 28 Ind. 429 (1867); McGrew v. Missouri Pac. Ry. Co., 177 Mo. 533, 76 S. W. 995 (1903); Harper Furniture Co. v. Southern Express Co., 144 N. C. 639, 57 S. E. 758 (1907).

9. Smitha v. Flournoy, 47 Ala. 345 (1872); Galveston, etc., R. Co. v. Johnson, (Tex. Civ. App. 1895) 29 S. W. 428.

10. Texas, etc., R. Co. v. Black, 87 Tex. 160, 27 S. W. 118 (1894) (Texas-arkana).

11. Phelps v. Lewiston, 19 Fed. Cas. No. 11,076, 15 Blackf. 131 (1878).

12. Wainwright v. Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530 (1901); Johnson v. Atlantic Coast Line R. Co., 140 N. C. 574, 581, 53 S. E. 362 (1906).

13. Indianapolis, etc., R. Co. v. Case, 15 Ind. 42 (1860).

general geographical position,<sup>14</sup> these and similar<sup>15</sup> facts pertaining to the topography of local railroads the court will judicially know. But details, if claimed, must be proved.<sup>16</sup>

**§ 742. (B. What Facts are Covered by the Rule; [3] Facts of Geography; State); Distances and Relative Positions.**—The distance between places in the jurisdiction will be regarded as common knowledge,<sup>1</sup> *a fortiori*, where the distances are established by statute.<sup>2</sup>

*The relative position* of two places in the state — as that a given town is between two others,<sup>3</sup> frequently requires no proof.

*Minor geographical details*, or those where the fact is uncertain, as whether a particular section of a state is “arid” within the meaning of an irrigation statute,<sup>4</sup> are not judicially known.

**§ 743. (B. What Facts are Covered by the Rule; [3] Facts of Geography); Counties.**—The courts of England,<sup>1</sup> and those of the states of the American Union, judicially know the

14. *McGrew v. Missouri Pac. R. Co.*, 177 Mo. 533, 76 S. W. 995 (1903).

15. *Gulf, etc., R. Co. v. State*, 72 Tex. 404, 10 S. W. 81, 13 Am. St. Rep. 815, 1 L. R. A. 849 (1888) (that certain railroads are parallel and competing).

16. *Georgia, etc., R. Co. v. Gaines*, 88 Ala. 377, 7 So. 382 (1889) (that certain roads would form a continuous line); *Miller v. Texas, etc., R. Co.*, 83 Tex. 518, 18 S. W. 954 (1892) (contract between railroads); *Texas Cent. R. Co. v. Childress*, 64 Tex. 346 (1885) (fenced at a particular point). The location of the tracks of a particular railroad company at a junction where several railroad locations come together is not a matter of common knowledge. *Pierce v. Galveston, H. & S. A. Ry. Co.*, (Tex. Civ. App. 1908) 108 S. W. 979.

1. *Illinois*.—*Bruson v. Clark*, 151 Ill. 495, 38 N. E. 252 (1894).

*New York*.—*Williams v. Brown*, 65 N. Y. Suppl. 1049, 53 App. Div. 486 (1900).

*North Carolina*.—*Harper Furniture Co. v. Southern Express Co.*, 144 N. C. 639, 57 S. E. 758 (1907).

*Pennsylvania*.—*Pearce v. Langfit*, 101 Pa. St. 507, 47 Am. Rep. 737 (1882).

*Tennessee*.—*Coover v. Davenport*, 1 Heisk. 368, 2 Am. Rep. 706 (1870).

*Washington*.—*Blumenthal v. Pacific Meat Co.*, 12 Wash. 331, 41 Pac. 47 (1895).

*Wisconsin*.—*Siegbert v. Stiles*, 39 Wis. 533 (1876) (that Prairie du Chien and McGregor are separated only by the Mississippi river).

2. *Hegard v. California Ins. Co.*, (Cal. 1886) 11 Pac. 594.

3. *Lowville & B. R. R. Co. v. Eliott*, 101 N. Y. Suppl. 328, 115 App. Div. 884 (1906).

4. *McGhee, etc., Co. v. Hudson*, 85 Tex. 587 (1893).

1. *Reg. v. St. Maurice*, 16 Q. B. 908, 15 Jur. 559, 20 L. J. M. C. 221, 71 E. C. L. 908 (1851) (“the general division of the kingdom into counties”); *Deybel’s Case*, 4 B. & Ald. 243, 6 E. C. L. 468 (1821).

That a city is also a county will be noticed. *Reg. v. St. Maurice*, 16 Q. B. 908, 15 Jur. 559, 20 L. J. M. C. 221, 71 E. C. L. 908 (1851).

existence,<sup>2</sup> date of organization,<sup>3</sup> area,<sup>4</sup> location,<sup>5</sup> name<sup>6</sup> and population as given in the census<sup>7</sup> of the counties of the state or country. They know, in the same way, the boundaries of the counties<sup>8</sup> and of its minor divisions into precincts and the like;

2. *Alabama*.—*Scheuer v. Kelly*, 121 Ala. 323, 26 So. 4 (1898).

*Arkansas*.—*Bittle v. Stuart*, 34 Ark. 224 (1879).

*Connecticut*.—*State v. Powers*, 25 Conn. 48 (1856).

*Illinois*.—*Gooding v. Morgan*, 70 Ill. 275 (1873).

*Indiana*.—*Dawson v. James*, 64 Ind. 162 (1878).

*Iowa*.—*Baily v. Birkhofer*, 123 Iowa 59, 98 N. W. 594 (1904).

*Maine*.—*State v. Simpson*, 91 Me. 83, 39 Atl. 287 (1897).

*Massachusetts*.—*Com. v. Desmond*, 103 Mass. 445 (1869) (Suffolk county).

*Missouri*.—*Parker v. Burton*, 172 Mo. 85, 72 S. W. 663 (1903); *State v. Fraker*, 148 Mo. 143, 49 S. W. 1017 (1899).

*New Hampshire*.—*Winnipiseogee Lake Co. v. Young*, 40 N. H. 420 (1860).

*Pennsylvania*.—*Com. v. McMichael*, 8 Pa. Dist. 157, 22 Pa. Co. Ct. 182 (1899).

*Tennessee*.—*Coover v. Davenport*, 1 Heisk. 368, 2 Am. Rep. 706 (1870).

*Texas*.—*Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575 (1879).

*Utah*.—*McMaster v. Morse*, 18 Utah 21, 55 Pac. 70 (1898).

*West Virginia*.—*Beasley v. Beckley*, 28 W. Va. 81 (1886).

*Wisconsin*.—*Woodward v. Chicago*, etc., R. Co., 21 Wis. 309 (1867).

*United States*.—*Gager v. Henry*, 9 Fed. Cas. No. 5,172, 5 Sawy. 237 (1878); *Lyell v. Lapeer County*, 15 Fed. Cas. No. 8,618, 6 McLean 446 (1855).

3. *People v. Wallace*, 101 Cal. 281, 35 Pac. 862 (1894); *Moseley v. Stucken*, 26 Tex. Civ. App. 290, 62 S. W. 1103 (1901).

4. *Jackson County v. State*, 147 Ind. 476, 46 N. E. 908 (1896); *State v. Glasgow*, Conf. R. (N. C.) 38, 2 Am. Dec. 629 (1800); *Wright v. Hawkins*, 28 Tex. 452 (1866).

5. *Iowa*.—*Baily v. Birkhofer*, 123 Iowa 59, 98 N. W. 594 (1904).

*Missouri*.—*Parker v. Burton*, 172 Mo. 85, 72 S. W. 663 (1903); *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106 (1894).

*Oklahoma*.—*Filson v. Terr.*, 11 Okl. 351, 67 Pac. 473 (1901).

*Tennessee*.—*Bond v. Perkins*, 4 Heisk. 364 (1871).

*Texas*.—*Hall v. Rushing*, 21 Tex. Civ. App. 631, 54 S. W. 30 (1899).

6. *Alabama*.—*Overton v. State*, 60 Ala. 73 (1877).

*Illinois*.—*Doyle v. Bradford*, 90 Ill. 416 (1878).

*Iowa*.—*Baily v. Birkhofer*, 123 Iowa 59, 98 N. W. 594 (1904).

*Kentucky*.—*Holley v. Holley*, Litt. Sel. Cas. 505, 12 Am. Dec. 342 (1821).

*Massachusetts*.—*Com. v. Desmond*, 103 Mass. 445 (1869).

*North Carolina*.—*State v. Snow*, 117 N. C. 774, 23 S. E. 322 (1895).

*Tennessee*.—*Brown v. Elms*, 10 Humph. 135 (1849).

7. *Illinois*.—*Worcester Nat. Bank v. Cheney*, 94 Ill. 430 (1880).

*Indiana*.—*Whitley County v. Garty*, 161 Ind. 464, 68 N. E. 1012 (1903).

*Iowa*.—*State v. Braskamp*, 87 Iowa 588, 54 N. W. 532 (1893).

*Missouri*.—*Crow v. Evans*, 166 Mo. 347, 66 S. W. 355 (1902).

*New York*.—*Farley v. McConnell*, 7 Lans. 428 (1872).

*United States*.—*Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200 (1875).

8. *Alabama*.—*Smitha v. Flournoy*, 47 Ala. 345 (1872).

*Arkansas*.—*Lyman v. State*, 119

but where the boundaries are subject to change at frequent intervals,<sup>9</sup> evidence may be required as to how these lines are related to those established by a public survey,<sup>10</sup> or the great natural

*S. W.* 1116 (1909) (boundaries); *Crow v. Roane*, 86 Ark. 172, 110 S. W. 801 (1908).

*California*.—*Merritt v. Trinity County*, (Cal. App. 1906) 84 Pac. 675.

*Illinois*.—*Gooding v. Morgan*, 70 Ill. 275 (1873).

*Indiana*.—*Jackson County v. State*, 147 Ind. 476, 46 N. E. 908 (1896).

*Maine*.—*Ham v. Ham*, 39 Me. 263 (1855).

*Missouri*.—*Parker v. Burton*, 172 Mo. 85, 72 S. W. 663 (1903).

*North Carolina*.—*State v. Southern Ry. Co.*, (N. C. 1906) 51 S. E. 294.

*Oklahoma*.—*Fuller v. Territory*, (Cr. App. 1909) 99 Pac. 1098; *Reed v. Territory*, (Cr. App. 1908) 98 Pac. 583.

*Texas*.—*Wright v. Hawkins*, 28 Tex. 452 (1866). See also *Hughes v. Adams*, (Tex. Civ. App. 1909) 119 S. W. 134; *Gaddy v. Smith*, (Tex. Civ. App. 1908) 116 S. W. 164.

*United States*.—*Ross v. Ft. Wayne*, 63 Fed. 466, 11 C. C. A. 288 (1894); *Bluefield Waterworks, etc., Co. v. Sanders*, 63 Fed. 333, 11 C. C. A. 232 (1894).

A county court will know that certain townships are all the townships of its own county. *Chicago, R. I. & P. Ry. Co. v. Perry County*, (Ark. 1908) 112 S. W. 977. A judge may properly dispense with proof that two towns are adjoining towns in the same county. *People v. Loris*, 115 N. Y. Suppl. 236, 131 App. Div. 127 (1909).

The precise boundaries of a county are not cognized in England. *Brune v. Thompson*, 2 Q. B. 789, 42 E. C. L. 913, C. & M. 34, 41 E. C. L. 34, 2 G. & D. 110 (1842). So far as the limits of county jurisdiction depend upon the construction of records, "it

is purely a question of law for the court." *State v. Wagner*, 61 Me. 178 (1873).

No right exists to offer evidence as to whether a certain place has been recognized by the legislature as within the boundaries of a particular county. "A criminal might as well call for the opinion of the jury upon the regularity of the judge's commission or the validity of the election of the governor by whom he was appointed. *State v. Wagner*, 61 Me. 178 (1873).

Where the boundary is established by law the knowledge is also judicial. *Carter County v. Brooks*, 25 Ky. L. Rep. 2284, 80 S. W. 443 (1904).

Venue.—Where a crime is alleged to have been committed within a mile and a half of a given town in the county the court will take judicial notice of the location of the town within the county, so as to know that the *locus* of the crime is alleged to have been within the county. *State v. Mitchell*, (Iowa 1908), 116 N. W. 808.

9. *State v. Carmody*, (Or. 1907) 91 Pac. 441 (two years).

10. *Alabama*.—*Webb v. Mullins*, 78 Ala. 111 (1884).

*California*.—*Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100 (1894).

*Illinois*.—*Dickerson v. Hendryx*, 88 Ill. 66 (1878).

*Indiana*.—*Richardson v. Hedges*, 150 Ind. 53, 49 N. E. 822 (1897).

*Iowa*.—*Wright v. Phillips*, 2 Greene 191 (1849).

*Missouri*.—*Parker v. Burton*, 172 Mo. 85, 72 S. W. 663 (1903); *Moon v. Missouri Pac. R. Co.*, 83 Mo. App. 458 (1900).

*Texas*.—*Wright v. Hawkins*, 28 Tex. 452 (1866).

features of the state, its waterways,<sup>11</sup> or the judicial districts of the state.<sup>12</sup>

*Other facts of public interest in county geography*, as what towns are county seats,<sup>13</sup> where they are located, that they are not always at the centers of population,<sup>14</sup> are judicially known. The result of an election to determine a question of such public interest need not be proved.<sup>15</sup> Minute facts, such as the peculiarities of climate, amount of rainfall or topography,<sup>16</sup> as whether a particular piece of land<sup>17</sup> or a given road<sup>18</sup> falls within the

11. *Bowling v. Mobile, etc., R. Co.*, 128 Ala. 550, 29 So. 584 (1900); *Walker v. Allen*, 72 Ala. 456 (1882).

12. *People v. Robinson*, 17 Cal. 363 (1861); *Chicago, etc., R. Co. v. Hyatt*, 48 Neb. 161, 67 N. W. 8 (1896); *State v. Ray*, 97 N. C. 510, 1 S. E. 876 (1887); *Barnwell v. Marion*, 58 S. C. 459, 36 S. E. 818 (1900).

13. *Arizona*.—*Maricopa County v. Burnett*, 71 Pac. 908 (1903).

*Arkansas*.—*St. Louis, etc., R. Co. v. State*, 68 Ark. 561, 60 S. W. 654 (1901).

*California*.—*People v. Faust*, 113 Cal. 172, 45 Pac. 261 (1896); *People v. Etting*, 99 Cal. 577, 34 Pac. 237 (1893).

*Illinois*.—*Andrews v. Knox County*, 70 Ill. 65 (1873).

*Indiana*.—*Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727 (1895).

*Iowa*.—*Adair v. Eglund*, 58 Iowa 314, 12 N. W. 277 (1882).

*Mississippi*.—*Ladd v. Craig*, 47 So. 777 (1908) (what is the county seat).

*Missouri*.—*State v. Pennington*, 124 Mo. 388, 27 S. W. 1106 (1894).

*Nevada*.—*State v. Buralli*, (1903) 71 Pac. 532.

*Texas*.—*Flynt v. Eagle Pass Coal & Coke Co.*, (Tex. Civ. App. 1903) 77 S. W. 831; *Whitener v. Belknap*, 89 Tex. 273, 34 S. W. 594 (1896). See also *Missouri, K. & T. Ry. Co. v. Lightfoot*, (Tex. Civ. App. 1907) 106 S. W. 395.

*United States*.—*Gager v. Henry*, 9 Fed. Cas. No. 5,172, 5 Sawy. 231 (1878).

The true nature of judicial notice is illustrated by the fact that the court will not take judicial notice that a particular place is within a given county unless it has been established by law as its county seat. *Dallas Brewery v. Holmes Bros.*, (Tex. Civ. App. 1908) 112 S. W. 122.

Courts of record in a county know the county seat of a county. Even where the public business was conducted at a county seat *de facto*, the propriety of action there taken cannot be collaterally attacked. *Board of Com'rs of Day County v. State of Kansas*, (Okl. 1907) 91 Pac. 699.

14. *Maricopa County v. Burnett*, (Ariz. 1903) 71 Pac. 908.

15. *Andrews v. Knox County*, 70 Ill. 65 (1873); *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727 (1895).

16. *Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197 (1892); *McCorkle v. Driskell*, (Tenn. Ch. App. 1900) 60 S. W. 172; *McGhee Irr. Ditch Co. v. Hudson*, 85 Tex. 587, 22 S. W. 398 (1893).

17. *St. Louis, etc., Ry. Co. v. Cady*, 67 Ark. 512, 55 S. W. 927 (1900); *Kretzschmar v. Meehan*, 74 Minn. 211, 77 N. W. 41 (1898) ("at least when not described according to the government survey").

18. *Waters v. State*, 117 Ala. 189, 23 So. 28 (1897).

That a road between two places will be within the county will be regarded as known. *Steinmetz v. Versailles, etc., Co.*, 57 Ind. 457 (1877).

boundaries of a county, cannot be judicially known. On the other hand, under the practice above referred to<sup>19</sup> where there is or is not<sup>20</sup> a railroad in a given county will often be treated as a fact of notoriety, i. e., of common knowledge.<sup>21</sup>

**§ 744. (B. What Facts are Covered by the Rule; [3] Facts of Geography); Cities.**— Courts of a state know its cities<sup>1</sup> and the geographical location,<sup>2</sup> even though the city owes its incorporation to a former government of the territory,<sup>3</sup> and the particular class to which each city belongs.<sup>4</sup> It will not be necessary to prove the census population of the cities of a state.<sup>5</sup> The cognizance of the court will, however, receive a reasonable construction. A judge, for example, may well be expected to know that there is a certain city within or without his jurisdiction but he cannot well be called upon to know that there is not elsewhere another city of the same name. Thus a court cannot

19. *Supra*, § 741.

20. The court knows that the Seaboard Air Line Railway Co. does not pass through the county of Craven. *McCullen v. Seaboard Air Line Ry. Co.*, (N. C. 1908) 60 S. E. 506.

21. *Missouri, K. & T. Ry. Co. v. Lightfoot*, (Tex. Civ. App. 1907) 106 S. W. 395.

1. *Alabama*.—*Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422 (1882). See also *Guarreno v. State*, (Ala. 1908) 48 So. 65.

*Arkansas*.—*Heno v. City of Fayetteville*, 119 S. W. 287 (1909) (*Fayetteville*).

*Iowa*.—*Baily v. Birkhofer*, 123 Iowa 59, 98 N. W. 594 (1904).

*Maine*.—*Goodwin v. Appleton*, 22 Me. 453 (1843).

*Missouri*.—*State v. Nolle*, 96 Mo. App. 524, 70 S. W. 504 (1902).

*Nebraska*.—*Agnew v. Pawnee City*, 113 N. W. 236 (1907).

*Pennsylvania*.—*Com. v. McMichael*, 8 Pa. Dist. 157, 22 Pa. Co. Ct. 182 (1899).

*Vermont*.—*French v. Barre*, 58 Vt. 567, 5 Atl. 568 (1886).

*Wisconsin*.—*Woodward v. Chicago, etc., R. Co.*, 21 Wis. 309 (1867). "The public acts apprise us that

*Mobile* is a municipal corporation of Alabama and where it is situated." *Alabama, etc., Ins. Co. v. Cobb*, 57 Ala. 547 (1877).

2. *Baily v. Birkhofer*, (Iowa 1904) 98 N. W. 594; *State v. Southern Ry. Co.*, (N. C. 1906) 54 S. E. 294.

3. *Payne v. Treadwell*, 16 Cal. 221 (1860).

4. *Ft. Scott v. Elliot*, (Kan. Sup. 1903) 74 Pac. 609.

5. *California*.—*People v. Wong Wang*, 92 Cal. 277, 28 Pac. 270 (1891).

*Colorado*.—*In re Senate Bill No. 293*, 21 Colo. 38, 39 Pac. 522 (1895).

*Indiana*.—*Huntington v. Cast*, (Ind. 1898), 48 N. E. 1025.

*Iowa*.—*Bennett v. Marion*, 106 Iowa 628, 76 N. W. 844 (1898).

*Nebraska*.—*Union Pac. R. Co. v. Montgomery*, 49 Neb. 429, 68 N. W. 619 (1896).

*New York*.—*Denair v. Brooklyn*, 5 N. Y. Suppl. 835 (1889).

*Oregon*.—*Stratton v. Oregon City*, 35 Or. 409, 60 Pac. 905 (1900).

The actual population and the rate of its increase may be facts judicially known. *Times Printing Co. v. Star Pub. Co.*, 51 Wash. 667, 99 Pac. 1040 (1909).

judicially know that a bill alleged to have been drawn in Dublin was drawn in Dublin, Ireland. A judge will probably experience no difficulty in knowing that there is a Dublin in Ireland; but, as Abbott, C. J., says, "it is not possible for the Court to take judicial notice that there is only one *Dublin* in the world."<sup>6</sup> Certain minor facts regarding the position and location of cities within its jurisdiction, for instance, that a borough and a city are contiguous and within the same county may be taken as true by a judge as part of his judicial cognizance.<sup>7</sup> In much the same way courts may notice judicially that certain cities are located in an arid region where the obtaining of water is a valuable right.<sup>8</sup>

**§ 745. (*B. What Facts are Covered by the Rule; [3] Facts of Geography; Cities*); Boundaries.**—Such courts know also the general boundaries of these municipalities<sup>1</sup> and how these monuments are related to the great geographical features of the state<sup>2</sup> or the districts established for the administration of justice.<sup>3</sup> The relation which the boundaries of a city (or town) have to those of the state<sup>4</sup> or county<sup>5</sup> will be judicially known;<sup>6</sup> *provided*

6. *Kearney v. King*, 2 B. & A. 301, 303 (1831).

7. *In re Sheraden Borough*, 34 Pa. Super. Ct. 639 (1907).

8. *City of South Pasadena v. Pasadena Land & Water Co.*, (Cal. 1908) 93 Pac. 490.

1. *De Baker v. Southern Cal. R. Co.*, 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237 (1895) (river often mentioned in statutes); *In re Independence Ave. Boulevard*, 128 Mo. 272, 30 S. W. 773 (1895); *Achison, T. & S. F. R. Co. v. Paxton*, 75 Kan. 197, 88 Pac. 1082 (1907); *Houlton v. Chicago, etc., R. Co.*, 86 Wis. 59, 56 N. W. 336 (1893).

Precise boundaries cannot be judicially known unless established by statute. *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575 (1879); *Brune v. Thompson*, 2 Q. B. 789 (1842) (tower of London not known to be within a certain city line in London).

2. *Montgomery v. Montgomery, etc., Plank-Road Co.*, 31 Ala. 76 (1857).

3. *Alabama Gold L. Ins. Co. v. Cobb* 57 Ala. 547 (1877).

4. *U. S. v. Beebe*, 2 Dak. 292, 11 N. W. 505 (1880); *Baumann v. Granite Sav. Bank, etc., Co.*, 66 Minn. 227, 68 N. W. 1074 (1896).

5. *Anniston Electric & Gas Co. v. Elwell*, 144 Ala. 317, 42 So. 45 (1905); *Smitha v. Flournoy*, 47 Ala. 345 (1872) (Eufaula is a city in Barbour county).

*Arkansas*.—*St. Louis, etc., R. Co. v. Magness*, 68 Ark. 289, 57 S. W. 933 (1900).

*California*.—*People v. Etting*, 99 Cal. 577, 34 Pac. 237 (1893).

*Connecticut*.—*State v. Powers*, 25 Conn. 48 (1856).

*Delaware*.—*State v. Tootle*, 2 Harr. 541 (1837).

*Georgia*.—*Central R. Co. v. De Bray*, 71 Ga. 406 (1883).

*Illinois*.—*Gilbert v. National Cash Register Co.*, 176 Ill. 288, 52 N. E. 22 (1898); *Huston v. People*, 53 Ill. App. 501 (1893).

the fact is not a jurisdictional one and is not part of the *res gestæ*.<sup>7</sup> In other words, courts know whether a given city (or town) is within the boundaries of a particular county. Recognition by state legislation may be reinforced by that made under federal authority in the establishment of a post-office in a given city or town. The effect is to enable a court more readily to know the location of the municipality in question.<sup>8</sup>

§ 746. (*B. What Facts are Covered by the Rule; [3] Facts of Geography; Cities*); Streets, Blocks, etc.—Much diversity of opinion exists as to judicial knowledge of streets, blocks and other local territorial divisions of cities, towns and other municipalities. As a primary result of public statutes, streets,

*Indiana*.—Steinmetz v. Versailles, etc., Turnpike Co., 57 Ind. 457 (1877).

*Iowa*.—Baily v. Birkhofer, 123 Iowa 53, 98 N. W. 594 (1904).

*Kansas*.—Kansas City, etc., R. Co. v. Burge, 40 Kan. 736, 21 Pac. 588 (1889).

*Maine*.—State v. Simpson, 91 Me. 83, 39 Atl. 287 (1897). But see Goodwin v. Appleton, 22 Me. 453 (1843).

*Massachusetts*.—Com. v. Springfield, 7 Mass. 9 (1810). Compare, however, Com. v. Wheeler, 162 Mass. 429, 38 N. E. 1115 (1894).

*Michigan*.—People v. Curley, 99 Mich. 238, 58 N. W. 68 (1894).

*Minnesota*.—Kretzschmar v. Meehan, 74 Minn. 211, 77 N. W. 41 (1898); Baumann v. Trust Co., 66 Minn. 227, 68 N. W. 1074 (1896).

*Missouri*.—State v. Pennington, 124 Mo. 388, 27 S. W. 1106 (1894).

*Nebraska*.—Green v. Paul, 60 Neb. 7, 82 N. W. 98 (1900).

*New York*.—People v. Wood, 131 N. Y. 617, 30 N. E. 243 (1892).

*Oregon*.—Marx v. Croisan, 17 Or. 393, 21 Pac. 310 (1889).

*Pennsylvania*.—Com. v. Kaiser, 184 Pa. St. 493, 39 Atl. 299 (1898).

*Texas*.—Traylor v. Blum, (Sup. 1888) 7 S. W. 829; Solyer v. Romanet, 52 Tex. 562, 568 (1880) (Galveston is in Galveston county).

*Utah*.—McMaster v. Morse, 18 Utah 21, 55 Pac. 70 (1898).

*Vermont*.—Bellows v. Elliot, 12 Vt. 569 (1840).

*Washington*.—Schilling v. Washington Territory, 2 Wash. Ter. 283, 5 Pac. 926 (1884).

*West Virginia*.—Beasley v. Beckley, 28 W. Va. 81 (1886).

*Wisconsin*.—Huey v. Van Wie, 23 Wis. 613 (1869).

The English parish or township, not being recognized or established in its boundaries by statutory law, stands in a somewhat different position. Com. v. Springfield, 7 Mass. 9 (1810); Rex v. Burridge, 3 P. Wms. 439 (1735).

Even the venue of a criminal act may be determined in this way. Commonwealth v. Salawich, 28 Pa. Super. Ct. 330 (1905).

6. A city recognized by a public statute as being within a given county will be so treated by the courts of Texas. Solyer v. Romanet, 52 Tex. 562 (1880); Lewis v. State, (Tex. Cr. App. 1894) 24 S. W. 903.

7. Mayes v. St. Louis, etc., R. Co., 71 Mo. App. 140 (1897); Porter v. St. Louis, etc., R. Co., 66 Mo. App. 623 (1896).

8. Smitha v. Flournoy, 47 Ala. 345 (1872); Central R., etc., Co. v. Gamble, 77 Ga. 584, 3 S. E. 287 (1886).



roads, etc., of any municipality are public highways.<sup>1</sup> But, as a general rule, a state court cannot judicially know the existence or location of particular city or town ways<sup>2</sup> or the name,<sup>3</sup> or as to particular facts regarding them<sup>4</sup> unless these highways are established by virtue of a public statute or recognized in one. It has been held that a court may judicially know the location of city<sup>5</sup> or town lots; but not whether they have been built upon,<sup>6</sup> and of city (or town) *blocks* as related thereto,<sup>7</sup> but not of the

1. *Montgomery v. Santa Anna, etc.*, R. Co., 104 Cal. 186, 37 Pac. 786 (1894); *City of Frankfort v. Coleman*, 19 Ind. App. 368, 49 N. E. 474 (1897); *City of Indianapolis v. Higgins*, 141 Ind. 1, 6, 40 N. E. 671 (1894); *Porter v. Waring*, 69 N. Y. 250 (1877); *Taylor v. Town of Philippi*, 35 W. Va. 554, 14 S. E. 130 (1891).

2. *California*.—*Diggins v. Harts-horne*, 108 Cal. 154, 41 Pac. 283 (1895).

Neither a trial court nor the court on appeal judicially knows the streets in a given municipality. *Vonkey v. City of St. Louis*, 219 Mo. 37, 117 S. W. 733 (1909). Courts cannot know, without proof, the local situation of a town or a street in a county. *Humphreys v. Budd*, 9 Dowl. 1000 (1841); *Deybel's Case*, 4 B. & A. 243 (1821).

**Alleys.**—Courts do not take judicial notice that alleys are not provided with sidewalks or that any particular alley has no sidewalk. *J. Burton Co. v. City of Chicago*, 236 Ill. 383, 86 N. E. 93 (1908) [*reversed*, decree, *City of Chicago v. J. Burton Co.*, 140 Ill. App. 344 (1908)]. In other words, this is not a notorious fact. It is a fact of notoriety that many streets contain in their sidewalks, cross-walks, curbs or pavements numerous slight irregularities. *Gastel v. City of New York*, 194 N. Y. 15, 86 N. E. 833 (1909) [*order reversed* (Sup. 1908), 110 N. Y. Suppl. 1129].

*Illinois*.—*North Chicago St. R. Co. v. Cheetham*, 58 Ill. App. 318 (1895);

*City of Topeka v. Cook*, 72 Kan. 595, 84 Pac. 376 (1906) (alley between streets in Topeka).

*Michigan*.—*Cicotte v. Anciaux*, 53 Mich. 227, 18 N. W. 793 (1884).

*Missouri*.—*Breckenridge v. American, etc., Ins. Co.*, 87 Mo. 62 (1885).

*England*.—*Humphreys v. Budd*, 9 Dowl. 1000, 5 Jur. 630 (1841). While a court may notice the existence, direction and certain interrelations of the streets of a city, it cannot know that a particular street is within a given distance of the city limits. *Stealey v. Kansas City*, 179 Mo. 400, 78 S. W. 599 (1904) (five miles). The street line and the horse line on a specified street in a given city must be proved. *City of New York v. Childs*, 84 N. Y. Suppl. 164 (1903).

3. *Baily v. Birkhofer*, (Iowa 1904) 98 N. W. 594.

4. *Cleveland v. Newsom*, 45 Mich. 62, 7 N. W. 222 (1880) (extent of use); *Allen v. Scharringhausen*, 8 Mo. App. 229 (1880) (numbering); *Porter v. Waring*, 69 N. Y. 250 (1877) (width); *People v. Callahan*, 60 How. Pr. (N. Y.) 372 (1881) (location and numbering).

5. *Gardner v. Eberhart*, 82 Ill. 316 (1876); *Brown v. Ogg*, 85 Ind. 234 (1882); *Houlton v. Chicago, etc., R. Co.*, 86 Wis. 59, 56 N. W. 336 (1893). See also *People v. Kelly*, 20 Hun (N. Y.) 549 (1880).

6. *State v. Rogers*, (Mont. 1904) 77 Pac. 293.

7. *Sever v. Lyon*, 170 Ill. 395, 48 N. E. 926 (1897).

position of such lots as related to city or town boundary lines.<sup>8</sup> With regard to judicial knowledge of city or town *streets*, town ways, etc., so great diversity of decision exists as to render it impossible to deduce from the cases a definite rule.

**§ 747. (*B. What Facts are Covered by the Rule; [3] Facts of Geography; Cities; Streets, Blocks, etc.*); Factors in Determining Whether Notice is Taken.**—Certain considerations are apt to affect the judge's action in any particular instance. (1) Where a plan has been recognized by statute the facts set forth in it will be more readily known<sup>1</sup> than when established by dedication or a municipal by-law.<sup>2</sup> (2) Where judicial knowledge is taken of streets, etc., it is rather of their general direction,<sup>3</sup> the existence of the arrangement itself,<sup>4</sup> and the interrelations in position of the streets, etc., to each other,<sup>5</sup> than an attempt actually to know of the true position of these ways on the surface of the ground<sup>6</sup> or of their definite relations to established monuments,<sup>7</sup> or even the actual distances between the streets themselves.<sup>8</sup> (3) Facts relating to streets widely known, because (a) in a great commercial metropolis,<sup>9</sup> (b) long established,<sup>10</sup> (c) located in the

8. *Gunning v. People*, 189 Ill. 165, 59 N. E. 494 [*reversing* 86 Ill. App. 676] (1901).

1. *Whiting v. Quackenbush*, 54 Cal. 306 (1880); *Sever v. Lyons*, 170 Ill. 395, 48 N. E. 926 (1897); *Armstrong v. Cummings*, 20 Hun (N. Y.) 313 (1880).

**Width of street** (*Coe College v. Cedar Rapids*, 120 Iowa 541, 95 N. W. 267 [1903] [*charter*]) prescribed by special statute, will be judicially known.

2. *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283 (1895).

3. *Brady v. Page*, 59 Cal. 52 (1881); *Canavan v. Stuyvesant*, 7 Misc. (N. Y.) 113, 27 N. Y. Suppl. 413 (1894); *Skelly v. New York El. R. Co.*, 7 Misc. 88, 27 N. Y. Suppl. 304 (1894).

4. *McMaster v. Morse*, 18 Utah 21, 55 Pac. 70 (1898).

5. *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283 (1895); *Brady v. Page*, 59 Cal. 52 (1881); *Gardner v. Eberhart*, 82 Ill. 316 (1876).

6. *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283 (1895); *Shepard v. Shepard*, 36 Mich. 173 (1877).

7. *Pennsylvania Co. v. Frana*, 13 Ill. App. 91 (1883) (intersection of a street with a railroad location, not noticed).

8. *West Chicago St. R. Co. v. Vandehouten*, 58 Ill. App. 318 (1895) (Chicago).

9. *Poland v. Dreyfous*, 48 La. Ann. 83, 18 So. 906 (1896) (New Orleans); *In re City of New York*, 96 N. Y. Suppl. 554, 48 Misc. 602 (1905) (New York); *Gruber v. New York City R. Co.*, 53 Misc. (N. Y.) 322, 103 N. Y. Suppl. 216 (1907) (New York city); *Canavan v. Stuyvesant*, 7 Misc. 113, 27 N. Y. Suppl. 413 (1894) (New York city).

The judicial district in which premises located on a given street are situated has been judicially known. *People v. Kelly*, 20 Hun 549 (1880). But cognizance of the numbering of the streets, their termini, etc., as related to the boundaries of the district,

place where the court is actually sitting,<sup>11</sup> will be known by the court as notorious.<sup>12</sup>

*A Contrary View.*—Several jurisdictions have peremptorily declined judicially to know these ways,<sup>13</sup> and, *a fortiori*, the house numbering on them.<sup>14</sup>

**§ 748. (B. What Facts are Covered by the Rule; [3] Facts of Geography; Cities); Wards, Noted Places, etc.**—The position of wards of a city will not be known.<sup>1</sup> A more liberal rule has extended judicial knowledge so as to cover facts of city geography, of a general nature, well known in the local community, as the location of celebrated places,<sup>2</sup> or even of noted buildings.<sup>3</sup>

has been declined. *People v. Callahan*, 23 Hun 581, 60 How. Pr. 372 (1881).

10. *State v. Ruth*, 14 Mo. App. 226 (1883); *Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62 (1885) (less well-known streets, or their direction, not noticed). See, however, *Allen v. Scharringhausen*, 8 Mo. App. 229 (1880) (where cognizance was taken of a street number).

11. *State v. Ruth*, 14 Mo. App. 226 (1883).

There is a natural tendency for a judge to assume that to be notorious which he happens to know. He not unjustifiably feels inclined to take judicial notice of such a fact, satisfied that such an act, if not well grounded in law, is, at least, in the line of substantial justice and of expediting business. *Supra*, § 544.

12. It is obvious also that many facts regarding streets, blocks, lots, and the like, may be matters of common knowledge to those living in a particular locality.

13. *California*.—*Brumagim v. Bradshaw*, 39 Cal. 24 (1870).

*Illinois*.—*Sever v. Lyons*, 170 Ill. 395, 48 N. E. 826 (1897).

*Iowa*.—*Baily v. Birkhofer*, 123 Iowa 59, 98 N. W. 594 (1904).

*Michigan*.—*Shepard v. Shepard*, 36 Mich. 173 (1877).

*Utah*.—*McMaster v. Morse*, 18 Utah 21, 55 Pac. 70 (1898).

*Wisconsin*.—*Ritchie v. Catlin*, 86 Wis. 109, 56 N. W. 473 (1893).

*Wyoming*.—*Ingersoll v. Davis*, (Wyo. 1905) 82 Pac. 867.

*England*.—*Humphreys v. Budd*, 9 Dowl. P. C. 1000, 5 Jur. 630 (1841) (street not in a given county, not noticed). See also *Reg. v. Holborn Union*, 6 E. & B. 715, 2 Jur. (N. S.) 571, 25 L. J. M. C. 110, 4 Wkly. Rep. 606, 88 E. C. L. 715 (1856).

14. *Ritchie v. Catlin*, 86 Wis. 109, 56 N. W. 473 (1893).

1. *Moberry v. Jeffersonville*, 38 Ind. 198 (1871); *Armstrong v. Cummings*, 20 Hun (N. Y.) 313 (1880). A Missouri court may take judicial notice that a part of Kansas City was platted as West Kansas. *Barber Asphalt Paving Co. v. Missouri Pac. Ry. Co.*, 136 Mo. App. 642, 119 S. W. 27 (1909).

2. *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 57 N. E. 1043 (1900) (World's Fair grounds). It cannot be noticed that part of the tower of London is within the county of Middlesex. *Brune v. Thompson*, 2 Q. B. 789 (1842).

3. *Gunning v. People*, 189 Ill. 165, 59 N. E. 494 (1901) (Reliance building is in South Chicago).

§ 749. (*B. What Facts are Covered by the Rule; [3] Facts of Geography; Cities*); Foreign Cities.—While a state court does not know the location and other facts concerning cities outside the state not of commercial or other general importance, a national court treats such cities more nearly as it does those within its immediate district.<sup>1</sup> Courts have, however, regarded the location of a city outside the state as matter of common knowledge, and have even treated, in the same way, minor facts regarding it, e. g., that it is the county seat of a particular county in another state.<sup>2</sup>

§ 750. (*B. What Facts are Covered by the Rule; [3] Facts of Geography*); Towns.—The court judicially knows the existence and geographical location of its towns, established or recognized by law;<sup>1</sup>—mere popular designations,<sup>2</sup> or even, it has been held, an unincorporated town,<sup>3</sup> not being so recognized. The boundaries of towns, where these are established by law,<sup>4</sup> will be known in a general way; but whether they are correctly run on the surface of the ground at a given point must be proved by evidence.<sup>5</sup> The court knows also the relation of these town boundaries to the judicial districts of the state,<sup>6</sup> their geographical

1. *Maese v. Hermann*, 17 App. Cas. (D. C.) 52 [*affirmed* in 183 U. S. 572, 22 S. Ct. 91, 46 L. ed. 335] (1900) (Las Vegas in New Mexico).

2. *Phillips v. Lindley*, 98 N. Y. Suppl. 423, 112 App. Div. 283 (1906).

1. *Connecticut*.—*State v. Powers*, 25 Conn. 48 (1856).

*Maine*.—*State v. Simpson*, 91 Me. 83, 39 Atl. 287 (1897).

*Missouri*.—*Parker v. Burton*, 172 Mo. 85, 72 S. W. 663 (1903).

*New Hampshire*.—*Winnipiseogee Lake Co. v. Young*, 40 N. H. 420, 429 (1860).

*North Carolina*.—*State v. Southern Ry. Co.*, (N. C. 1906) 54 S. E. 294; *State v. Glasgow*, Conf. R. 38, 2 Am. Dec. 629 (1800).

*Texas*.—*Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575 (1879).

*Vermont*.—*French v. Barre*, 58 Vt. 567, 5 Atl. 568 (1886).

*Wisconsin*.—*Woodward v. Chicago, etc.*, R. Co., 21 Wis. 309 (1867).

2. *Huston v. People*, 53 Ill. App. 501 (1893). See also *St. Louis, etc., R. Co. v. Cady*, 67 Ark. 512, 55 S. W. 929 (1900).

3. *Anderson v. Com.*, 100 Va. 860, 42 S. E. 865 (1902).

4. *Re Independence Boulevard*, (Ark. 1895) 30 S. W. 773; *Atchison, T. & St. F. R. Co. v. Paxton*, 75 Kan. 197, 88 Pac. 1082 (1907); *Hite v. State*, 9 Yerg. (Tenn.) 357 (1836); *Boston v. State*, 5 Tex. App. 383, 22 Am. Rep. 575 (1879). But see *Blackenstoe v. Wabash, etc., R. Co.*, 86 Mo. 492 (1885); *Mayes v. St. Louis, etc., R. Co.*, 71 Mo. App. 140 (1897).

5. *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 286 (1895).

6. *St. Louis, etc., R. Co. v. State*, 68 Ark. 561, 60 S. W. 654 (1901).

position,<sup>7</sup> as being within the state<sup>8</sup> or within a given county;<sup>9</sup>—although certain courts decline judicially to know in any but civil causes,<sup>10</sup> unless the position of the town within the county has

**7. Connecticut.**—*Keyser v. Coe*, 37 Conn. 597 (1871).

**Illinois.**—*Reading v. Wedder*, 66 Ill. 80 (1872).

**Iowa.**—*State v. Reader*, 60 Iowa 527, 15 N. W. 423 (1883).

**Maine.**—*State v. Wagner*, 61 Me. 178 (1873).

**Missouri.**—*McGrew v. Missouri Pac. R. Co.*, 177 Mo. 533, 76 S. W. 995 (1903); *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123 (1902).

**Nevada.**—*State v. Buralli*, 81 Pac. 532 (1903).

**United States.**—*Toppan v. Cleveland, etc.*, R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74 (1862); *King v. American Transp. Co.*, 14 Fed. Cas. No. 7,787, 1 Flipp. 1 (1859).

**8. King v. Kent**, 29 Ala. 542 (1857).

**9. See CITIES.** *Supra*, § 744.

**Alabama.**—*Smitha v. Flournoy's Adm.*, 47 Ala. 345 (1872).

**Arkansas.**—*St. Louis, etc.*, R. Co. v. *Magness*, 68 Ark. 289, 57 S. W. 933 (1900).

**California.**—*People v. Etting*, 99 Cal. 577, 34 Pac. 237 (1893).

**Connecticut.**—*State v. Powers*, 25 Conn. 48 (1856).

**Delaware.**—*State v. Tootle*, 2 Harr. 541 (1837).

**Georgia.**—*Perry v. State*, 113 Ga. 936, 39 S. E. 315 (1901) (it being shown that the town is within the state); *Central R., etc., Co. v. Gamble*, 77 Ga. 584, 3 S. E. 287 (1886).

**Illinois.**—*Gilbert v. National Cash Register Co.*, 176 Ill. 288, 52 N. E. 22 (1898).

**Indiana.**—*Cleveland, C., C. & St. L. R. Co. v. Miller*, (Ind. App. 1907) 81 N. E. 517; *Turbeville v. State*, 42 Ind. 490 (1873).

**Iowa.**—*State v. Reader*, 60 Iowa 527, 15 N. W. 423 (1883).

**Kansas.**—*Atchison, T. & St. F. R.*

*Co. v. Paxton*, 75 Kan. 197, 88 Pac. 1082 (1907).

**Maine.**—*State v. Simpson*, 91 Me. 83, 39 Atl. 287 (1897) (Waterville in Kennebec county); *Ham v. Ham*, 39 Me. 263 (1855).

**Michigan.**—*People v. Curley*, 99 Mich. 238, 58 N. W. 68 (1894).

**Missouri.**—*Parker v. Burton*, 172 Mo. 85, 72 S. W. 663 (1903).

**New Hampshire.**—*Winnipiseogee Lake Co. v. Young*, 40 N. H. 420 (1860).

**New York.**—*Vanderwerker v. People*, 5 Wend. 530 (1830).

**Oklahoma.**—*Reed v. Territory*, (Cr. App. 1908) 98 Pac. 583.

**Oregon.**—*Marx v. Croisan*, 17 Or. 393, 21 Pac. 310 (1889).

**Texas.**—*Lewis v. State*, (Tex. 1894) 24 S. W. 903.

**Vermont.**—*State v. Soragan*, 40 Vt. 450 (1868). "The court can take judicial notice of the lines of counties and the towns embraced in them." *Steinmetz v. Versailles Turnpike Co.*, 57 Ind. 457 (1877).

The relation of law to common knowledge is indicated by the fact that while the court takes judicial notice of the boundaries of a county in the state, it does not take such notice of the county in which an unincorporated town is situated. *State v. Bush*, 136 Mo. App. 608, 118 S. W. 670 (1909).

**To the contrary**, see *Com. v. Wheeler*, 162 Mass. 429, 38 N. E. 1115 (1894).

**10. State v. Burgess**, 75 Mo. 541 (1882); *State v. Clark First Nat. Bank*, 3 S. D. 52, 51 N. W. 780 (1892); *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575 (1879). See also *Hutto v. State*, (Tex. Cr. App. 1895) 33 S. W. 223; *Cain v. State*, (Tex. Cr. App. 1894) 25 S. W. 1119; *Fields v. State*, (Tex. Cr. App. 1893) 24 S. W. 407.

been recognized in a public statute.<sup>11</sup> The courts of England decline to take such judicial knowledge of these facts of location under any circumstances,<sup>12</sup> though they judicially know the names and location of parishes.<sup>13</sup> Courts will know the town's distance from given geographical monuments, such as the county line,<sup>14</sup> the meridian at Greenwich,<sup>15</sup> or other fixed points of notoriety,<sup>16</sup> but not, it would seem, the distance between places in the county.<sup>17</sup> The names of towns and whether or not there is more than one of that name in the state,<sup>18</sup> their numbering,<sup>19</sup> their respective populations as given in the official census tabulations,<sup>20</sup> are facts that require no proof.<sup>21</sup>

**§ 751. (B. What Facts are Covered by the Rule; [3] Facts of Geography); Townships.**— Townships stand, in this connection, in the same position as towns. Their existence, location, relative positions, both to each other,<sup>1</sup> and to lines established by the public survey<sup>2</sup> will be known judicially. The exact position of boundary line<sup>3</sup> and facts dependent on that position —

11. *Lewis v. State*, (Tex. Cr. App. 1894) 24 S. W. 903 (made capital of the state); *Latham v. State*, 19 Tex. App. 305 (1885); *Fields v. State*, (Tex. Cr. App. 1893) 24 S. W. 407.

12. *Brune v. Thompson*, 2 Q. B. 789, 42 E. C. L. 913, C. & M. 34, 41 E. C. L. 34, 2 G. & D. 110 (1842).

13. *Reg. v. Sharpe*, 8 C. & P. 436, 34 E. C. L. 823 (1838).

14. *Terre Haute, etc., R. Co. v. Pierce*, 95 Ind. 496 (1884); *Kansas City, etc., R. Co. v. Burge*, 40 Kan. 736, 21 Pac. 589 (1889); *Harvey v. Terr.*, 11 Okl. 156, 65 Pac. 837 (1901).

In case of an unincorporated village the rule has been held to be otherwise. *Anderson v. Com.*, 100 Va. 860, 42 S. E. 865 (1902).

15. *Curtis v. March*, 3 H. & N. 866, 4 Jur. N. S. 1112, 28 L. J. Exch. 36 (1858).

16. *Bruson v. Clark*, 151 Ill. 495 (1894) (two miles from court house).

17. *Goodwin v. Appleton*, 22 Me. 453 (1843). See also *Wainright v. Lake Shore, etc., R. Co.*, 11 Ohio Cir.

Dec. 530 (1901); *Anderson v. Com.*, 100 Va. 860, 42 S. E. 865 (1902).

18. *Smitha v. Flournoy*, 47 Ala. 345 (1872).

19. *Kile v. Yellowhead*, 80 Ill. 208 (1875).

20. *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157 (1891).

21. *De Baker v. R. Co.*, 106 Cal. 257, 39 Pac. 610 (1895) (river often mentioned in statutes).

1. *Kile v. Yellowhead*, 80 Ill. 208 (1875); *O'Brien v. Krockinski*, 50 Ill. App. 456 (1893).

2. *Kile v. Yellowhead*, 80 Ill. 208 (1875) (coincide with sectional lines); *Wright v. Phillips*, 2 Greene (Iowa) 191 (1849); *Dexter v. Cranston*, 41 Mich. 448, 2 N. W. 674 (1879).

3. *Backenstoe v. Wabash, etc., R. Co.*, 86 Mo. 492 (1885); *Mayes v. St. Louis, etc., R. Co.*, 71 Mo. App. 140 (1897). But see *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123 (1902).

whether, for example, the particular township is<sup>4</sup> or is not<sup>5</sup> within a given county — must be proved.

**§ 752. (B. What Facts are Covered by the Rule; [3] Facts of Geography); Villages, Boroughs, etc.**—So far as the territorial limits of a village are established by a statute which the court judicially knows, the judge will not require that they be proved to him by evidence.<sup>1</sup> The rule is otherwise where the village is not incorporated.<sup>2</sup> That a village is within the bounds of a given county will be judicially known.<sup>3</sup> Even where a statute requires that judicial notice be taken of villages, it does not necessarily follow that the area of the village will be noticed in the same way.<sup>4</sup> The same rule applies to still smaller subdivisions, such as boroughs,<sup>5</sup> created for governmental purposes. But subdivisions of municipalities whose existence is due to the doing of acts *in pais* of which no evidence is furnished, will not be judicially known.<sup>6</sup>

**§ 753. (B. What Facts are Covered by the Rule); (4) Facts of Human Experience.**—The broad inductions of experience are “assumed as truths in any process of reasoning by the mass of sane minds.”<sup>1</sup> A tribunal legally required to render judgments according to reason, must know<sup>2</sup> such propositions; and counsel may properly use them as a basis of their argument to the jury.<sup>3</sup> It has even been said that the knowledge is not optional;<sup>4</sup>— the use of sound reason is mandatory at all times upon the tribunal.

4. *Cornshock v. People*, 56 Ill. App. 467 (1894); *Parker v. Burton*, 172 Mo. 85, 72 S. W. 663 (1903); *State v. Buralli*, (Nev. 1903) 71 Pac. 532; *Com. v. Kaiser*, 184 Pa. St. 493, 39 Atl. 299 (1898).

5. *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123 (1902).

1. *U. S. v. Beebe*, 2 Dak. 292, 11 N. W. 505 (1880); *Chamberlain v. Litchfield*, 56 Ill. App. 652 (1894); *Shaw v. New York, etc., R. Co.*, 85 N. Y. Suppl. 91, 85 App. Div. 137 (1903); *French v. Barre*, 58 Vt. 567, 5 Atl. 568 (1886).

2. *Anderson v. Com.*, 100 Va. 860, 42 S. E. 865 (1902).

3. *Louisville, etc., R. Co. v. Hixon*, 101 Ind. 337 (1884); *People v. Telford*, 56 Mich. 541, 23 N. W. 213

(1885); *Moon v. Missouri Pac. R. Co.*, 83 Mo. App. 458 (1899).

4. *People v. Pederson*, 220 Ill. 554, 77 N. E. 251 (1906).

5. *Stroudsburg v. Brown*, 11 Pa. Co. Ct. 272 (1889).

6. *Moberry v. Jeffersonville*, 38 Ind. 198 (1871); *Ritchie v. Catlin*, 86 Wis. 109, 56 N. W. 473 (1893).

1. *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274, 292 (1872).

2. *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274, 292 (1872).

3. *Philadelphia R. Co. v. Lehman*, 56 Md. 209 (1881); *State v. Lingle*, 128 Mo. 528, 31 S. W. 20 (1895).

4. Whatever is matter of common knowledge and experience, courts are bound to recognize. *Griffith v. Denver Consol. Tramway Co.*, 14 Colo. App. 504, 61 Pac. 46, 48 (1900).

**§ 754. (B. What Facts are Covered by the Rule; [4] Facts of Human Experience); Standards of Reasonable Conduct.**

— The standards of conduct which experience has established in the community are known to its courts.<sup>1</sup> An act which this standard of experience unhesitatingly stamps as unreasonable will be known to the court to be so,<sup>2</sup> while conduct which the community's standard of prudence deems permissible will be so regarded by the court.<sup>3</sup> This knowledge is essential that legal reasoning, whether by court or jury,<sup>4</sup> should start from a correct major premise.

**§ 755. (B. What Facts are Covered by the Rule); (5) Facts of Social Life.**— No proof need be offered of facts which are well known incidents of the social life of the community. "*Quicquid agant homines*," said Lord Mansfield,<sup>1</sup> "is the business of courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind." "It is the duty of courts judicially to know what is the general course of the transactions of human life."<sup>2</sup>

**§ 756. (B. What Facts are Covered by the Rule; [5] Facts of Social Life); Customs.**— Courts know the customary methods of doing business, prevalent in the community. These will be re-

1. *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 So. 500 (1901); *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274, 292 (1872); *Davey v. London, etc., R. Co.*, 12 L. R. Q. B. D. 70, 48 J. P. 279, 53 L. J. Q. B. 58, 49 L. T. Rep. (N. S.) 739 [*affirming* 11 Q. B. D. 213] (1883). See also *White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167 (1891); *Betcher v. Capital F. Ins. Co.*, 78 Minn. 240, 80 N. W. 971 (1899).

2. *Griffith v. Denver Consol. Tramway Co.*, 14 Colo. App. 504, 61 Pac. 46, 48 (1900); *Jones v. Flint, etc.*, (1901); *Lillibridge v. McCann*, 117 R. Co., 127 Mich. 198, 86 N. W. 838 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381 (1898) (sleeping on straw with a lighted pipe); *Upington v. Corrigan*, 69 Hun (N. Y.) 320, 23 N. Y. Suppl. 451

(1893) (delay of twenty-nine years in starting to build a church); *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829 (1892). That electricity is a dangerous and treacherous agent, similar to gunpowder or dynamite and is not to be handled with a low degree of caution, is a fact of common knowledge. *De Kallands v. Washtenaw Home Telephone Co.*, 153 Mich. 25, 116 N. W. 564, 15 Detroit Leg. N. 337 (1908).

3. *Gilbert v. Flint, etc.*, R. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592 (1883) (leaving a box freight car at a highway crossing).

4. *Infra*, § 1733.

1. *Barwell v. Brooks*, 3 Dougl. 371, 373, 26 E. C. L. 245 (1784).

2. *Duncan v. Littell*, 2 Bibb. (Ky.) 424, 426 (1811).



garded as notorious.<sup>1</sup> That prudent business men insure manufacturing establishments in amounts approximating full value,<sup>2</sup> that they are in the habit of consulting commercial agencies and being governed, in giving credit, by their reports;<sup>3</sup> that merchants usually charge interest after a certain date,<sup>4</sup> these, and similar customs, are generally known. Even where the court knows as a matter of common knowledge the existence of a custom, it will not, for that reason, know necessarily the exact limitations of its scope or the conditions imposed on its exercise.<sup>5</sup> Actual knowledge

1. *Arkansas*.—City Electric St. R. Co. v. First Nat. Exch. Bank, 62 Ark. 33, 34 S. W. 89, 54 Am. St. Rep. 282, 31 L. R. A. 535 (1896).

*Illinois*.—Munn v. Burch, 25 Ill. 35 (1860).

*Maryland*.—Sasscer v. Farmers' Bank, 4 Md. 409 (1853).

*Massachusetts*.—Murphy v. Calley, 1 Allen 107 (1861).

*Michigan*.—Samberg v. American Exp. Co., (Mich. 1904) 11 Detroit Leg. N. 154, 99 N. W. 879 (cancel signature by drawing line through it); Pfeiffer v. Detroit Bd. of Education, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536 (1898).

*New York*.—Rowland v. Miln, 2 Hilt. 150 (1858).

*Pennsylvania*.—Watt v. Hoch, 25 Pa. St. 411 (1855).

*South Carolina*.—Union Bank v. Union Ins. Co., Dudley 171 (1838).

*Texas*.—Chadoin v. Magee, 20 Tex. 476 (1857).

*Vermont*.—Wood v. Smith, 23 Vt. 706 (1851).

*Washington*.—Cady v. Case, 11 Wash. 124, 39 Pac. 375 (1895); Bowman v. Spokane First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870 (1894).

*Wisconsin*.—John O'Brien Lumber Co. v. Wilkinson, (Wis. 1904) 101 N. W. 1050.

*United States*.—U. S. r. Arredondo, 6 Pet. 691, 8 L. ed. 547 (1832).

*England*.—Bruin v. Knott, 9 Jur. 979, 12 Sim. 453 (1845); Piper v. Chappell, 9 Jur. 601, 14 M. & W.

624 (1845); Jones v. Peppercorne, 5 Jur. (N. S.) 140, Johns. 430, 28 L. J. Ch. 158, 7 Wkly. Rep. 103 (1858). "We must take judicial notice of a custom which is familiar everywhere." Cameron v. Blackman, 39 Mich. 108 (1878).

Effect will not be given to unreasonable customs or usages. Cady v. Case, 11 Wash. 124. 39 Pac. 375 (1895) (payment of wages by goods from a particular store).

A fortiori the same rule applies to a custom directly contrary to law. Columbia Bank v. Fitzhugh, 1 Harr. & G. (Md.) 239 (1827); Murphy v. Calley, 1 Allen (Mass.) 107 (1861); Rowland v. Miln, 2 Hilt. (N. Y.) 150 (1858).

The knowledge may equally well be negative;—i. e., that no such custom as is claimed exists.

2. Hill v. American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691 (1900).

3. Furry v. O'Connor, 1 Ind. App. 573, 579, 28 N. E. 103 (1891); Gene-see, etc., Bank v. Michigan Barge Co., 52 Mich. 164, 17 N. W. 790 (1883); Eaton, etc., Co. v. Avery, 83 N. Y. 31 (1880); Wilmot v. Lyon, 7 Ohio Civ. Dec. 394 (1897). But see Holmes v. Harrington, 20 Mo. App. 661 (1886).

4. Watt v. Hoch, 25 Pa. St. 411 (1855).

5. McKibbin v. Great Northern R. Co., 78 Minn. 232, 80 N. W. 1052 (1899) (carrying "drummers' samples" as baggage).

on the part of the judge is inevitably a factor in determining the action of the court as to whether a custom shall be treated as commonly known. It is usual, therefore, for the judge to assume as notorious a usage or custom once judicially established.<sup>6</sup>

**§ 757. (B. What Facts are Covered by the Rule; [5] Facts of Social Life; Customs); Financial.**— Certain customs of a financial nature, i. e., with relation to money dealings, as that taxes are often paid by cheque,<sup>1</sup> that banks remit collections made on behalf of their customers by draft, or certificate of deposit,<sup>2</sup> that bills for goods are frequently collected by having payment made to an agent of the vendor who will deliver the bill of sale to the vendee,<sup>3</sup> will be taken as established by common knowledge, i. e., regarded as “judicially” known. But local customs, as the allowance of a commission on bills of exchange received in payment of a judgment,<sup>4</sup> stand in a different position. Customs of courtesy in trade, as where business houses allow each other’s employees or customers to buy goods on their credit,<sup>5</sup> require no proof.

**§ 758. (B. What Facts are Covered by the Rule; [5] Facts of Social Life; Customs); Local.**— A custom observed among a few persons, confined to a particular locality or not generally established and known,<sup>1</sup> must be proved. A custom, though in a sense local, will be noticed if it affects the public at large and is generally known and observed throughout a particular locality, such as certain colonies,<sup>2</sup> a given port,<sup>3</sup> city<sup>4</sup> or the like; but it is otherwise with customs where both observance and operation are confined to a limited locality.<sup>5</sup> Therefore, municipal customs as

6. *Consequa v. Willings*, 6 Fed. Cas. No. 3,128, Pet. C. C. 225 (1816).

1. *Indiana Bond Co. v. Bruce*, 13 Ind. App. 550, 41 N. E. 958 (1895).

2. *Bowman v. Spokane First Nat. Bank*, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870 (1894).

3. *Gibson v. Stevens*, 8 How. (U. S.) 384, 12 L. ed. 1123 (1850).

4. *Ward v. Everett*, 1 Dana (Ky.) 429 (1833).

5. *Cameron v. Blackman*, 39 Mich. 108 (1878).

1. *Sanders v. Brown*, (Ala. 1905) 39 So. 732 (on sale of business to secure covenant not to compete);

*Schultz v. Ford Bros.*, (Iowa 1906) 109 N. W. 614.

2. *Chandoin v. Magee*, 20 Tex. 476 (1857) (selection of lands already surveyed).

3. *Union Bank v. Union Ins. Co.*, *Dudley* (S. C.) 171 (1837) (demurrage charges).

4. *Koons v. Miller*, 3 Watts & S. (Pa.) 271 (1842) (Philadelphia); *Watt v. Hoch*, 25 Pa. St. 411 (1855) (Pittsburgh).

5. *California*.— *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534 (1859).

*Indiana*.— *Rapp v. Grayson*, 2 Blackf. 130 (1828).

to the improvement of streets,<sup>6</sup> the use of their premises by individual owners<sup>7</sup> or the tribal laws<sup>8</sup> or customs<sup>9</sup> of the Indians will not be commonly, i. e., "judicially" known.

**§ 759. (B. What Facts are Covered by the Rule; [5] Facts of Social Life); Fine Arts.**—As part of the life of the community, courts know, in a general way, that which is customarily known by people of average education as to the existence and scope of the fine arts.<sup>1</sup>

*Drama.*—It will be commonly recognized that a dramatic artist is not a laborer or servant.<sup>2</sup>

*Engraving.*—That lithographing<sup>3</sup> or preparing maps for a geological survey<sup>4</sup> requires a high degree of skill and is therefore expensive<sup>5</sup> need not be proved.

**§ 760. (B. What Facts are Covered by the Rule; [5] Facts of Social Life); Gaming.**—Facts of such common knowledge as the general methods in which gaming is conducted as by a faro bank,<sup>1</sup> lottery,<sup>2</sup> or gift enterprise,<sup>3</sup> have been held by some courts to be within their judicial knowledge, while other

*Kentucky.*—*Longes v. Kennedy*, 2 Bibb 607 (1812).

*Maryland.*—*Columbia Bank v. Fitzhugh*, 1 Harr. & G. 239 (1827).

*Mississippi.*—*Turner v. Fish*, 28 Miss. 306 (1878).

*New York.*—*In re Walter*, 75 N. Y. 354 (1878).

*Oregon.*—*Lewis v. McClure*, 8 Or. 273 (1880).

*Tennessee.*—*McCorkle v. Driskell*, (Ch. App. 1900) 60 S. W. 172.

*Vermont.*—*Wood v. Smith*, 23 Vt. 706 (1851).

6. *In re Walter*, 75 N. Y. 354 (1878).

7. *McCorkle v. Driskell*, (Tenn. Ch. App. 1900) 60 S. W. 172 (construction or elimination of fences in Chattanooga).

8. *Sass v. Thomas*, (Indian Terr. 1902) 69 S. W. 893; *Kelly v. Churchill*, (Indian Terr. 1902) 69 S. W. 817; *Livingston v. Spero*, 18 Misc. (N. Y.) 243, 41 N. Y. St. 606 (1896); *Hockett v. Alston*, 110 Fed. 910, 49 C. C. A. 180 (1901);

*Wilson v. Owens*, 86 Fed. 571, 30 C. C. A. 257 (1898).

9. *Turner v. Fish*, 28 Miss. 306, 311 (1854) (headship of Choctaw family).

1. For judicial knowledge as to literature, see *infra*, § 764.

2. *Lumley v. Gye*, 2 E. & B. 216, 267, 17 Jur. 827, 22 L. J. Q. B. 463, 1 Wkly. Rep. 432, 75 E. C. L. 216 (1853).

3. *Beck, etc., Lithographing Co. v. Evansville Brewing Co.*, 25 Ind. App. 662, 58 N. E. 859 (1900).

4. *Adams Express Co. v. Hoeing*, 9 Ky. L. Rep. 814 (1888).

5. *Adams Express Co. v. Hoeing*, 9 Ky. L. Rep. 814 (1888) (\$120 per month held fair).

1. *State v. Burton*, 25 Tex. 420 (1860).

2. *Salomon v. State*, 28 Ala. 83 (1856); *Boullemet v. State*, 28 Ala. 83 (1856).

3. *Lohman v. State*, 81 Ind. 15 (1881).

judges have required proof of similar facts.<sup>4</sup> Everyone knows, and so a court, that "craps" is played with dice,<sup>5</sup> or that draw-poker<sup>6</sup> is a gambling game played with cards.

**§ 761. (B. What Facts are Covered by the Rule; [5] Facts of Social Life); Language; Abbreviations.**—Abbreviations and symbols of ideas which have been adopted by the community generally and so have become part of the language will be known to the court.<sup>1</sup> These abbreviations may be those used in legal proceedings<sup>2</sup> in general mercantile business,<sup>3</sup> or in specific lines of business activity, such as printing,<sup>4</sup> surveying,<sup>5</sup> transportation,<sup>6</sup> or the like; or used in everyday social life to mark the divisions of

4. *State v. Bruner*, 17 Mo. App. 274 (1885).

5. *Sims v. State*, 1 Ga. App. 776, 57 S. E. 1029 (1907).

6. *City of Shreveport v. Bowen*, 116 La. 522, 40 So. 859 (1906).

1. *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328 (1893).

2. *Moseley v. Mastin*, 37 Ala. 216 (1861) ("admr."); *Rowley v. Berrian*, 12 Ill. 198 (1850) ("N. P." and "J. P."). See also *City of Topeka v. Stevenson*, (Kan. 1909) 99 Pac. 589. (In internal revenue matters, "R. M. L. D." for "retail malt liquor dealer.") A court "must judicially take notice of such abbreviations as 'Adm'r.' or acknowledge itself incompetent to understand the commonest writings." *Moseley's Adm'r v. Mastin*, 37 Ala. 216 (1861). "N. P." is known to be the official abbreviation of the title of a notary public. *Fowler v. Carithers*, 4 Ga. App. 517, 61 S. E. 1132 (1908).

3. *Sheffield Furnace Co. v. Hull Coal, etc., Co.*, 101 Ala. 446, 14 So. 672 (1892) ("F. O. B."); *Heaton v. Ainley*, 108 Iowa 112, 78 N. W. 798 (1899) ("acct."); *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360 (1890) ("Supt."). That "5 x 16," in speaking of shingles, means 5 inches wide and 16 inches long, is a matter of common knowledge. *Bir-*

*mingham & A. R. Co. v. Maddox & Adams*, (Ala. 1908) 46 So. 780. "O. N." signifies "order notify." *Ala. Gt. So. R. Co. v. Organ Power Co.*, (Miss. 1908) 46 So. 254 (abbreviations).

4. *Johnson v. Robertson*, 31 Md. 476 (1869).

5. *McChesney v. Chicago*, 173 Ill. 75, 50 N. E. 191 (1898) ("Sec. 23, 38, 14"); *Paris v. Lewis*, 85 Ill. 597 (1877) ("W ½"; "NW ¼"; "T. 37 N"); *Kile v. Yellowhead*, 80 Ill. 208 (1875) (courts will not pretend "to be more ignorant than the rest of mankind"); *Power v. Bowdle*, 3 N. D. 107 (1893). See also *Hull v. Croft*, 132 Ill. App. 509 (1907).

A purely local usage in the use of abbreviations by surveyors will not be known. *Keith v. Hayden*, 26 Minn. 212, 2 N. W. 495 (1879).

6. *U. S. Express Co. v. Keefer*, 59 Ind. 263 (1877) ("C. O. D."); *Accola v. Chicago, etc., R. Co.*, 70 Iowa 185, 30 N. W. 503 (1886) ("C. B. & Q. R. R. Co."); *State v. Intoxicating Liquors*, 73 Me. 278 (1882) ("C. O. D."); *Vogt v. Shienebeck*, (Wis. 1904) 67 L. R. A. 756, 100 N. W. 820 (f. o. b.).

C. O. D. is not judicially known to the courts of Missouri; its meaning should be left to the jury. *McNichol v. Pacific Express Co.*, 12 Mo. App. 401 (1882).

time,<sup>7</sup> to indicate the names of states,<sup>8</sup> or places in them, and innumerable other connections. The usual abbreviations of proper names will be noticed.<sup>9</sup> The judge may properly decline to hear

**7.** *Hedderich v. State*, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768 (1884) ("A. M."; "P. M."). February may properly be abbreviated into "Feb'y." *Cutting v. Conklin*, 28 Ill. 506 (1862).

**8.** *Burroughs v. Wilson*, 59 Ind. 536 (1877) (Ind.).

A set of rulings in the State of Texas is to the effect that the court does not know that "La." is an abbreviation for "Louisiana." *Russell v. Martin*, 15 Tex. 238 (1855). Or that "Mo." is an abbreviation for "Missouri." *Ellis v. Park*, 8 Tex. 205 (1852). The basis is a misapprehension of the ruling of an earlier case in the same state, correctly decided on its own facts. *Andrews v. Hoxie*, 5 Tex. 171 (1849).

**9. Alexander.**—The community is generally aware that Alexander is shortened to "Alex." *Kemp v. McCormick*, 1 Mont. 420 (1872).

**Barnabas.**—Common knowledge covers the fact that "Barney" is a contraction for Barnabas. *McGregor v. Balch*, 17 Vt. 562 (1845).

**Bartholomew.**—It is a matter of common knowledge that Bartholomew may with propriety be abbreviated to "Bart." *Curtiss v. Marrs*, 29 Ill. 503 (1863).

**Christopher.**—Common abbreviations of Christopher are "Christ," or "Christy." *Weaver v. McElhenon*, 13 Mo. 89 (1850).

**Daniel.**—Conspicuous among the syncopated forms of "Daniel" is that of "Dan." *Sparks v. Sparks*, 51 Kan. 195, 32 Pac. 892 (1893).

**Eleanor** may be shortened to "Ellen." *Exendine v. Morris*, 8 Mo. App. 383 (1880).

**Elizabeth.**—"Eliza" is known to be an abbreviation of "Elizabeth." *Goodell v. Hall*, 112 Ga. 435, 37 S. E. 725 (1900).

**George.**—It is a matter of common

knowledge that "Geo." represents "George." *People v. Ferguson*, 8 Cow. (N. Y.) 102 (1827).

**Henry.**—No proof need be furnished a court that "Hen." as a proper name, stands for Henry. *People v. Ferguson*, 8 Cow. (N. Y.) 102 (1827).

**James.**—"Jas." is a recognized abbreviation for James. *Stephen v. State*, 11 Ga. 225 (1852).

**John.**—Among familiar conventional arrangement of letters to indicate the Christian name of John are "Jno." *McDonald v. State*, Fla. (1908) 46 So. 176; *Kemp v. McCormick*, 1 Mont. 420 (1872).

**Joseph.**—"Jo." is a well known contraction for Joseph. *Com. v. O'Baldwin*, 103 Mass. 210 (1869).

**Mordecai.**—It is well known that "Mord." is a recognized contraction for Mordecai. *Thursby v. Myers*, 57 Ga. 155 (1876).

**Richard.**—It cannot be questioned that "Rich." is a common abbreviation for Richard. *State v. Dodson*, 16 S. C. 453 (1831).

**Robert** is known to be abbreviated by "Bob." *Alsop v. State*, 36 Tex. Cr. App. 535 (1896).

**Susanna.**—"Susan" is a commonly recognized shortening of Susanna. *Trimble v. State*, 4 Blackf. 435 (1837).

**Thomas.**—Prominent among the abbreviations of "Thomas" is "Thos." *Studstill v. State*, 7 Ga. 2 (1849).

**William.**—No evidence need be furnished that "Wm." is an abbreviation of William. *Linn v. Buckingham*, 2 Ill. 451 (1838).

**Initial letters of names.**—Single letters, as is said, suggest the name, or one among a series of names rather than indicate it. Thus, it is commonly known that "H." for "Henry," *People v. Ferguson*, 8 Cow. (N. Y.) 102 (1827), "J." for "John,"

evidence tending to show the meaning of an abbreviation to be contrary to common knowledge.<sup>10</sup>

**§ 762. (B. What Facts are Covered by the Rule; [5] Facts of Social Life; Language); Words.**—A very important and widely extending part of the court's common knowledge is as to the meaning of language. The court knows the vernacular;<sup>1</sup>—its

*Clafin v. Chicago*, 178 Ill. 549, 53 N. E. 339 (1899), and the like, *Lee v. Mendel*, 40 Ill. 359 (1866); *State v. Senn*, 32 S. C. 392, 11 S. E. 292, 296 (1889) ("M." for "Melissa"), are customary abbreviations although these letters may equally well stand for other names. The court may, however, properly feel justified in rejecting so slight an evidentiary connection.

**Contra.**—*Andrews v. Wynn*, 4 S. D. 40, 54 N. W. 1047 (1893) ("E." for "Edward").

**Initials not those of notorious phrases** must be proved. For example, the court cannot know, in the absence of evidence that certain initials represent the name of a local association. *Van Heusen v. Doe*, 194 N. Y. 309, 87 N. E. 437 (1909) ("N. E. K. C.") [order reversed, *Van Heusen v. Argenteau*, 109 N. Y. Suppl. 238, 124 App. Div. 776 (1908)]. The *res gestæ* quality of certain facts may remove them from the scope of common knowledge. *Supra*, § 710. The court cannot take judicial notice that "Edward H." and "E. H." are one and the same person or that "E. H." is not the full Christian name of a person. *Andrews v. Wynn*, 4 S. D. 40, 54 N. W. 1047 (1893).

**Administrative assumptions.**—As a mark of identity, it seems fairly well settled that it will not be assumed (*Infra*, § 1187) that where an individual has both a given name and a Christian name, an abbreviation of the middle name indicates the same person. Thus the abbreviation "Nat." is known to indicate Nathaniel.

"Nat. Locke," however, does not in the absence of evidence, indicate, stand for or identify "James N. Locke." *People v. Ferguson*, 8 Cow. (N. Y.) 102 (1827). See also *People v. Hamilton County*, 75 N. Y. App. Div. 110, 77 N. Y. Suppl. 620 (1902). The converse is equally well established; that the designation of a person by Christian and family name with middle initial will not be assumed to represent the same person as the same family name with an abbreviation of the name for which the middle initial might properly stand. Thus "James N. Locke" is not necessarily or by assumption the same person as "Nat." Locke. *People v. Ferguson*, 8 Cow. (N. Y.) 102 (1827). "Mc" and "Mac" are, however, commonly known to be variants of the same word. *State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162 (1839).

**10. Greenfield First Nat. Bank v. Coffin**, 162 Mass. 180, 38 N. E. 444 (1894); *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328 (1893).

**1. Adler v. State**, 55 Ala. 16 (1876) ("malt liquor").

**Arkansas.**—*Reed v. State*, 16 Ark. 499 (1855) ("Wyandotte Indian"; — a man, not a river)

**California.**—*Sinnott v. Colombet*, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594 (1895).

**Illinois.**—*Hill v. Bacon*, 43 Ill. 477 (1867).

**Kansas.**—*Sun Ins. Office v. Western Woolen Mill Co.*, (Kan. 1905) 82 Pac. 513.

**Kentucky.**—*Locke v. Com.*, 74 S. W.

words, phrases, abbreviations. The meaning of common English words at any time will be known to the judge,<sup>2</sup> when used in the ordinary way, and any changes in meaning will be cognized by him.<sup>3</sup> The meaning or pronunciation<sup>4</sup> of foreign names and other words, and the meaning of common English words used in an unusual sense, or technical, trade, or otherwise unusual words must be proved; and, probably, if the fact be one of the *res gestæ*<sup>5</sup> parties have a right to be heard on the subject, if more than one meaning is reasonably possible. In any case, the judge may require the assistance of the parties; and may receive evidence on the subject.<sup>6</sup> As to common English words, not reasonably to be considered ambiguous, he is under no obligation to hear evidence.<sup>7</sup> He may consult the dictionary but not as evidence. He merely does as any other intelligent person would do in his own affairs; he ascertains for himself what he ought, theoretically, to have known without this aid.<sup>8</sup> On the other hand, no error is committed by allowing counsel to read a standard dictionary to the jury as to the meaning of a word.<sup>9</sup> Properly speaking, whatever name may be given to the transaction, the dictionary is not introduced into the evidence. As the jury cannot conveniently seek the information of the book in order to form or refresh their own knowledge, it is brought to them.

654, 25 Ky. L. Rep. 76 (1903); Jones v. Overstreet, 4 T. B. Mon. (Ky.) 547 (1827) ("money").

*Massachusetts*.—Com. v. Pear, 183 Mass. 242, 66 N. E. 719 (1903) ("vaccination"); Com. v. Kneeland, 20 Pick. 206 (1838).

*Mississippi*.—Rodgers v. Kline, 56 Miss. 808, 31 Am. Rep. 389 (1879); Atty.-Gen. v. Dublin, 38 N. H. 459 (1859) ("Congregational").

*New York*.—Simpson v. Press Pub. Co., 33 Misc. 228, 67 N. Y. Suppl. 401 (1900).

*Oregon*.—Martin v. Eagle Development Co., 41 Or. 448, 69 Pac. 216 (1902).

*United States*.—Eureka Vinegar Co. v. Gazette Printing Co., 35 Fed. 570 (1888).

*England*.—Clementi v. Golding, 2 Campb. 25 (1809).

"We take judicial notice of the true significance of all English words and phrases." Grennan v. McGregor, 78 Cal. 253 (1889).

2. Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92 (1829).

3. Lampton v. Haggard, 3 T. B. Mon. (Ky.) 149 (1826).

4. State v. Johnson, 26 Minn. 316, 3 N. W. 982 (1879); Galveston, etc., R. Co. v. Sanchez, (Tex. Civ. App. 1901) 65 S. W. 893 (Polish).

5. *Supra*, § 47.

6. Atty.-Gen. v. Dublin, 38 N. H. 459 (1859).

7. Com. v. Marzynski, 149 Mass. 68, 21 N. E. 228 (1889).

8. Nix v. Hedden, 149 U. S. 304, 13 S. Ct. 881, 37 L. ed. 745 (1892).

9. Adler v. State, 55 Ala. 16 (1876) (Webster's Unabridged Dictionary).

§ 763. (*B. What Facts are Covered by the Rule; [5] Facts of Social Life; Language*); Phrases.—The court knows established or even slang phrases which are familiar to the general community. The expressions relate to any subject-matter; e. g., the terms customarily used by the community in speaking of money.<sup>1</sup> The phrase may be of literary origin as “frozen snake.”<sup>2</sup> It may refer to interesting events of comparatively recent history, as “squatter riot.”<sup>3</sup> It may be used in connection with politics, as “sack” (in the sense of a corruption fund),<sup>4</sup> “deal”<sup>5</sup> or the phrase may be merely descriptive of articles in common use, e. g., “fence pole,”<sup>6</sup> or with which the community is acquainted.<sup>7</sup> The court, for example, will understand that to say of a clergyman “that Iowa Beecher business of his lost him a situation,” is an imputation of adultery, “inasmuch as courts have no right to be ignorant of the meaning of current phrases which everybody else understands.”<sup>8</sup> As in case of words,<sup>9</sup> the judge may decline to admit evidence on the subject<sup>10</sup> where but one meaning can with reason, be attached to the phrase. Legal phrases in common use will, *a fortiori*, be known by the court,<sup>11</sup> but phrases, the meaning of which is not established<sup>12</sup> or the existence of which is disputed,<sup>13</sup> cannot be taken as commonly known.

1. *Lampton v. Haggard*, 3 T. B. Mon. (Ky.) 149 (1826).

2. *Hoare v. Silverlock*, 12 Q. B. 624, 12 Jur. 695, 17 L. J. Q. B. 306, 64 E. C. L. 624 (1848).

3. *Clarke v. Fitch*, 41 Cal. 472 (1871).

4. *Edwards v. San Jose Printing, etc., Soc.*, 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70 (1893).

5. *Greenfield First Nat. Bank v. Coffin*, 162 Mass. 180, 38 N. E. 444 (1894).

6. *Baker v. Hope*, 49 Cal. 598 (1875).

7. *Lohman v. State*, 81 Ind. 15 (1881) (“gift enterprise”).

8. *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251 (1879).

9. *Supra*, § 762.

10. *Greenfield First National Bank v. Coffin*, 162 Mass. 180, 38 N. E. 444 (1894) (“deal”).

11. *Alabama*.—*Ward v. State*, 22 Ala. 16 (1853).

*Massachusetts*.—*Com. v. Kneeland*, 20 Pick. 206 (1838).

*Missouri*.—*South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360 (1890).

*New York*.—*Lenahan v. People*, 5 Thomps. & C. 265 (1875).

*United States*.—*Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. 570 (1888).

12. *Grennan v. McGregor*, 78 Cal. 258, 20 Pac. 559 (1889) (“branch railroad”); *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572 (1859) (“Black Republican”; “Supporters of the Helper Book”).

13. *The Mary*, 123 Fed. 609 (1903) (“sack raft”).



§ 764. (*B. What Facts are Covered by the Rule; [5] Facts of Social Life*); *Literature*.—Facts within the knowledge of the average well-informed person, from the reading of books commonly used, are known to the court. Courts will recognize and the community knows what is meant by allusions to commonly known literary works;—as Robinson Crusoe and his man Friday,<sup>1</sup> the fable of the “frozen snake,”<sup>2</sup> and the like. It will be known, in construing a copyright law, that the term “book” covers a single sheet.<sup>3</sup>

§ 765. (*B. What Facts are Covered by the Rule; [5] Facts of Social Life*); *Mechanic Arts*.—In connection with the mechanic arts, the state of the art in any special calling,<sup>1</sup> e. g., the general use of soft coal in factories<sup>2</sup>—the average price of labor in particular trades or mechanical occupations,<sup>3</sup> these and similar facts, so far as popularly known, will be known by the court upon ordinary principles.

*In patent causes*, where the expert knowledge of the judge familiar with these subjects is involved, a somewhat wider cognizance is customarily taken;—both for the reasons which apply to most facts of scientific research<sup>4</sup> and because the “community” among which the relevant facts are known is a limited one, which includes the judge. A fact notorious among experts on the subject-matter of a patent, will be known to the court, though the community, as a whole, knows nothing about it. In like manner, courts will recognize the familiar mechanical devices in common use,<sup>5</sup> the bicycle,<sup>6</sup> telephone,<sup>7</sup> and the general uniformity of their

1. *Forbes v. King*, 1 Dowl. P. C. 672 (1833). The courts will take the same knowledge as the community at large of matters of literature. *St. Hubert Guild v. Quinn*, 118 N. Y. Suppl. 582, 64 Misc. Rep. 336 (1909).

2. *Hoare v. Silverlock*, 12 Q. B. 624, 12 Jur. 695, 17 L. J. Q. B. 306, 64 E. C. L. 624 (1848).

3. *Clementi v. Golding*, 2 Campb. 25 (1809).

1. *Phillips v. Detroit*, 111 U. S. 604, 4 S. Ct. 580, 28 L. ed. 532 (1883); *Parsons v. Seelye*, 100 Fed. 452, 40 C. C. A. 434 (1900); *Heaton-Peninsular Button-Fastener Co. v. Schlochtmeier*, 69 Fed. 592 (1895); *Infra*, §§ 820, 902, 1988, 2404.

2. *Harmon v. Chicago*, 110 Ill. 400, 51 Am. St. Rep. 698 (1884) (Chicago).

3. *Bell v. Barnet*, 2 J. J. Marsh. (Ky.) 516 (1829).

4. *Supra*, § 698.

5. *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539 (1888); *King v. Gallun*, 109 U. S. 99, 101, 3 S. Ct. 85, 27 L. ed. 870 (1883). See also *Black Diamond Coal-Min. Co. v. Excelsior Coal Co.*, 156 U. S. 611, 15 S. Ct. 482, 39 L. ed. 553 (1895); *Terhune v. Phillips*, 99 U. S. 592, 25 L. ed. 293 (1878); *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200 (1875); *Farmers' Mfg. Co. v. Spruks Mfg. Co.*, 119 Fed. 594 (1902); *Lamson*

action.<sup>8</sup> Facts regarding the more usual products of mechanical skill, as that mineral wool is made of slag,<sup>9</sup> are in the same category.<sup>10</sup>

**§ 766. (B. What Facts are Covered by the Rule; [5] Facts of Social Life); Medicine.**—The usual remedies or preventatives for disease<sup>1</sup> will be assumed to be commonly known.

*Dose.*—The ordinary dose of certain common drugs may be notorious in a community. Thus, in case of morphine, it will be known that one-fourth of a grain, taken every four hours, is not a poisonous dose.<sup>2</sup>

**§ 767. (B. What Facts are Covered by the Rule; [5] Facts of Social Life); Phenomena of Life; Animal.**—What the community as a whole knows regarding animals, the court knows.<sup>1</sup>

*Nature, Disposition, etc.*—It will know the ordinary domestic

Consol. Service Co. v. Seigel-Cooper Co., 106 Fed. 734 (1901). It is known that the ordinary shot gun is a dangerous weapon when fired at a distance of 57 steps. State v. Sutherland, (S. D. 1909) 119 N. W. 548. The fact that cog wheels are customary methods of transmitting power is a fact of common knowledge. Brownwood Oil Mill v. Stubblefield, (Tex. Civ. App. 1909) 115 S. W. 626. Regarding evidence by *phonograph*, see 8 L. R. A. (N. S.) 306; Boyne City, G. & A. R. Co. v. Anderson, (Mich. 1906) 109 N. W. 429.

6. Rochester, etc., Turnpike Road Co. v. Joel, 41 N. Y. App. Div. 43, 58 N. Y. Suppl. 346 (1899) (extensively used as a means of locomotion).

7. Wolfe v. Missouri Pac., etc., R. Co., 97 Mo. 473, 481, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539 (1888). See also Globe Printing Co. v. Stahl, 23 Mo. App. 451 (1886).

8. Luke v. Calhoun County, 52 Ala. 115 (1875); Globe Printing Co. v. Stahl, 23 Mo. App. 451 (1886); Cozzens v. Higgins, 1 Abb. Dec. (N. Y.) 451, 3 Keyes (N. Y.) 206 (1866); Udderzook v. Com., 76 Pa. St. 340 (1874).

9. Western Mineral Wool, etc., Co. v. Globe, etc., Co., 75 Fed. 400 (1896).

10. See also Betcher v. Capital Fire Ins. Co., 78 Minn. 240, 80 N. W. 971 (1899).

1. Com. v. Pear, 183 Mass. 242, 66 N. E. 719 (1903) (vaccination); *Infra*, §§ 825, 911, 1991, 2413.

2. Laturen v. Bolton Drug Co., 93 N. Y. Suppl. 1035 (1905).

1. *Illinois*.—St. Louis, etc., R. Co. v. Hurst, 25 Ill. App. 181 (1886).

*Iowa*.—Fisk v. Chicago, etc., R. Co., 74 Iowa 424, 38 N. W. 132 (1888).

*Michigan*.—Gilbert v. Flint, etc., R. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592 (1883).

*New Jersey*.—Meyer v. Krauter, 56 N. J. L. 696, 29 Atl. 426, 24 L. R. A. 575 (1894).

*Tennessee*.—Citizens', etc., Co. v. Dew, 100 Tenn. 317, 45 S. W. 790, 40 L. R. A. 518 (1898).

*Texas*.—Damron v. State, (Tex.) 27 S. W. 7 (1894).

*West Virginia*.—State v. Gould, 26 W. Va. 258 (1885).

*United States*.—Lyon v. Marine, 55 Fed. 964 (1893); Northern P. R. Co. v. Sullivan, 53 Fed. 219 (1892). But compare Chicago City R. Co. v. Smith, 54 Ill. App. 415 (1894); Enders v. McDonald, 5 Ind. App. 297, 31 N. E. 1056 (1892). See *infra*, § 814.

animals,<sup>2</sup> their nature and disposition,<sup>3</sup> what will,<sup>4</sup> and what will not<sup>5</sup> frighten them;<sup>6</sup> and their habits of conduct under given circumstances.<sup>7</sup> In like manner, the physical endurance<sup>8</sup> and other prominent characteristics of domestic animals are not proper subjects of special knowledge.<sup>9</sup>

*Bodily Conditions.*—The general facts of natural history, as that wool in the fleeces of unimproved species of sheep is impaired in value by the admixture of hair,<sup>10</sup> common diseases of animal life, as "Texas fever,"<sup>11</sup> may well be regarded as known; but minor details,<sup>12</sup> especially when uncertain, scientifically considered,<sup>13</sup> cannot be taken as settled. For the court will not treat as commonly known facts regarding a disease as to which competent authorities differ in opinion.<sup>14</sup> The judge will know, with-

2. *State v. Gould*, 26 W. Va. 258 (1885) (mule).

3. *Borden v. Falk Co.*, 97 Mo. App. 566, 71 S. W. 478 (1903) (mule is vicious). The proneness of a mule to kick is common knowledge. *Tolin v. Terrell*, (Ky. 1909) 117 S. W. 290.

4. *Barber v. Manchester*, 72 Conn. 675, 45 Atl. 1014 (1900); *Baltimore, etc., Turnpike Road v. State*, 71 Md. 573, 18 Atl. 884 (1889); *Meyer v. Krauter*, 56 N. J. L. 696, 29 Atl. 426, 24 L. R. A. 575 (1894) (trolley car); *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676 (1895).

5. *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124 (1892); *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156, 39 N. E. 787 (1895); *Gilbert v. Flint, etc., R. Co.*, 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592 (1883) (box car at crossing).

6. That an empty box car in the limits of the highway will not frighten ordinary horses is among the "things which do not require to be pleaded or to be made the subject of specific proof," and that it is error to leave the question to the jury. *Gilbert v. Flint, etc., R. R.*, 51 Mich. 488 (1883).

7. *St. Louis, etc., R. Co. v. Hurst*, 25 Ill. App. 181, 182 (1886) (cattle crossing a railroad in front of an approaching train).

8. *Brewster v. Weir*, 93 Ill. App. 588 (1900) (death from overdriving).

9. *Infra*, §§ 870 *et seq.*

10. *Lyon v. Marine*, 55 Fed. 964, 5 C. C. A. 359 (1893).

11. *Grimes v. Eddy*, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638 (1894); *Kimmish v. Ball*, 129 U. S. 217, 9 S. Ct. 277, 32 L. ed. 695 (1889). Courts know that wood and water, though each harmless, in itself, could not, in combination, produce death if introduced into the stomach of an animal. *Sprinkle v. Bart*, 25 Ind. App. 681, 58 N. E. 862 (1900).

That Texas fever is a contagious and infectious disease is a matter of common knowledge. *Dorr Cattle Co. v. Chicago G. W. Ry. Co.*, (Iowa 1905) 103 N. W. 1003.

12. *Grimes v. Eddy*, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638 (1894).

13. *State v. Fox*, 79 Md. 514, 528, 29 Atl. 601 (1894) (that glanders are contagious to a human being).

14. *Bradford v. Floyd*, 80 Mo. 207 (1883); *Bradford v. Floyd*, 80 Mo. 207 (1883); *Minnesota v. Barber*, 136 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455 [*affirming* 39 Fed. 64] (1890) (that inspection shortly before slaughtering is necessary to detect disease).

out proof, whether certain animals are found within the state.<sup>15</sup>

**§ 768. (B. What Facts are Covered by the Rule; [5] Facts of Social Life; Phenomena of Life); Human; (a) Moral Nature.**

— Courts “must take judicial notice of human nature.”<sup>1</sup> The administrative functions of the court, dealing with natural and normal phenomena recognize, without proof, the ordinary constitution of man into moral, mental and physical and, therefore, require no proof of salient facts concerning (a) his moral nature, (b) mind or (c) body. The usual manifestations of moral sensibilities are notorious. The prevalence of the vice of mendacity, as related to certain classes of the community, may be taken as a reasonable illustration of this fact. Thus, while it cannot be known as matter of law that negroes do not tell the truth,<sup>2</sup> the common unreliability of Chinese witnesses has been deemed a fair subject of common knowledge.<sup>3</sup> The effect of certain indulgences, as habitual drunkenness,<sup>4</sup> upon the moral nature, is known to the courts as to the rest of the community. The judgment of a skilled witness will not aid the jury as to what are the ordinary standards of conduct established in the community; — as to whether certain acts are safe or dangerous,<sup>5</sup> cruel<sup>6</sup> or merciful.

**§ 769. (B. What Facts are Covered by the Rule; [5] Facts of Social Life; Phenomena of Life; Human); (b) Mind.—**

The laws regulating the action of the human mind, in its more obvious manifestations, are known to the court.<sup>1</sup> That certain races, for example, the negro race immediately after the American Civil War,<sup>2</sup> are inferior to other races in intelligence, will be taken as true without proof.

15. *State v. Gould*, 26 W. Va. 258 (1885) (wild mules).

1. *Ricks v. Broyles*, 78 Ga. 610, 3 S. E. 772, 6 Am. St. 282 (1887).

2. *Fonville v. State*, 91 Ala. 39, 8 So. 688 (1890).

3. *People v. Lou Yeck*, 123 Cal. 246, 55 Pac. 984 (1899).

4. *Gurley v. Butler*, 83 Ind. 501 (unfits administrator for his trust) (1882).

5. *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. 447 (1898); *Locke v. International, etc., R. Co.*, 25 Tex. Civ. App. 145, 60 S. W. 314 (1901).

6. *Hall v. Goodson*, 32 Ala. 277 (1858) (whipping).

1. *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274, 292 (1872).

2. *Hunt v. Wing*, 10 Heisk. (Tenn.) 139 (1872). The courts can take judicial notice of social status and of the superiority and inferiority of races without affecting the civil rights of citizens. *Wolfe v. Georgia Ry. & Electric Co.*, 2 Ga. App. 499, 58 S. E. 899 (1907).

*Phenomena of Life; Mental.*—The common operations of the mind in men or animals are as fully within the knowledge of the jury as that of a skilled witness. The orderly processes of reasoning are matters both of judicial and common knowledge; and included within this general field are the common range of mental operations in the average man and the retentiveness of his memory. In like manner no proof need be offered as to the effect on human memory of certain attendant circumstances, e. g., the fixity of attention, the interest of the person in the subject-matter, the intrinsic or subjective importance of the object of perception<sup>3</sup> and the like. That a given individual understands a language<sup>4</sup> calls merely for common observation.

*Emotions.*—The court will notice the usual feelings which actuate the mass of the community. That children are fond of playing around an irregularly piled mass of lumber,<sup>5</sup> or that there is a repugnance to death and that, therefore, the business of an undertaker is a distasteful one,<sup>6</sup> need not be proved.

*Motive.*—Prominent among facts relating to the human mind are the ordinary motives that actuate mankind.<sup>7</sup> What motives influence the mind of the average person are taken as known<sup>8</sup>—the instinct for self-preservation,<sup>9</sup> and the consequent impulse to

3. Whether an important omission could have been accidental presents a question with which the jury is competent to deal. *Stone v. Denny*, 4 Metc. (Mass.) 151 (1842).

4. *Koccis v. State*, 56 N. J. L. 44, 27 Atl. 800 (1893) (English).

5. *Spengler v. Williams*, 67 (Miss.) 1, 6 So. 613 (1889).

6. *Rowland v. Miller*, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182 (1893).

7. *Chase v. Maine Central R. Co.*, 77 Me. 62 (1885).

8. *Jenny Electric Co. v. Branham*, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395 (1896); *Reg. v. Aspinall*, 2 L. R. Q. B. D. 48, 46 L. J. M. C. 145, 36 L. T. Rep. N. S. 297, 25 Wkly. Rep. 283 (1876).

9. *Chicago & E. I. R. Co. v. Beaver*, 199 Ill. 34, 65 N. E. 144 (1902); *Huntress v. R. Co.*, 66 N. H. 185, 34 Atl. 154 (1890); *Bridges v. R. Co.*,

L. R. 7 H. L. 213 (1873). No proof need be offered that the instinct of self preservation is among the most powerful motives which influence conduct.

*Iowa.*—*Hopkinson v. Knapp, etc.*, Co., 92 Iowa 328, 60 N. W. 653 (1894).

*Maine.*—*Chase v. Maine Cent. R. Co.*, 77 Me. 62, 52 Am. Rep. 744 (1885).

*Massachusetts.*—*Lamoureux v. New York, etc., R. Co.*, 169 Mass. 338, 47 N. E. 1009 (1897).

*New Hampshire.*—*Huntress v. Boston, etc., R. Co.*, 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600 (1890).

*New York.*—*Reynolds v. New York Cent., etc., R. Co.*, 58 N. Y. 248 (1874).

*Wisconsin.*—*Strong v. Stevens Point*, 62 Wis. 255, 22 N. W. 425 (1885).

avoid danger,<sup>10</sup> or to gain something when a risk is to be run.<sup>11</sup> Motives of *self interest* bulk large in a judge's experience and the common knowledge of the community. It is known that persons do not borrow<sup>12</sup> property of no value. It will be known that the desire for gain is so general that men do not gamble except in the hope of gaining property of some value,<sup>13</sup> and do not hunt for an object which is worthless.<sup>14</sup>

*Curiosity.*—The curiosity of children and their disposition to play around and about objects of unusual appearance,<sup>15</sup> is notorious.

*Reasoning.*—The phase of mental action which is of supreme importance in trials at law is necessarily that of reasoning. The rules of correct thinking are judicially as well as commonly known. Indeed, as the law requires the exercise of sound reason at every stage of a trial,<sup>16</sup> and as it is the right of the party to demand the proper exercise of the reasoning faculty,<sup>17</sup> the cognizance of the general propositions of human experience<sup>18</sup> on which the reasoning, in most instances, is based as a major premise,<sup>19</sup> and the correct reasoning therefrom is no more optional than cognizance of any rule of law would be.<sup>20</sup> The court in enforcing the rules of reason is discharging a legal duty.

**§ 770. (B. What Facts are Covered by the Rule; [5] Facts of Social Life; Phenomena of Life; Human); (c) Body.**—Notorious facts concerning the frame of the human body, the usual limits of time within which its gestation normally takes place,<sup>1</sup> the average length of human life at the present time,<sup>2</sup> the

10. *Hopkinson v. Knapp Co.*, 92 Iowa 328, 60 N. W. 653 (1894). But see *Ellis v. Leonard*, 107 Iowa 487, 78 N. W. 246 (1899).

11. *Stevens v. State*, 3 Ark. 66 (1840) (bone counters used in gambling represent value).

12. *Houston v. State*, 13 Ark. 66 (1852) (horse).

13. *Stevens v. State*, 3 Ark. 66 (1839).

14. *Houston v. State*, 13 Ark. 66 (1852).

15. *Spengler v. Williams*, 67 Miss. 1, 4, 6 So. 613 (1889).

16. *Supra*, § 394.

17. *Supra*, §§ 385 *et seq.*

18. *Supra*, § 694.

19. *Infra*, § 1728.

20. *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274, 292 (1872). *Supra*, § 571.

1. *Eddy v. Gray*, 4 Allen (Mass.) 435 (1862); *Erickson v. Schmill*, 62 Neb. 368, 87 N. W. 166 (1901); *Rex v. Luffe*, 8 East 193, 9 Rev. Rep. 406 (1807). See also *People v. Farina*, 118 N. Y. Suppl. 817, 134 App. Div. 110 (1909).

The range of extraordinary gestation must be proved. *Erickson v. Schmill*, 62 Neb. 368, 87 N. W. 166 (1901) (in excess of 280 days).

2. *Floyd v. Johnson*, 2 Litt. (Ky.)

normal size of the average man at different periods of growth, and, by consequence, the height of a human being in different positions,<sup>3</sup> need not be proved. The courts know human ability to perform certain physical acts at a stated age<sup>4</sup> and other normal human bodily attributes will be recognized and their existence assumed in any given case.

*In like manner* the ordinary capacity of human beings for making effort,<sup>5</sup> the effect of alcohol<sup>6</sup> and other drugs or offensive odors<sup>7</sup> on the human system, the nature and functions of different parts of the body,<sup>8</sup> are matters of common knowledge.<sup>9</sup>

**§ 771. (B. What Facts are Covered by the Rule; [5] Facts of Social Life; Phenomena of Life; Human; [c] Body); Disease, Injuries, etc.**—The well-known diseases of the human body,<sup>1</sup>

109, 13 Am. Dec. 255 (1822); *Scheffler v. Minneapolis, etc.*, R. Co., 32 Minn. 518, 21 N. W. 711 (1884); *Hawley v. Jahnel*, (Neb. 1906) 106 N. W. 459; *Johnson v. Hudson River R. Co.*, 6 Duer (N. Y.) 633 (1857); *Allen v. Lyons*, 1 Fed. Cas. No. 227, 2 Wash. 475 (1811).

3. *Hunter v. New York, etc.*, R. Co., 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246 (1889). "We know that the average height of man is less than six feet. That the average length of the body from the lower end of the spine to the top of the head is less than thirty-six inches. That the measurement varies but little in adults, and that the chief difference in the height of men is in the length of their lower limbs." *Hunter v. N. Y., etc.*, R. Co., 116 N. Y. 615, 622 (1889).

4. *Southern R. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 62 Am. St. Rep. 312, 40 L. R. A. 253 (1896) (child under two cannot do valuable work). *Johns v. Northwestern, etc., Assn.*, 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587 (1895) (that an average man cannot go through a hole 15 x 20 inches except by going head first, and that to do so by accident would be almost impossible).

5. *Clay County v. Redifer*, 32 Ind.

App. 93, 69 N. E. 305 (1903) (visiting for purposes of assessment); *New Jersey Traction Co. v. Brabban*, 57 N. J. L. 691, 32 Atl. 217 (1895) (stand on wooden leg).

6. *Johnson v. Louisville, etc., R. Co.*, 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39 (1893); *Golding v. Golding*, 6 Mo. App. 602 (1879); *Rawls v. American Mut. L. Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280 (1863).

7. *Metropolitan Sav. Bank v. Manion*, 87 Md. 68, 39 Atl. 90 (1898) (stable).

8. *Lidwinofsky's Petition*, 7 Pa. Dist. 188.

9. Presumptions of regularity, so called, (*infra*, § 1049) of which the "presumption of sanity" is, in reality, an instance, are, often merely the establishment of *prima facie* cases in accordance with what the judge knows to be the normal state of affairs. The presumption of sanity is a mere connotation of the term "man."

1. *Kiernan v. Metropolitan L. Ins. Co.*, 13 Misc. (N. Y.) 39, 34 N. Y. Suppl. 95 (1895) (pneumonia). See also *Lidwinofsky's Petition*, 7 Pa. Dist. 188 (1898). See also *State v. Fox*, 79 Md. 514, 29 Atl. 601, 47 Am. St. 424 (1894). Nervous conditions are not known to be an ac-

common injuries to it,<sup>2</sup> the causes to which they are commonly ascribed,<sup>3</sup> the effects which they produce,<sup>4</sup> and the remedies usually applied in such cases,<sup>5</sup> as, for example, that medical authorities recommend vaccination as a preventative of small-pox,<sup>6</sup> and is generally so regarded by the community at large,<sup>7</sup> are legitimate subjects of common knowledge. The court knows, as everyone does, that prolonged occupation in certain pursuits, e. g., mills for reducing ore,<sup>8</sup> is prejudicial to health.

companionment of syphilis. *St. Louis & S. F. R. Co. v. Savage*, (Ala. 1909) 50 So. 113. Where the effect on the body of mental suffering is one as to which there can be no dispute, the judge may dispense with proof. Otherwise, where a difference of opinion may rationally exist, the fact cannot be taken as true without evidence. *Mathewson v. Mathewson*, 81 Vt. 173, 69 Atl. 646 (1908).

2. *McDaniel v. State*, 76 Ala. 1 (1884) (fracture of skull); *Springfield, etc., Ry. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884 (1898); *Lidwinofsky's Petition*, 7 Pa. Dist. 188 (1898) (varicose veins). Technical incidents of bodily injury are not matters of common knowledge. *Gordon v. Northern Pac. Ry. Co.*, 39 Mont. 571, 104 Pac. 679 (1909) (injury to one eye impairing the other). That one whose hand and two fingers have been crushed in a machine suffered pain is a matter requiring no proof. *Bolton v. Ovitt*, 80 Vt. 362, 67 Atl. 881 (1907). Effects of bodily injuries which are well known need not be proved. *Rood v. Seattle Electric Co.*, (Wash. 1909) 104 Pac. 249 (sensativeness of amputated fingers to cold).

3. *Alabama*.—*Birmingham Southern R. Co. v. Cuzzart*, 133 Ala. 262, 31 So. 979 (1901) (low, swampy ground).

*California*.—*Sloane v. Southern Cal. R. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193 (1896) (fright and exposure).

*Maryland*.—*State v. Hyman*, (Md.

1904) 57 Atl. 6 (labor in unsanitary surroundings).

*Minnesota*.—*State v. Zeno*, 79 Minn. 80, 81 N. W. 748, 48 L. R. A. 88, 90 (1900) (skin disease from barber shop); *Rosted v. R. Co.*, 76 Minn. 123, 78 N. W. 971 (1899) (inflammatory rheumatism due to exposure to cold).

*Missouri*.—*Applegate v. Franklin*, 109 Mo. App. 293, 84 S. W. 347 (1904) (surplus water).

*North Carolina*.—*Rosenbaum v. Newbern*, 118 N. C. 83, 24 S. E. 1 32 L. R. A. 123 (second hand clothing) (1896).

*United States*.—*Leovy v. U. S.*, 177 U. S. 621, 20 S. Ct. 797, 44 L. ed. 914 [reversing 92 Fed. 344, 34 C. C. A. 392] (1900).

4. *McDaniel v. State*, 76 Ala. 1 (1884) (a fracture of the skull is usually but not invariably fatal); *Chicago, etc., R. Co. v. Warner*, 108 Ill. 538 (1884) (loss of arm will diminish earning capacity).

5. Hypnotism is not such a remedial agency. *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269 (1897).

6. *Auten v. Board of Directors of Special School Dist. of Little Rock*, (Ark. 1907) 104 S. W. 130; *Com. v. Pear*, 66 N. E. 183 Mass. 242, 719 (1903); *Jacobson v. Com.*, 25 S. Ct. 358, 197 U. S. 11, 49 L. ed. 643 (1905).

7. *Viemeister v. White*, 179 N. Y. 235, 72 N. E. 97 (1904).

8. *Ex parte Kair*, (Nev. 1905) 80 Pac. 463.



*Disputed Points not Cognized.*—The truth of disputed or minor propositions regarding human maladies, as that a certain disease is hereditary,<sup>9</sup> are proper subjects for evidence.

*Sense-Perception.*—In a general way, the extent to which the loss or impairment of one sense, such as sight, hearing or the like, increases the efficiency of such others as are relied on to supply its place,<sup>10</sup> the customary improvement in the power of a given sense by exercise,<sup>11</sup> need not be proved.

**§ 772. (B. What Facts are Covered by the Rule; [5] Facts of Social Life; Phenomena of Life); Vegetable.**—Commonly accepted facts with regard to vegetable life are known by the court. Species of vegetation known to the community are noticed by its tribunals.<sup>1</sup> It is, therefore, no more necessary to prove to the court that potatoes, sugar beets, turnips, etc., will not grow without cultivation,<sup>2</sup> than it would be to prove it to any other intelligent person. Facts of common local knowledge relating more specifically to particular crops as, that rice requires water in order to reach maturity,<sup>3</sup> that cotton is not planted until after January,<sup>4</sup> will, as a rule, be taken as commonly known in jurisdictions where the crop is a staple. Notorious diseases which affect vegetation, as peach “yellows,”<sup>5</sup> require no proof. Minor

9. *Leovy v. U. S.*, 177 U. S. 621 (1900).

10. *Matter of Cross*, 85 Hun (N. Y.) 343, 356 (1895) (persons in business not able to read or write have a highly developed memory).

11. *Matter of Cross*, 85 Hun (N. Y.) 343, 32 N. Y. Suppl. 933 (1895) (power of memory in persons doing business without written memoranda).

1. *Rex v. Woodward*, 1 Moody C. C. 323 (1831) (beans are a specie of pulse). “This court will take judicial notice of the flora and climatic conditions of the country. It may from these and the character of the trees in question determine whether they are natural timber growing upon the land, or trees of an ornamental nature, planted for a special purpose.” *Scarborough v. Woodill*, (Cal. App. 1907) 93 Pac. 383. Many trees are noticed to shed a large number

of dead limbs. *Miller v. City of Detroit*, 156 Mich. 630, 121 N. W. 490, 16 Detroit Leg. N. 225 (1909). Drawing turpentine is not known to injure the trees in a serious way. *Jefferson Davis County v. Long*, (Miss. 1909) 49 So. 613. Courts will take judicial notice of the fact that trees and other forms of plant life are subject to destructive communicable diseases. *Ex parte Hawley*, (S. D. 1908) 115 N. W. 93.

2. *Meyers v. Menter*, 63 Neb. 427, 88 N. W. 662 (1902).

3. *Barr v. Cardiff*, (Tex. Civ. App. 1903) 75 S. W. 341.

4. *Wetzler v. Kelly*, 83 Ala. 440, 442, 3 So. 747 (1888); *Person v. Wright*, 35 Ark. 169 (1879); *Garth v. Caldwell*, 72 Mo. 622 (1880).

5. *State v. Main*, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623 (1897).

facts of vegetable life, as that the age of a tree can be ascertained by counting the number of concentric circles shown by a transverse section,<sup>6</sup> must, on the contrary, be established by evidence.

**§ 773. (B. What Facts are Covered by the Rule; [5] Facts of Social Life); Politics.**—The well recognized features of political life are known to judges. Thus, the power of national political conventions to bind the party as its highest authority<sup>1</sup> need not be proved.

**§ 774. (B. What Facts are Covered by the Rule; [5] Facts of Social Life); Religion.**—As a matter of wide notoriety and general importance the court knows the existence,<sup>1</sup> history, general character and distinctive features, in a broad and general way,<sup>2</sup> of religious denominations.<sup>3</sup> The knowledge, however, is as to the external features;—those which everyone may see.<sup>4</sup> Internal elements of a religious polity, such as the power of officers, as defined by the law or custom of a particular body, and matters of administrative detail, must be established in the ordinary way. The court, for example, does not know the jurisdic-

6. *Patterson v. McCausland*, 3 Bland (Md.) 69 (1829).

1. *State v. Lindahl*, 11 N. D. 320, 91 N. W. 950 (1902).

1. Christian Science is said not to be known. *Evans v. State*, 9 Ohio S. & C. Pl. Dec. 222, 6 Ohio N. P. 129 (1889).

2. *Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 32 L. R. A. 838 (1896); *State v. So. Kingstown*, 18 R. I. 258, 273, 27 Atl. 599, 22 L. R. A. 65 (1893) ("Seventh-day baptists" do not work on Saturday); *State v. District Board*, 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330 (1890).

The Mormon Church doctrines of celestial marriages, and the general creeds and religious beliefs are known to the courts of Utah;—partly, at least, as a matter of history. *Hilton v. Roylance*, 25 Utah 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723 (1902).

3. *Delaware*.—*State v. Chandler*, 2 Harr. 553 (1837).

*New York*.—*People v. Ruggles*, 8 Johns. 290, 5 Am. Dec. 335 (1811).

*Pennsylvania*.—*Updegraph v. Com.*, 11 Serg. & R. 394 (1824).

*Wisconsin*.—*State v. Edgerton* School Dist. No. 8, 76 Wis. 177, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330 (1890).

*United States*.—*Vidal v. Girard*, 2 How. 127, 11 L. ed. 205 (1844).

*Canada*.—*Pringle v. Napanee*, 14 Can. L. J. 219 (1878).

4. *Alden v. St. Peter's Parish*, 153 Ill. 631, 42 N. E. 392, 30 L. R. A. 232 (1895) (many church societies are unincorporated); *McAlister v. Burgess*, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158 (1895) (persons go to church who are not church members); *People v. Powers*, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502 (1895) (that both organized and unorganized charities may be found in large cities).

tion and powers of the Roman Catholic church<sup>5</sup> — the laws and regulations of that organization,<sup>6</sup> as to the tenure in office of a minister<sup>7</sup> or as to the rights and duties of vestrymen<sup>8</sup> of the Protestant Episcopal church. In like manner the general organization of the Methodist Episcopal church<sup>9</sup> must be established by proof. The court knows what is commonly known as to the Bible, its general use, or its employment in particular connections of social importance, as in public schools.<sup>10</sup> A judge knows the general nature of blasphemy.<sup>11</sup> The common methods of conducting ecclesiastical affairs, as the practice of keeping a record of official acts<sup>12</sup> will be taken as commonly known.

*Important historical facts* in the religious life of the community, as the geographical division, in 1844, of the Methodist Episcopal church by a common line,<sup>13</sup> require no proof.

**§ 775. (B. What Facts are Covered by the Rule; [5] Facts of Social Life); Things of Common Life; Amusements.**— Courts have the common knowledge of the community as to what are the ordinary general amusements of the people. For example, notorious and unquestioned meaning of the word “pool-room” to the court<sup>1</sup> is known. Judges have the general cognizance of other people as to the terms relating to the use of automobiles.<sup>2</sup> The court knows that ping pong balls are not *toys*, for children, because the game is played at a table too high for children to use and requires a degree of skill which they do not ordinarily possess.<sup>3</sup> The court will take judicial notice that the football season proper, in American institutions of learning, begins in the fall and ends Thanksgiving day.<sup>4</sup>

5. *Baxter v. McDonnell*, 155 N. Y. 83, 49 N. E. 667, 40 L. R. A. 670 [reversing 18 N. Y. App. Div. 235, 45 N. Y. Suppl. 765] (1898).

6. *Katzer v. Milwaukee* (Misc. 1899) 79 N. W. 745.

7. *Youngs v. Ransom*, 31 Barb. (N. Y.) 49 (1859).

8. *Hill Estate Co. v. Whittlesey*, 21 Wash. 142, 57 Pac. 345 (1899). See also *Beckwith v. McBride*, 70 Ga. 642 (1883).

9. *Sarahass v. Armstrong*, 16 Kan. 192 (1876).

10. *Pfeiffer v. Board of Education*, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536 (1898).

11. *Com. v. Kneeland*, 20 Pick. (Mass.) 206, 239 (1838).

12. *Sawyer v. Baldwin*, 11 Pick. (Mass.) 492 (1831).

13. *Humphrey v. Burnside*, 4 Bush (Ky.) 215 (1868).

1. *State v. Maloney*, 115 La. 498, 39 So. 539 (1905).

2. *Ex parte Berry*, 147 Cal. 523, 82 Pac. 44 (1905).

3. *U. S. v. Strauss, Bros. & Co.*, 69 C. C. A. 201, 136 Fed. 185 (1905).

4. *Sieberts v. Spangler*, (Iowa 1908) 113 N. W. 292.

§ 776. (*B. What Facts are Covered by the Rule; [5] Facts of Social Life; Things of Common Life*); Clothing.—The habits of men to wear vests and watches in them, during business hours,<sup>1</sup> need not be proved.

§ 777. (*B. What Facts are Covered by the Rule; [5] Facts of Social Life; Things of Common Life*); Food.—The court knows articles of food, but it does not know the natural color either of oleomargarine<sup>1</sup> or of butter.<sup>2</sup> It knows the appliances by which articles of food are prepared for use.<sup>3</sup> Ordinary injuries to food need not be proved. Thus it is common knowledge that meat in storage may become damaged through inherent defects or the operation of natural causes.<sup>4</sup> In much the same way, the well known processes in the preparation of food products may be treated by the judge as matters of notoriety. For example, screening or sifting is known to be one of the processes in the making of catsup.<sup>5</sup>

§ 778. (*B. What Facts are Covered by the Rule; [5] Facts of Social Life; Things of Common Life*); Household Conveniences.—The court knows, without evidence, the form and conventional use of an ordinary bushel basket.<sup>1</sup> That kerosene is a product of crude petroleum is a fact of common knowledge requiring no proof.<sup>2</sup> A *fortiori*, the court cannot take judicial notice that carpets, napkins, curtains, beds, pins, and other similar merchandise may not be useful in the customary furnishing and ornamenting of a hotel.<sup>3</sup>

§ 779. (*B. What Facts are Covered by the Rule; [5] Facts of Social Life; Things of Common Life*); Taxes.—Certain

1. *Wamser v. Browning, King & Co.*, 95 N. Y. Suppl. 1051, 109 App. Div. 53 (1905).

1. *People v. Meyer*, 44 N. Y. App. Div. 1, 60 N. Y. Suppl. 415 (1899).

2. *People v. Hillman*, 58 N. Y. App. Div. 571, 69 N. Y. Suppl. 66, 15 N. Y. Cr. 394 (1901).

3. *Brown v. Piper*, 91 U. S. 37 (1875) (ice cream freezer).

4. *Patterson v. Wenatchee Canning Co.*, 53 Wash. 155, 101 Pac. 721 (1909).

5. *U. S. v. Six Hundred and Fifty*

*Cases of Tomato Catsup*, 166 Fed. 773 (1909).

1. *Roberts v. Bennett*, 69 C. C. A. 533, 136 Fed. 193 (1905).

2. *Moeckel v. C. A. Cross & Co.*, 190 Mass. 280, 76 N. E. 447 (1906). The practice of lighting fires with coal oil is commonly known. *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 29 S. Ct. 270 (1909).

3. *P. Hoffmaster Sons Co. v. Hodges*, 154 Mich. 641, 118 N. W. 484, 15 Detroit Leg. N. 926 (1908).

facts with regard to taxes are notorious; — e. g., that many of them are not paid until after they have been assessed.<sup>1</sup>

**§ 780. (B. What Facts are Covered by the Rule; [5] Facts of Social Life; Things of Common Life); Tobacco.**— Courts know, as matters of common knowledge, as to tobacco; — its various forms and the uses to which they are respectively put.<sup>1</sup> Thus, for example, they know the constituents and general form of cigarettes<sup>2</sup> or cigars.<sup>3</sup>

**§ 781. (B. What Facts are Covered by the Rule; [5] Facts of Social Life; Things of Common Life); Value of Property.**— Among facts commonly known is the general value of real<sup>1</sup> or personal<sup>2</sup> property, the general diminution of value caused to real estate by certain injurious acts.<sup>3</sup> But such a loss in value which does not plainly and uncontrovertibly follow from the operation of definite causes will not be regarded as a matter of common knowledge.<sup>4</sup>

**§ 782. (B. What Facts are Covered by the Rule; [5] Facts of Social Life); Wealth.**— Courts know, as a matter of common

1. *State v. Mutt*, 39 Wash. 624, 82 Pac. 118 (1905).

1. *Austin v. State*, 101 Tenn. 563, 48 S. W. 305, 70 Am. St. Rep. 703, 50 L. R. A. 478 [affirmed in 179 U. S. 343, 21 S. Ct. 132, 45 L. ed. 224] (1898).

2. *Kappes v. City of Chicago*, 119 Ill. App. 436 (1905).

3. "Cigars are manufactured articles familiar to everybody." *Com. v. Marzynski*, 149 Mass. 68.

1. *Rock Island & E. I. R. Co. v. Gordon*, 184 Ill. 456, 56 N. E. 810 (1900); *Green v. Chicago*, 97 Ill. 370, 372 (1881); *Chicago K. & W. R. Co. v. Parsons*, 51 Kan. 408, 32 Pac. 1083 (1893) (personal knowledge excluded); *Bradford v. Cunard Co.*, 147 Mass. 55, 16 N. E. 719 (1888); *Parks v. Boston*, 15 Pick. (Mass.) 198, 209 (1834); *Head v. Hargrave*, 105 U. S. 45, 49 (1881) (expert evidence as to land values). Courts will recognize that a grossly inadequate price is merely nominal. *York v. Leverett*, (Ala. 1909) 48 So. 684.

2. *Murdock v. Sumner*, 22 Pick. (Mass.) 156 (1839); *Cummings v. Com.*, 2 Va. Cas. 128 (1818) (bank note; passing shows value).

3. *Washburn v. R. Co.*, 59 Wis. 364, 371, 18 N. W. 328 (1884). Ill established and disputatious facts (*De Gray v. N. Y. & N. J. Telephone Co.*, 68 N. J. L. 454, 53 Atl 200 [1902] [impaired value of property due to telephone structures]) cannot be assumed in this way

4. *Davies v. Hotchkiss*, 112 N. Y. Suppl. 233 (1908) (failure to repair and furnish). This common knowledge of value is general and approximate rather than specific. A court cannot know the value of the legal services rendered in a given case, without proof. *Glynn v. Glynn*, 139 Ill. App. 185 (1908). That wheat, corn and tobacco are fluctuating in value need not be shown by evidence. *Lindsay v. Hewitt*, (Ind. App. 1908) 86 N. E. 446.

knowledge, that the wealth of a community is partly in lands and partly consists of personalty, in various forms.<sup>1</sup> But what may be the proportion between the two forms of property must be proved.<sup>2</sup> Courts cannot know, as a matter of common knowledge, that there are persons in the jurisdiction owning property of a particular kind. Nor will the fact be judicially known from the circumstance that two designated persons have been pursued at law by the tax authorities to collect taxes for it.<sup>3</sup> The deposit and working of valuable minerals, or other substances,<sup>4</sup> within a state is a matter of common knowledge to its judges, equally with other citizens. Notorious facts regarding the earning or spending capacity of various classes of persons need not be proved. Such knowledge is of facts in their large and general aspect. Those minute or specific are most frequently the subject of evidence.<sup>5</sup>

**§ 783. (*B. What Facts are Covered by the Rule*); (6) Facts of History.**—Facts of history stand in much the same position, in regard to practical possibilities of proof, as that of facts of science.<sup>1</sup> Certain matters of recent occurrence of a local nature may at times be established by witnesses possessing first-hand knowledge. Other facts may be regularly proven by persons of exceptional skill and training from the use of original documents or other historical data. In exercising his right to make proof of his case according to the practical possibilities of procuring evidence which it presents,<sup>2</sup> a party, to substantiate an historical fact, must, in the average case, rely directly or indirectly, upon hearsay;—either as presented by a witness who has examined treatises on the subject or by production of the treatise itself. The natural, and at times, the necessary resort of one who would seek knowledge on the subject, is to printed works on history. These being excluded as evidence of the truth of the statements

1. *Central of Georgia R. Co. v. Wright*, 125 Ga. 589, 54 S. E. 64 (1906).

2. *Central of Georgia Ry. Co. v. Wright*, 125 Ga. 589, 54 S. E. 64 (1906).

3. *Central of Georgia Ry. Co. v. Wright*, (Ga. 1906) 54 S. E. 64.

4. *State v. Jacksonville & S. W. R. Co.*, (Fla. 1904) 37 So. 652 (phosphate).

5. That \$24.50 is not excessive for the necessities of an abandoned wife is a matter requiring no proof. *Irwin v. Irwin*, (Tex. Civ. App. 1908) 110 S. W. 1011. Courts know that a seaman's accrued wages seldom equal \$100. *Detroit Lumber Co. v. The Petrel*, 153 Mich. 528, 117 N. W. 80, 15 Detroit Leg. N. 506 (1908).

1. *Supra*, § 698.

2. *Supra*, § 334.

contained in them by the rule against hearsay,<sup>3</sup> the administrative expedient is adopted of treating the matter as one of common knowledge and allowing the use of the book to refresh the memory of the court on a point, in many cases, of which it has never heard. The community in general has gained knowledge of certain protruding historical facts in much the same way, to wit, from standard treatises. The court, in like manner, in the absence of evidence to the contrary, will assume the knowledge so gained as correct and proceed to act judicially in accordance with it. More recondite facts, the court, *ex necessitate rei*, will investigate for itself, by action of the judge, with or without the assistance of the parties. The operation of this administrative expedient, supplementing the common knowledge of judge and jury, may cover the entire range of history, sacred or profane;—whether of the world, the nation, state, county or of smaller municipal divisions, cities, towns, parishes, etc.

*Common Knowledge.*—The range of facts covered by the first process, assumption of the correctness of notorious facts without investigation—will be found, in an indeterminate manner, but to a very considerable extent, to be commensurate with and in proportion to the jurisdiction of the court itself. To make the assumption involved in a ruling that a historical fact is a matter of common knowledge the judge may justifiably insist on being shown that a fact said to be notorious, should, with a fair degree of reason, be supposed to be known throughout the community for which the court is sitting. Facts of local history will, as a rule, be regarded as common knowledge only in local courts. Facts of more general historical importance will be taken as known to all courts alike.<sup>4</sup> Judges constantly make use of this common knowledge of state history;—to determine, for example, in construing a statute, what was the mischief which the

3. *Supra*, § 2700.

4. *California*.—Payne v. Treadwell, 16 Cal. 221 (1860).

*Indiana*.—Williams v. State, 64 Ind. 553, 31 Am. Rep. 135 (1878).

*Kentucky*.—Bell v. Barnet, 2 J. J. Marsh. 516 (1829).

*Maine*.—Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325 (1880).

*Texas*.—Magee v. Chadoin, 30 Tex. 644 (1868).

*United States*.—Underhill v. Hernandez, 168 U. S. 250, 18 S. Ct. 83, 42 L. ed. 456 (1897); Sears v. The Scotia, 14 Wall. 170, 20 L. ed. 822 (1871); U. S. v. One Thousand Five Hundred Bales of Cotton, 27 Fed. Cas. No. 15,958 (1872). But see, *contra*, Woods v. Banks, 14 N. H. 101 (1843); McKinnon v. Bliss, 21 N. Y. 206 (1860); Gregory v. Baugh, 4 Rand. (Va.) 611 (1827).

legislature was seeking to prevent;<sup>5</sup> in construing a contract, to judge as to the probable intention of the parties in using certain language.<sup>6</sup> The same common knowledge will be used in judging of the propriety of certain conduct;—delay on the part of a guardian in investing funds of a ward during times of general insolvency,<sup>7</sup> caution in conducting the affairs of a trust estate in a community affected by a civil war,<sup>8</sup> and similar occurrences. Upon the principle, that, *caeteris paribus*, common knowledge of historical facts varies directly with the distance, the courts of a state regard as matters of common knowledge domestic historical events of a minute character of which they would require proof had they occurred in another jurisdiction.

*Minor facts of limited historical interest* will not be cognized though such facts be connected with others of which cognizance is taken.<sup>9</sup>

**§ 784. (B. What Facts are Covered by the Rule; [6] Facts of History); World.**—Notorious facts of foreign history will be noticed, whether ancient or contemporaneous.<sup>1</sup> The existence of war in a foreign country,<sup>2</sup> at a given time, will be regarded as a fact of common knowledge. Where such a state of affairs is recognized by the executive department of the national government, the element of common knowledge is reinforced by that of judicial cognizance.

*Prominent facts of commerce, as the general adoption of the rules of navigation prescribed by the Orders in Council of the British Government, on January 9, 1863,<sup>3</sup>* are of this class, i. e.,

5. *Smith v. Speed*, 50 Ala. 276 (1874); *Tompkins County v. Taylor*, 21 N. Y. 173 (1860). Current history will be noticed. *Reineman v. Larkin*, 222 Mo. 156, 121 S. W. 307 (1909).

6. *Buford v. Tucker*, 44 Ala. 89 (1870) (contracts prior to January, 1865, were made in confederate money).

7. *Ashley v. Martin*, 50 Ala. 537 (1874). See also *Foscue v. Lyon*, 55 Ala. 440 (1876).

8. (*Lyon v. Foscue*, 60 Ala. 468) (1877).

9. *Kelley v. Story*, 6 Heisk. (Tenn.)

202 (1871); *Simmons v. Trumbo*, 9 W. Va. 358 (1876) (political views as affecting personal safety); *Cross v. Sabin*, 13 Fed. 308 (1882).

1. *Banco de Sonora v. Bankers' Mut. Casualty Co.*, (Iowa 1903) 95 N. W. 232 (basis of foreign law).

2. *Dowie v. Sutton*, 227 Ill. 183, 81 N. E. 395 (1907) (Boer war); *Underhill v. Hernandez*, 168 U. S. 18 S. Ct. 83, 42 L. ed. 456 (1897) (Venezuela).

3. *Sears v. The Scotia*, 14 Wall. (U. S.) 170, 20 L. ed. 822 (1871).



matters of common notoriety in world history which are also, in a sense, matters of judicial knowledge.

**§ 785. (B. What Facts are Covered by the Rule; [6] Facts of History; World); Minor Facts.**—Special historical facts of comparatively slight general importance connected with foreign countries, as the financial solvency of a particular state and the consequent legal value of its obligations<sup>1</sup> cannot be regarded as commonly known. Distance in time and space as well as intrinsic importance will be considered in determining what facts of foreign history are minor. In the same way, knowledge of the distinctive products of the foreign countries cannot be taken as a matter of world history. Thus the chemical and mechanical composition of asphalt is not a matter of common knowledge.<sup>2</sup>

**§ 786. (B. What Facts are Covered by the Rule; [6] Facts of History); Nation.**—Any court of a nation will know as matters of common knowledge, notorious facts in the nation's history. Where these are a direct result of legal action, the knowledge of the court may also be *judicial*;—as in the case of important acts of foreign governments directly affecting the nation will be judicially known to its courts. Of this nature, in the United States, would be acts of the French and Spanish governments carrying into effect treaties of cession.<sup>1</sup> Where the act is one entirely *in pais*, not a direct result of law—the judge shares the common historical knowledge of the community or acquires it for himself—rendering his potential<sup>2</sup> knowledge actual. In such a class would be important events in the settlement of the country, e. g., in the United States, Col. J. C. Fremont's career in California in 1846 and 1847.<sup>3</sup> Important national expositions, as the World's Fair, so-called,<sup>4</sup> will be regarded as being commonly known. English courts will notice the date

1. *Hebblethwaite v. Flint*, 115 N. Y. App. Div. 597, 101 N. Y. Suppl. 43 (1906).

2. *City of Chicago v. Gage*, 237 Ill. 328, 86 N. E. 633 (1908).

1. *U. S. v. Reynes*, 9 How. (U. S.) 127, 147, 13 L. ed. 74 (1850).

2. *Supra*, § 698

3. "The court will take judicial notice of the leading and controlling events in the history of the country

and of the official relations of the principal actors therein to the government; and, in elucidation thereof, also of less important transactions of general and public interest immediately connected therewith, when they have passed into commonly received authentic history." *De Celis v. U. S.*, 13 Ct. of Claims, 117 (1877).

4. *Daggett v. Colgan*, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474 (1891);

of the sovereign's death.<sup>5</sup> Here the knowledge is not only common but judicial also.

*Great religious movements* constitute an important part of the nation's history. Of this nature is the separation and division of property and jurisdiction in the Methodist denomination.<sup>6</sup> Other salient features of national history, such as the growth in wealth and population<sup>7</sup> or the founding and development of leading institutions of learning<sup>8</sup> will be known to the courts of a nation as matters of notoriety. In a similar way, these tribunals will recognize, without proof, the principal historical events in or relating to the colonial possessions of the country.<sup>9</sup>

**§ 787. (B. What Facts are Covered by the Rule; [6] Facts of History; Nation); Commerce.**— The history of the invention of the steamboat and the development of its usefulness in carrying merchandise<sup>1</sup> are matters of notorious national history. The history, at any particular time, of the circulating medium of the country,<sup>2</sup> its constituent elements at a given period,<sup>3</sup> the value of

McCoy v. World's Columbia Exposition, 186 Ill. 356, 57 N. E. 543, 78 Am. St. Rep. 288 (1900).

5. Henry v. Cole, 2 Ld. Raym. 811, 7 Mod. 103 (1702).

6. Malone v. La Croix, 144 Ala. 648, 143 Ala. 657, 41 So. 724 (1906).

7. Daly v. Old, (Utah 1909) 99 Pac. 460 (population, condition of people in Utah and Washington).

8. Courts will take judicial notice of the existence and general history of the two great English universities, Oxford and Cambridge, and recognize that the object of their establishment was the advancement of religion and learning. *Re Oxford Rate*, 8 E. & B. 184 (1857).

9. The federal supreme court must recognize the history of Porto Rico and of its legal and political institutions up to the time of its annexation to the United States. *Municipality of Ponce v. Roman Cath. A. Church, etc.*, (Porto Rico 1908) 28 S. Ct. 737, 210 U. S. 296, 52 L. Ed. 1068.

1. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. ed. 23 (1824).

2. *Alabama*.—*Gady v. State*, 83 Ala. 51, 3 So. 429 (1887).

*Arkansas*.—*Dillard v. Evans*, 4 Ark. 175 (1841).

*Indiana*.—*Hart v. State*, 55 Ind. 599 (1877).

*Kentucky*.—*Lampton v. Haggard*, 3 T. B. Mon. 149 (1826).

*Maryland*.—*Chesapeake Bank v. Swain*, 29 Md. 483, 502 (1868).

*Missouri*.—*State v. Moseley*, 38 Mo. 380 (1866).

*North Carolina*.—*Grant v. Reese*, 94 N. C. 720 (1886).

*Tennessee*.—*Wood v. Cooper*, 2 Heisk. 441 (1871). *Compare*, however, *Laird v. Folwell*, 10 Heisk. 92 (1872).

*Texas*.—*Lumpkin v. Murrell*, 46 Tex. 51 (1876).

*West Virginia*.—*Hix v. Hix*, 25 W. Va. 481 (1885).

*United States*.—*U. S. v. American Gold Coin*, 24 Fed. Cas. No. 14,439, 1 Woolw. 217 (1868).

3. *Hart v. State*, 55 Ind. 599 (1877); *Lumpkin v. Murrell*, 46 Tex. 51 (1876).

gold coin in different epochs of national history,<sup>4</sup> the change in the United States from a depreciated paper currency to a gold basis and the consequent effect on prices,<sup>5</sup> will be known to the court as matters of national history. The existence of times of marked financial depression in the commercial history of the country need not be proved.<sup>6</sup> Thus, the court of appeals of the commonwealth of Kentucky, speaking of the alleged abandonment of rights under a mining lease, say: "When in 1898, the defendants left the premises and left Ashland and ceased to pay rent, they were bound to understand that the company when it took possession of the property had taken possession of it upon the idea that they had abandoned it. They allowed the company to hold possession of it in this way for something over 4 years before this suit was brought. In the meantime as is a matter of common knowledge, values had changed. In 1898 the country had not recovered from the panic of 1893. All values were low and there was little market for real estate. In 1902 the country was rapidly recovering from the panic, and prices everywhere had risen. These are matters of current history which the court may take judicial notice of."<sup>7</sup>

**§ 788. (*B. What Facts are Covered by the Rule; [6] Facts of History; Nation*); Foreign Affairs.**—The action of the nation in important foreign transactions<sup>1</sup> as the invasion of another country,<sup>2</sup> will be known by its courts.

4. *Bryant v. Foot*, L. R. 3 Q. B. 497, 9 B. & S. 444 (1868) (comparison of value of money in time of Richard I).

5. *Alabama*.—*Morris v. Morris*, 58 Ala. 443 (1877).

*Arkansas*.—*Dillard v. Evans*, 4 Ark. 175 (1841).

*Missouri*.—*Farwell v. Kennett*, 7 Mo. 595 (1842).

*North Carolina*.—*Grant v. Reese*, 94 N. C. 720 (1886).

*Tennessee*.—*Henly v. Franklin*, 3 Coldw. 472, 91 Am. Dec. 296 (1866).

*West Virginia*.—*Hix v. Hix*, 25 W. Va. 481 (1885).

*United States*.—*U. S. v. American Gold Coin*, 24 Fed. Cas. No. 14,439, 1 Woolw. 217 (1868).

6. The financial depression of 1907 is a matter of common knowledge. *Germania Life Ins. Co. v. Potter*, 109 N. Y. Suppl. 435, 124 App. Div. 814 (1908) [*reversing* 107 N. Y. Suppl. 912 (1907)].

7. *Kentucky Iron, Coal & Mfg. Co. v. Adams*, 32 Ky. L. Rep. 823, 106 S. W. 1198 (1908).

1. *Neely v. Henkel*, 180 U. S. 109, 21 S. Ct. 302, 45 L. ed. 448 [*affirming* 103 Fed. 631] (1901); *U. S. v. Reynes*, 9 How. (U. S.) 127, 13 L. ed. 74 (1850).

2. *Neely v. Henkel*, 180 U. S. 109, 21 S. Ct. 302, 45 L. ed. 448 [*affirming* 103 Fed. 631] (1901) (Cuba).

**§ 789. (B. What Facts are Covered by the Rule; [6] Facts of History; Nation; Foreign Affairs); Wars, Insurrections, etc.**

—The existence of a state of war between a nation and some foreign power will be known to the courts of each forum;<sup>1</sup>—partly because notorious<sup>2</sup> and, in part, because the result of executive action.<sup>3</sup> The insurrections in the Phillipine islands against the authority of the United States<sup>4</sup> are known to its courts.

**§ 790. (B. What Facts are Covered by the Rule; [6] Facts of History; Nation); Habits and Customs.**—Established habits well known in the community, as habitual drunkenness,<sup>1</sup> reading other persons' postal cards or telegrams,<sup>2</sup> asking more for property than it is worth,<sup>3</sup> fishing in private ponds until forbidden by the owner,<sup>4</sup> need not be proved. Widespread and general recognized social customs, as resorting to saloons to procure liquor as a beverage,<sup>5</sup> the custom on occasions where champagne is served of cooling the bottle under circumstances which usually result in the loss of the label before the guest has seen it,<sup>6</sup> are matters of common knowledge. In like manner, it is commonly known that the yachting season in northern waters closes on the arrival of cold weather.<sup>7</sup>

*Customs little known* because foreign,<sup>8</sup> provincial, local, or for other reasons,<sup>9</sup> must be proved.

1. Maclane's Trial, 26 How. St. Tr. 797 (1797).

2. R. De Berenger, 3 M. & S. 67, 69 (1814) ("so many statutes that speak of a war with France").

3. *Supra*, §§ 645 *et seq.*

Both reasons may fail to apply to a war entirely between outside nations. Dolder v. Lord Huntingfield, 11 Ves. Jr. 283, 292 (1805) (France at war with Austria).

4. La Rue v. Kansas Mut. L. Ins. Co., (Kan. Sup. 1904) 75 Pac. 494 (1904).

1. Youngs v. Youngs, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548 (1889); Com. v. Whitney, 11 Cush. (Mass.) 477 (1853).

2. Williamson v. Freer, L. R. 9 C. P. 393, 43 L. J. C. P. 161, 30 L. T. Rep. N. S. 332, 22 Wkly. Rep.

878 (1874); Robinson v. Jones, L. R. 4 Ir. 391 (1879).

3. State v. Chingren, 105 Iowa 169, 74 N. W. 946 (1898).

4. Marsh v. Colby, 39 Mich. 626, 33 Am. Rep. 439 (1878).

5. Zapf v. State, 11 Ind. App. 360, 39 N. E. 171 (1894).

6. Von Mumm v. Wittemann, 85 Fed. 966, 967 (1898).

7. The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 14 L. ed. 937 (1896) (before November 1st).

8. De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045 (1902) (Austrian use of titles of nobility).

9. State v. Travelers' Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138 (1898) (irrelevant use of the custom of giving English names to persons).

**§ 791. (B. What Facts are Covered by the Rule; [6] Facts of History; Nation); War of the Rebellion.**—Facts contributory to the Civil War between the states of the American Union,<sup>1</sup> as the existence of slavery in certain sections of the United States,<sup>2</sup> executive proclamations preceding it,<sup>3</sup> its duration and termination,<sup>4</sup> will be known without proof. Essential facts concerning the struggle,<sup>5</sup> as the elimination of the precious metals from the currency of the Confederacy, entailing depreciation of the paper remaining in circulation,<sup>6</sup> prominent military,<sup>7</sup> or naval<sup>8</sup> events,

1. *Cuyler v. Ferrill*, 6 Fed. Cas. No. 3,523, 1 Abb. 169 (1867).

2. *Jack v. Martin*, 12 Wend. (N. Y.) 311, 328 (1834); *Miller v. McQuerry*, 17 Fed. Cas. No. 9,583, 5 McLean 469 (1853).

3. *Woods v. Wilder*, 43 N. Y. 164, 3 Am. Rep. 684 (1870).

4. *Turner v. Patton*, 49 Ala. 406 (1873).

The exact legal date of the war's termination is, however, to be decided by the executive branch of the government, of which the court has judicial knowledge as of a fact established by operation of law. *U. S. v. Fifteen Hundred Bales of Cotton*, 27 Fed. Cas. No. 15,958 [reversing 27 Fed. Cas. No. 15,957] (1872).

5. *Alabama*.—*Lyon v. Foscue*, 60 Ala. 469 (1877); *Turner v. Patton*, 49 Ala. 406 (1873) (restoration of mail service); *Donegan v. Wood*, 49 Ala. 242, 20 Am. Rep. 275 (1873) (suspension of mail service).

*Arkansas*.—*Williams v. State*, 37 Ark. 463 (1881); *Rice v. Shook*, 27 Ark. 137, 11 Am. Rep. 783 (1871) (certain localities in a confederate state in possession of the Union forces).

*Indiana*.—*Brooke v. Filer*, 35 Ind. 402 (1871).

*Mississippi*.—*Day v. Smith*, (Miss. 1905) 39 So. 526.

*Missouri*.—*Douthitt v. Stinson*, 63 Mo. 268 (1876) (position of the several states).

*New York*.—*Woods v. Wilder*, 43 N. Y. 164, 3 Am. Rep. 684 (1870).

*Tennessee*.—*Smart v. Mason*, 2 Heisk. 223 (1870); *Wood v. Cooper*, 2 Heisk. (Tenn.) 441 (1871) (that Missouri was represented in the confederate congress).

*United States*.—*Cuyler v. Ferrill*, 6 Fed. Cas. No. 3,523, 1 Abb. 169 (1867).

6. *Alabama*.—*Modawell v. Holmes*, 40 Ala. 391, 405 (1867); *Morris v. Morris*, 58 Ala. 443 (1877).

*North Carolina*.—*Grant v. Reese*, 94 N. C. 720 (1886).

*Tennessee*.—*Wood v. Cooper*, 2 Heisk. 441 (1871).

*Texas*.—*Lumpkin v. Murrell*, 46 Tex. 51 (1876).

*West Virginia*.—*Hix v. Hix*, 25 W. Va. 481 (1885); *Simmons v. Trumbo*, 9 W. Va. 358, 364 (1876).

Notice will not be taken of the precise degree of this depreciation. *Modawell v. Holmes*, 40 Ala. 391 (1867).

7. *Williams v. State*, 67 Ga. 260 (1881) (Sherman's march to the sea). See also *Ham v. State*, (Ala. 1908) 47 So. 126 (date of battle of Atlanta).

8. *The Mersey*, 17 Fed. Cas. No. 9,489, Blatchf. Pr. Cas. 187 [reversed on other grounds in 17 Fed. Cas. No. 9,490, Blatchf. Pr. Cas. 658] (1862) (blockade).

The effect of the blockade in causing a circuitous course of shipment between the blockaded ports and certain neutral ports will be noticed. *The Mersey*, 17 Fed. Cas. No. 9,489, Blatchf. Pr. Cas. 187 [reversed on

are equally well known. In like manner the results of the war,—as the abolition of slavery<sup>9</sup> and their effects;<sup>10</sup>—are notorious and, therefore, commonly known.

*But minor facts connected with it*, as the relative position in the field of the contending armies at a particular time,<sup>11</sup> the circumstance that legal process could not be issued or served in a particular county,<sup>12</sup> or that its courts were closed,<sup>13</sup> or that it was unsafe to announce certain political views in that region,<sup>14</sup> though of quasi general interest, are not so notorious as to dispense with proof.

**§ 792. (B. What Facts are Covered by the Rule; [6] Facts of History); State; Settlement.**—Courts of a general jurisdiction throughout a state, whether conferred by national or state authority, know the notorious facts of state history;<sup>1</sup>—most frequently perhaps in connection with the construction of statutes.<sup>2</sup>

other grounds in 17 Fed. Cas. No. 9,490, Blatchf. Pr. Cas. 658] (1862).

9. *Morgan v. Nelson*, 43 Ala. 586 (1869); *Ferdinand v. State*, 39 Ala. 706 (1866).

10. *Hunt v. Wing*, 10 Heisk. (Tenn.) 139 (1872) (on the colored race).

11. *Kelly v. Story*, 6 Heisk. (Tenn.) 202 (1871).

12. *Smart v. Mason*, 2 Heisk. (Tenn.) 223 (1870).

13. *Cross v. Sabin*, 13 Fed. 308 (1882). But see, *contra*, *Killebrew v. Murphy*, 3 Heisk. (Tenn.) 546 (1871).

14. *Simmons v. Trumbo*, 9 W. Va. 358 (1876).

1. *Alabama*.—*Bonner v. Philips*, 77 Ala. 427 (1884).

*Indiana*.—*Carr v. McCampbell*, 61 Ind. 97 (1878).

*Kentucky*.—*Wood v. Lee*, 5 T. B. Mon. 50 (1827).

*Louisiana*.—*Lake v. Caddo Parish*, 37 La. Ann. 788 (1885).

*Missouri*.—*Douthitt v. Stinson*, 63 Mo. 268 (1876).

*Nebraska*.—*Porter v. Flick*, 60 Neb. 773, 84 N. W. 262 (1900).

*New York*.—*Howard v. Moot*, 64

N. Y. 262 [affirming 2 Hun 475] (1876).

*Texas*.—*Kilpatrick v. Sisneros*, 23 Tex. 113 (1859).

*Vermont*.—*State v. Franklin County Sav. Bank, etc., Co.*, 74 Vt. 246, 52 Atl. 1069 (1902).

*Washington*.—*Yelm Jim v. Territory*, 1 Wash. Terr. 63 (1859).

*West Virginia*.—*Dryden v. Stephens*, 19 W. Va. 1 (1881).

*United States*.—*Lamb v. Davenport*, 14 Fed. Cas. No. 8,015, 1 Sawy. 609 (1871); *De Celis v. U. S.*, 13 Ct. Cl. 117 (1877).

2. *Indiana*.—*State v. Schoonover*, 135 Ind. 526, 35 N. E. 119 (1893); *Board v. Ft. Wayne, etc., Co.*, 17 Ind. App. 36, 46 N. E. 36 (1896).

*Massachusetts*.—*Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610 (1896).

*Nebraska*.—*Redell v. Moores*, 63 Neb. 219, 88 N. W. 243 (1901).

*Wyoming*.—*Rasmussen v. Baker*, (Wyo.) 50 Pac. 819, 38 L. R. A. 773 (1897).

*Vermont*.—*State v. Franklin, etc., Co.*, 74 Vt. 246, 52 Atl. 1069 (1902). "The history of a country, its topography and condition, enter into the

*Colonial History.*—In case of the older states of the American Union, the common knowledge of state history includes that relating to the colonial stage of existence. Among such facts is the relation of the territorial limits of the colony when compared to those of the state.<sup>3</sup>

*The existence of documents* of general importance affecting the history of a state, even while under the sovereignty of a foreign country,<sup>4</sup> will be judicially known.

**§ 793. (B. What Facts are Covered by the Rule; [6] Facts of History; State); Land Titles.**—The early history of the acquisition of land titles,<sup>1</sup> whether by discovery, conquest, cession by a foreign government, or grant from the national authorities,<sup>2</sup>

construction of the laws which are made to govern it, and we must notice these facts judicially."

*Indiana.*—*Williams v. State*, 64 Ind. 553 (1878).

See also:

*Alabama.*—*Smith v. Speed*, 50 Ala. 276 (1873).

*United States.*—*Ohio Life Ins. Co. v. Debolt*, 16 How. 416 (1853).

3. *N. Frank & Sons v. Gump*, (Va. 1905) 51 S. E. 358.

4. *Smyth v. New Orleans C. & B. Co.*, 35 C. C. A. 646, 93 Fed. 899 (1899) (ancient Spanish land register). The court knows that, prior to statehood, Oklahoma consisted of the territory of Oklahoma and Indian Territory, and that the territories were governed in a large measure by different laws emanating from different sources. *Western Union Tel. Co. v. Parsley*, (Tex. Civ. App. 1909) 121 S. W. 226.

1. *Alabama.*—*Bonner v. Phillips*, 77 Ala. 427 (1884); *Lewis v. Harris*, 31 Ala. 689 (1858) (government title).

*Indiana.*—*Carr v. McCampbell*, 61 Ind. 97 (1878).

*New Jersey.*—*City of Paterson v. East Jersey Water Co.*, (Ch. 1908) 70 Atl. 472.

*New York.*—*Townsend v. Trustees of Freeholders and Commonalty of Town of Brookhaven*, 89 N. Y. Suppl.

982, 97 App. Div. 316 (1904); *Howard v. Moot*, 64 N. Y. 262 [*affirming* 2 Hun 475] (1876) (extinguishment of Indian title).

*United States.*—*Bigelow v. Chatterton*, 51 Fed. 614, 2 C. C. A. 402 (1892); *Lamb v. Davenport*, 14 Fed. Cas. No. 8,015, 1 Sawy. 609 (1871). The size of lots in a particular county of the state as originally laid out may be taken by a court as a matter of common or judicial knowledge. *Williams v. State*, 2 Ga. App. 629, 58 S. E. 1071 (1907) (Turner County; 490 acres).

2. *Chicago, etc., R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088 (1900); *Smith v. Stevens*, 82 Ill. 554 (1876) (cognizance taken of location of such land); *Dickenson v. Breeden*, 30 Ill. 279 (1863) (notice taken of dedication as military bounties). The donation of lands to a state for school purposes by act of Congress and the legislation of the state in relation thereto are proper subjects of both judicial and common knowledge. *Greene v. Boaz*, (Ala. 1908) 47 So. 255; *Black v. Chicago, B. & Q. R. Co.*, 237 Ill. 500, 86 N. E. 1065 (1909) (national grants for school purposes).

The absence of affirmative action by the United States government, in not forfeiting a state land grant, will

need not be proved. The settlement of the various parts of the state,<sup>3</sup> the primitive conditions existing during the settlement of the original states,<sup>4</sup> the inaccuracy of older surveys,<sup>5</sup> the ancient names of places within the jurisdiction,<sup>6</sup> the cessions of land within its borders by the state to the national government,<sup>7</sup> the acquirement by purchase of lands for national purposes,<sup>8</sup> the establishment of reservations for the benefit of the Indian tribes,<sup>9</sup> or with regard to certain territory, as that particular lowlands are overflowed by freshets,<sup>10</sup> may be taken as commonly known.

*But the public ownership* of individual tracts of land,<sup>11</sup> even when under tide water,<sup>12</sup> is not within the rule. The law is otherwise, where as a result of notoriety and public interest and as a direct result of legal enactment the bed of a great river<sup>13</sup>

be noticed. *Mathis v. Tennessee, etc.*, R. Co., 83 Ala. 411, 3 So. 793 (1887).

Whether a particular piece of land has been granted by congress, or still constitutes part of the public domain, cannot be judicially known. *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448 (1895).

3. *Holmes v. Mallett, Morr.* (Iowa) 82 (1840); *Kreuger v. Schultz*, 6 N. D. 310, 70 N. W. 269 (1896) (lands within Indian territory); *Kilpatrick v. Sisneros*, 23 Tex. 113 (1859).

Courts of Texas have taken judicial notice of the existence and conditions of the several colonial land contracts made with individuals. *Chadwin v. Magee*, 20 Tex. 476; *Williamson v. Simpson*, 16 Tex. 433; *Hatch v. Dune*, 11 Tex. 708; *Robertson v. Teal*, 9 Tex. 344; *Wheeler v. Moody*, 9 Tex. 372.

4. *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 Am. Dec. 575 (1866).

5. *Hellman v. Los Angeles*, 125 Cal. 383, 58 Pac. 10 (1899).

6. *Trenier v. Stewart*, 55 Ala. 458 (1876) (Dauphin island formerly called "Massacre island").

7. *People v. Snyder*, 41 N. Y. 397 [affirming 51 Barb. 589] (1869); *Wills v. State*, 3 Heisk. (Tenn.) 141

(1871); *Lasher v. State*, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922 (1891).

8. *Baker v. State*, (Tex. Cr. App. 1904) 83 S. W. 1122 (military post). The precise metes and bounds will not be known. *Baehler v. Consolidated Ranch Co.*, 31 Kan. 502 (1884); *Baker v. State*, (Tex. Cr. App. 1904) 83 S. W. 1122.

9. *Peano v. Brennan*, (S. D. 1906) 106 N. W. 409. Well-known facts with regard to Indian reservations, as that in certain of them no freemen qualified to act as jurors can be found, [*Goodson v. U. S.*, 7 Okl. 117, 54 Pac. 423 (1898)] are equally notorious as matters of history, and, in many instances, a direct result of legislation which the judge judicially knows. National courts will take the same judicial notice. *Gardner v. United States*, (Ind. Terr. 1904) 82 S. W. 704 (Choctaw nation).

10. *Kerns v. Perry*, (Tenn. 1898) 48 S. W. 724.

11. *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448 (1895).

12. *New York, etc., Bridge Co. v. Skelly*, 90 Hun (N. Y.) 312, 35 N. Y. Suppl. 920 (1895).

13. *McCarter v. Hudson County Water Co.*, (N. J. Ch. 1905) 61 A. 710 (Passaic).



within the ebb and flow of the tide, is judicially and commonly known to be vested in the state.

**§ 794. (B. What Facts are Covered by the Rule; [6] Facts of History; State); Industrial Development.**—Important facts in the industrial or business life of the state, such as changes in the rate of interest,<sup>1</sup> establishment and general features of the state banking system, the organization<sup>2</sup> and operation of corporations, will be treated by the courts as matters of common knowledge, but cognizance cannot be taken of details not clearly established or generally known as the value of a bank's paper at a particular time.<sup>3</sup> The movements, more prominent speculative activity in the business life of the state, as "that there was a great complaint of tax collectors . . . speculating in warrants," at a given time,<sup>4</sup> will be regarded by courts as notorious historical facts. The growth of agriculture, commerce and manufacturing will be noticed. The great inventions and the hopes, perplexities and fears of inventors and early manufacturers<sup>5</sup> are part of the public history of the state.

*Modern developments.*—Prominent incidents in modern industrial development will be known by judges as part of the common stock of the community's knowledge.<sup>6</sup> Thus, the existence of labor troubles is matter of history.<sup>7</sup> In like manner, the evils of consolidating domestic corporations will be known to the court.<sup>8</sup>

*Telephone communication.*—Among the more salient features of modern industrial development of which judges possess the same knowledge as other intelligent members of the community is the improved facility of communication due to the general in-

1. *New Haven Trust Co. v. Doherty*, 74 Conn. 468, 51 Atl. 130 (1902); *Collins v. Wardell*, 63 N. J. Eq. 371, 52 Atl. 708 (1902).

2. That companies of a certain class are incorporated in a given way is "a matter of public history" which the court "cannot refuse to notice." *Ohio, etc., Co. v. Debolt*, 16 How. 435 (1853).

3. *Feemster v. Ringo*, 5 T. B. Monr. (Ky.) 336 (1827).

4. *Smith v. Speed*, 50 Ala. 276 (1873).

5. "The common disappointments

and retardations incident to the manufacture of any new article," need not be proved. *Cocker v. Franklin Hemp, etc., Co.*, 3 Sumner, 530, per Story, J.

6. *Funderburg v. Augusta & A. Ry. Co.*, 81 S. C. 141, 61 S. E. 1075 (1908).

7. *New York Cent. & H. R. R. Co. v. Williams*, 118 N. Y. Suppl. 785, 64 Misc. 15 (1909).

8. *Jackson Consol. Traction Co. v. Jackson Circuit Judge*, 155 Mich. 522, 119 N. W. 915, 15 Detroit Leg. N. 1081 (1909).

troductioin of the telephone into business and social life. "Courts of justice do not ignore the great improvement in the means of communication which the telephone has made. Its nature, operation, and ordinary uses are facts of general scientific knowledge of which the courts will take judicial notice as part of public contemporary history."<sup>9</sup> The judge knows, as a matter of common knowledge, notorious facts concerning the use of the telephone as a means of communicating thought.<sup>10</sup> The convenience of the telephone in use is obviously accompanied by certain inherent difficulties in satisfactorily proving the identity of the speaker which call for the sound administrative action of the presiding judge. Naturally, it is essential that the speaker should be identified.<sup>11</sup> It is further required that the legally connecting relation of the party against whom the evidence of statements made at a telephone conversation is offered should be established to the judge's satisfaction wherever so doing would ordinarily be necessary.<sup>12</sup> No special rules attach to the matter. Primarily,

9. *Wolfe v. Missouri Pacific Railway Co.*, 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331 (1888), *quoted* in *Western Union Telegraph Co. v. Rowell*, (Ala. 1907) 45 So. 73, 80.

10. *Galt v. Woliver*, 103 Ill. App. 71 (1902); *Barrett v. Magnier*, (Minn. 1908) 117 N. W. 245.

**Notice in writing.**—It is scarcely necessary to say that a notice "given over the telephone" is verbal and not "in writing." *In re Shier's Estate*, 35 S. C. 417, 14 S. E. 931 (1892).

11. *Iowa*.—*Shawyer v. Chamberlain*, 113 Iowa 742, 84 N. W. 661 (1900).

*Kentucky*.—*Holzhauser v. Sheeny*, 31 Ky. L. Rep. 1238, 104 S. W. 1034 (1907).

*Missouri*.—*Guest v. Railroad Co.*, 77 Mo. App. 258 (1899).

*Nebraska*.—*Oskamp v. Gadsden*, 35 Neb. 7, 52 N. W. 718 and note to same in 17 L. R. A. 440 (1892).

*Pennsylvania*.—*Dunham v. McMichael*, 214 Pa. 485, 63 Atl. 1007 (1906); *Southwark Nat. Bank v. Smith*, 7 Pa. Dist. R. 182, 21 Pa. Co. Ct. R. 1 (1898). Identity is a

question of fact for the jury in each case. *Rogers Grain Co. v. Tanton*, 136 Ill. App. 533 (1907). In other words, lack of positiveness in identification goes merely to the question of credibility or probative weight. *Conkling v. Standard Oil Co.*, (Iowa 1908) 116 N. W. 822.

12. *Globe Prtg. Co. v. Stahl*, 23 Mo. App. 451 (1886); *Swing v. Walker*, 27 Pa. Super. Ct. 366 (1905). Telephone communications stand upon the same footing as conversations as to admissibility in evidence. *Star Bottling Co. v. Cleveland Faucet Co.*, 128 Mo. App. 517, 109 S. W. 802 (1908). "No testimony is necessary to show that a declaration or admission is not admissible unless the party making it is identified as the party sought to be charged. The introduction of the telephone has not changed the rule of evidence on that subject. If the witness had been in the presence of the person at the other end of the line, the declaration of that person would not have been admissible without evidence that he was one of the defendants." *Swing v. Walker*, 27 Pa. Super. Ct. 366

the question of admissibility is one of administration. Should the speaker be identified by the tones of his voice,<sup>13</sup> his later

(1904). "To hold parties responsible for answers made by unidentified persons in response to a call at the telephone from their offices or place of business concerning their affairs, opens the door for fraud and imposition, and establishes a dangerous precedent, which is not sanctioned by any rule of law or principle of ethics of which we are aware. A party replying or acting upon a communication of that character takes the risk of establishing the identity of the person conversing with him at the other end of the line." *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988 (1903).

**Course of business.**—Where the reply to a telephone conversation purports to come from a party's *place of business*, a situation is presented analogous to the case where a party should go to the other's office and hold a conversation with one in apparent charge of the affairs there being conducted. Less stringent proof of connection with the proprietor will under such circumstances properly be required by the court. See *Kimbark v. Illinois Car, etc., Co.*, 103 Ill. App. 632 (1902). The rule is very fairly stated in a leading case in Missouri. "When a person places himself in connection with a telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are admissible in evidence, as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. And the fact that the person or voice of the person at the telephone was not identified does not render the conversation inadmissible. This ruling is intended to determine merely the admissibility

of such conversations in such circumstances, but not the effect of such evidence after its admission. That is a jury question." *Wolfe v. Missouri Pacific Railway Co.*, 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331 (1888), *quoted* in *Western Union Telegraph Co. v. Rowell*, (Ala. 1907) 45 So. 73, 80.

*E converso*, where this fact of connection with a party's office is absent, more conclusive proof of identification and connection with the party to be affected by a telephone conversation may properly be demanded by a presiding judge. Thus, a telephone conversation is inadmissible to establish admissions of one of the parties, where it appears that the witness was not acquainted with the party's voice, and could not identify it. Such a case would not be controlled by the decisions which relate to communications by telephone from an office in response to communications or inquiries, and to the presumption which arises from the transaction of business of the person in whose control the telephone is. *Swing v. Walker*, 27 Pa. Super. Ct. 366 (1905).

13. *Western Union Telegraph Co. v. Rowell*, (Ala. 1907) 45 So. 73; *Rogers Grain Co. v. Tanton*, 136 Ill. App. 533 (1907); *Knickerbocker Ice Co. of Baltimore City v. Gardiner Dairy Co.*, (Md. 1908) 69 Atl. 405; *People v. Ward*, 3 N. Y. Crim. 483 (1885). See also *Southwark Nat. Bank v. Smith*, 21 Pa. Co. Ct. 1 (1899).

It is not essential that the one testifying to the conversation should have been able at the time to identify the speaker by his voice. *Miller v. Leib*, 109 Md. 414, 72 Atl. 466 (1909); *Barrett v. Wagner*, (Minn. 1908) 117 N. W. 245; *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63

admissions,<sup>14</sup> or by other sufficient evidence,<sup>15</sup> direct or circumstantial,<sup>16</sup> his verbal utterances made through the telephone will be regarded as competent. Absolute identification is not required. If the jury, having regard to all the circumstances of the case, might reasonably find that a designated individual was the speaker, what he says may be received upon ordinary principles of evidence.<sup>17</sup>

L. R. A. 988 (1903). It is sufficient if the witness *subsequently* identifies the speaker over the telephone upon hearing him speak on another occasion. *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573 (1908). That the reporting witness does not know the speaker affects merely the weight of the evidence. *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539 (1888); *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861 (1897).

14. *Nebraska Nat. Bank v. Burke*, 44 Neb. 234, 62 N. W. 452 (1895).

15. *Wilson v. Minneapolis & N. W. R. Co.*, 31 Minn. 481, 18 N. W. 291 (1884).

16. *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988 (1903); *Globe Prtg. Co. v. Stahl*, 23 Mo. App. 451 (1886); *Shawyer v. Chamberlain*, 113 Iowa 742, 84 N. W. 661, 86 Am. St. Rep. 411 (1900).

A bystander may testify to such portion of a telephone conversation as he may have heard. *Miles v. Andrews*, 153 Ill. 262, 38 N. E. 644 (1894); *Dannemiller v. Leonard*, 15 Ohio C. C. 686, 8 Ohio C. D. 735 (1898). One using a telephone in an office connected with that employed in the conversation may give evidence as to the statements heard by him. *Rimes v. Carpenter*, 114 N. Y. Suppl. 96, 61 Misc. 614 (1909).

17. *Shawyer v. Chamberlain*, 113 Iowa 742, 84 N. W. 661, 86 Am. St. Rep. 411 (1900); *Globe Prtg. Co. v. Stahl*, 23 Mo. App. 451 (1886);

*Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988 (1903).

Where an operator intervenes, as at a public telephone station, the question as to the responsibility of a party acting through such an assistant, is a matter to be determined by the law of agency. "As business expands by the aid of new inventions, wider scope must be given to the rules of evidence. There is no need, however, of any departure or innovation in this case, because it is a well settled rule of evidence that the statements of an agent, when acting within the scope of his agency, are competent against his principal. When one is using the telephone if he knows that he is talking to the operator, he also knows that he is making him his agent to repeat what he is saying to another party; and, in such a case, certainly the statements of the operator are competent, being the declarations of the agent, made during the progress of the transaction. If he is ignorant whether he is talking to the person with whom he wishes to communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information is intended, that it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because the person using a telephone knows that there

*Oath by telephone.*—For administration of oath by telephone, see § 203.

**§ 795. (B. What Facts are Covered by the Rule; [6] Facts of History; State; Industrial Development); Mining.**—Thus discovery of minerals, and the mining of these or other valuable substances,<sup>1</sup> are historical facts which need not be proved. The exhaustion, in certain sections of the country, of wells for obtaining natural gas is a matter of common knowledge.<sup>2</sup> The mining statistics of a particular state compiled and published under a provision of law may be properly said to be judicially known to its judges.<sup>3</sup>

**§ 796. (B. What Facts are Covered by the Rule; [6] Facts of History; State; Industrial Development); Railroads.**—The establishment of lines of railroad, in any state,<sup>1</sup> the date of their opening,<sup>2</sup> the permanence of their location,<sup>3</sup> and the increase of their traffic,<sup>4</sup> need not be proved. So courts commonly know, as other persons do, the making or forfeiture of land grants to railroad companies.<sup>5</sup>

**§ 797. (B. What Facts are Covered by the Rule; [6] Facts of History; State); Later History.**—Prominent features of the later history of the state, its Indian wars,<sup>1</sup> the salient features of the Civil War as it affected the particular state,<sup>2</sup> as the elimina-

is one at each station whose business it is to so act; and we think that the necessities of a growing business require this rule and that it is sanctioned by the known rules of evidence." *Sullivan v. Kuykendall*, 82 Ky. 483 (1888). The rule is the same where, owing to the influence of atmospheric conditions, or other cause, it seems advisable that a long distance message should be repeated at an intermediate station by another operator. *Oskamp v. Gadsden*, 35 Neb. 7, 52 N. W. 718, 37 Am. St. Rep. 428, 17 L. R. A. 440 (1892).

1. *State v. Jacksonville* (Fla. 1904), 37 So. 652 (phosphate); *infra*, §§ 822, 908, 2032, 2430.

2. *State v. Indianapolis Gas Co.* (Ind. 1904) 71 N. E. 139.

3. *State v. Barrett*, (Ind. 1909) 87 N. E. 7.

1. *Knowlton v. New York, etc., R. Co.*, 72 Conn. 188, 44 Atl. 8 (1899); *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336 (1873); *infra*, §§ 826, 919, 2035, 2435.

2. *Knowlton v. R. Co.*, 72 Conn. 188, 44 Atl. 8 (1899).

3. *Miller v. Texas, etc., R. Co.*, 83 Tex. 518, 18 S. W. 954 (1892).

4. *Chinn v. Chicago, etc., R. Co.*, 100 Mo. App. 576, 75 S. W. 375 (1903) (live stock traffic shows yearly increase).

5. *Mathias v. Tennessee, etc., R. Co.*, 83 Ala. 411, 3 So. 793 (1887).

1. *Yelm Jim v. Territory*, 1 Wash. Terr. 63 (1859). "The history of the Six Nations of Indians is a part of the history of the state, of which the courts will take notice." *Howard v. Moot*, 64 N. Y. 262 (1876).

2. *Buford v. Tucker*, 4 Ala. 89

tion of gold and United States notes from the circulating medium of the Confederate states,<sup>3</sup> the position of the state on the issue of secession,<sup>4</sup> the events which grew out of the struggle,<sup>5</sup> will be noticed. So the life history of its famous men<sup>6</sup> is part of the common history of a state. But the historical fact should not be such as "concerns individuals or mere local communities."<sup>7</sup> The general increase of land values<sup>8</sup> need not be proved.

*But minor facts of limited general interest<sup>9</sup> cannot be treated as commonly known.*

**§ 798. (B. What Facts are Covered by the Rule; [6] Facts of History; State); Politics.**—The political history of the state, what was the tenure of office of the successive chief magistrates of the state,<sup>1</sup> the date<sup>2</sup> of a general,<sup>3</sup> national,<sup>4</sup> state<sup>5</sup> or congress-

(1870) (contracts made in Confederate money); *Douthitt v. Stinson*, 63 Mo. 268 (1876) (State loyal to the Union); *Simmons v. Trumbo*, 9 W. Va. 358, 364 (1876) (progressive depreciation of Confederate currency; that it never was made legal tender). The action of one of the public officers in making military records of the muster roll of the state's volunteer regiments will be noticed. "It is part of the history of the state of which we must take notice." *Commissioners v. May*, 67 Ind. 562 (1879).

3. *Morris v. Morris*, 58 Ala. 443 (1877). *Riddle v. Hill*, 51 Ala. 224 (1874). *Grant v. Reese*, 94 N. C. 720 (1886); *Wood v. Cooper*, 49 Tenn. (2 Heisk.) 441 (1871). See also *Dillard v. Evans*, 4 Ark. (4 Pike) 175 (1841); *Farwell v. Kennett*, 7 Mo. 595 (1842).

*In Tennessee* it will not be noticed that certain bank notes circulated as money. *Laird v. Folwell*, 57 Tenn. (10 Heisk.) 92 (1872); *State v. Shelton*, 26 Tenn. (7 Humph.) 31 (1846).

4. *Brooke v. Filer*, 35 Ind. 402 (1871); *Hill v. Baker*, 32 Iowa 302, 7 Am. Rep. 193 (1872); *Douthitt v. Stinson*, 63 Mo. 268 (1876).

5. *Board, etc. v. May*, 67 Ind. 562

(1879) (preparation of muster rolls by adjutant-general).

6. *Walden v. Canfield*, 2 Rob. (La.) 466 (1842) (Edward Livingstone); *Sargent v. Lawrence*, 16 Tex. Civ. App. 540, 40 S. W. 1075 (1897) (Sam. Houston); *De Celis v. U. S.*, 13 Ct. Cl. 117 (1877) (John C. Fremont's career in 1846).

7. *McKinnon v. Bliss*, 21 N. Y. 206 (1860).

8. *Hawley v. Johnel*, (Neb. 1906) 106 N. W. 459.

9. *State ex inf. Hadley v. Delmar Jockey Club*, (Mo. 1905) 92 S. W. 185 (contribution by a racing association to agricultural exhibits at state fairs).

1. *State v. Boyd*, 34 Neb. 435, 51 N. W. 964. As to the incumbency of office see *supra*, § 639.

2. *Mills v. Green*, 159 U. S. 651, 16 S. Ct. 132, 40 L. ed. 293 (1895); *Jones v. U. S.*, 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691 (1890); *Hoyt v. Russell*, 117 U. S. 401, 6 S. Ct. 881, 29 L. ed. 914 (1885).

3. **Special and local elections** and their results will not, in the absence of some peculiar reason, be treated as generally known.

*Alabama.*—*Ex parte Reynolds*, 87 Ala. 138, 6 So. 335 (1888); *Grider v.*

sional<sup>6</sup> election; or of a special election held under a general law,<sup>7</sup> and what national,<sup>8</sup> state,<sup>9</sup> county,<sup>10</sup> town,<sup>11</sup> or local officials are to be elected, need not be established by evidence.

**§ 799. (B. What Facts are Covered by the Rule; [6] Facts of History; State; Politics); Great National Parties.**—The general history of the great national parties is a fact of common knowledge. In like manner, their common usages and customs<sup>1</sup> need not be proved by evidence.

Lally, 77 Ala. 422, 54 Am. Rep. 65 (1884).

*Maryland.*—Whitman v. State, 80 Md. 410, 31 Atl. 325 (1895).

*Massachusetts.*—Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610 (1896).

*Mississippi.*—Puckett v. State, 71 Miss. 192, 14 So. 452 (1893).

*Missouri.*—Rousey v. Wood, 47 Mo. App. 465 (1891); State v. Mackin, 41 Mo. App. 99 (1890).

*Virginia.*—Thomas v. Com., 90 Va. 92, 17 S. E. 788 (1893). Where such notice has been taken.

*United States.*—United States v. Johnson, 2 Sawy. (U. S. C. C.) 482 (1873). The *times* legally appointed for holding county and town elections are direct results of legislation of which notice will be taken.

*Indiana.*—Urmston v. State, 73 Ind. 175 (1880). See also Rauch v. Com., 78 Pa. St. 490 (1875).

4. Jackson Co. v. Arnold, 135 Mo. 207, 368 W. 662 (1896) (President of the United States).

5. *Alabama.*—Lewis v. Bruton, 74 Ala. 317, 49 Am. Rep. 816 (1883).

*Iowa.*—State v. Minnick, 15 Iowa 123 (1863).

*Kansas.*—Ellis v. Reddin, 12 Kan. 306 (1873).

*Missouri.*—State v. Flynn, 119 Mo. App. 712, 94 S. W. 543 (1906) (Democrats cast over 10,000 votes); Jackson County v. Arnold, 135 Mo. 207, 36 S. W. 662 (1896).

*New York.*—Taylor v. Rennie, 35 Barb. (N. Y.) 272 (1861).

*United States.*—U. S. v. Morrissey, 32 Fed. 147 (1887). The date of elections in other states are not judicially noticed. Taylor v. Rennie, 35 Barb. (N. Y.) 272 (1861). "The August election is established by law, and the time it is held should be judicially taken notice of." Davis v. Best, 2 Iowa 96 (1855).

6. Lewis v. Bruton, 74 Ala. 317, 49 Am. Rep. 816 (1883).

7. Wampler v. State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829 (1897).

8. Jackson County v. Arnold, 135 Mo. 207, 36 S. W. 662 (1896) (President of the United States).

9. State v. Seibert, 130 Mo. 202, 32 S. W. 670 (1895) (prosecuting attorney); Hizer v. State, 12 Ind. 330 (1859) (governor); State v. Minnick, 15 Iowa 123 (1863) (secretary of state); Ellis v. Reddin, 12 Kan. 306 (1873).

10. Wampler v. State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829 (1897) (county superintendent); Martin v. Aultman, 80 Wis. 150, 49 N. W. 749 (1891) (sheriff). See also Urmston v. State, 73 Ind. 175 (1880).

11. State v. Minnick, 15 Iowa 123 (1863) (township trustee).

1. State v. Metcalf, (S. D. 1904) 67 L. R. A. 331, 100 N. W. 923.

**§ 800. (B. What Facts are Covered by the Rule; [6] Facts of History; State; Politics); Results of Elections.**—So any legal contests as to such results,<sup>1</sup> or any other notorious facts connected with a general election, such as the outcome of national, state<sup>2</sup> or local<sup>3</sup> elections held within the state, will be noticed;—especially as indicated by the official returns,<sup>4</sup> as that one of the great national parties<sup>5</sup> submitted a ticket to the voters. In other words, courts will take judicial notice of general state elections, but not of special elections, unless their result is required by law to be made a matter of record in a court originally having jurisdiction of a cause involving such election.<sup>6</sup>

**§ 801. (B. What Facts are Covered by the Rule; [6] Facts of History; State); Religion.**—Courts will know salient facts in the religious history of the state, as the conflicting views of the various Christian sects,<sup>1</sup> use of the Bible in the public schools,<sup>2</sup> the differences between the King James and Douay versions of the Bible,<sup>3</sup> and the like.

**§ 802. (B. What Facts are Covered by the Rule; [6] Facts of History); County.**—Notice will be taken of the more notorious facts of county history;—as the date of its organization,<sup>1</sup> its

1. *Lewis v. Bruton*, 74 Ala. 317, 49 Am. Rep. 816 (1883).

2. *State v. Swift*, 69 Ind. 505 (1880) (ratification of constitutional amendment); *Kokes v. State*, 55 Neb. 691, 76 N. W. 467 (1898); *State v. South Kingston*, 18 R. I. 258, 273, 27 Atl. 606 (1888) (that many Seventh-day Baptists, living in a certain town, refused to vote at an election held on Saturday); *Thomas v. Com.*, 90 Va. 92, 17 S. E. 788 (1893); *Savage's Case*, 84 Va. 582, 5 S. E. 563 (1888).

3. *Whitman v. State*, 80 Md. 410, 31 Atl. 325 (1894) (local option); *Kokes v. State*, 55 Neb. 691, 76 N. W. 467 (1898) (county elections); *Thomas v. Com.*, 90 Va. 92, 95, 17 S. E. 788 (1893).

4. *In re Denny*, 156 Ind. 104, 59 N. E. 359, 52 L. R. A. 722 (1901); *State v. Stearns*, 72 Minn. 200, 75 N. W. 210 (1898).

5. *State v. Downs*, 148 Ind. 324, 47 N. E. 670 (1897) (Republican).

6. *Gay v. City of Eugene*, (Or. 1909) 100 Pac. 306.

1. *State v. District Board*, 76 Wis. 177 (1890).

2. *Pfeiffer v. Board of Education*, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536 (1898).

3. *State v. District Board*, 76 Wis. 177 (1890).

1. *Buckinghouse v. Gregg*, 19 Ind. 401 (1862); *Ellsworth v. Nelson*, 81 Iowa 57, 46 N. W. 740 (1890). See also *Board of County Com'rs of Sheridan County v. Patrick*, (Wyo. 1909) 104 Pac. 531; *State v. Schnitger*, (Wyo. 1908) 95 Pac. 698. But see *contra*, *Trimble v. Edwards*, 84 Tex. 497, 19 S. W. 772 (1892).

Where incorporation is, as it were, by an act in pais, rather than by statute; for example, where, under a general law, county commissioners



political position during the Civil War,<sup>2</sup> whether at a particular time in that epoch it was within the Union<sup>3</sup> or Confederate<sup>4</sup> lines, or what has been the county seat at different times.<sup>5</sup>

**§ 803. (B. What Facts are Covered by the Rule; [6] Facts of History; County); Officials.**—The incumbents of county offices<sup>1</sup> within the jurisdiction of the court,<sup>2</sup> their terms of office,<sup>3</sup> will also be commonly known.

**§ 804. (B. What Facts are Covered by the Rule; [6] Facts of History; County); Population, Public Buildings, etc.**—The official census population of the county<sup>1</sup> requires no proof.<sup>2</sup> Where, in the statutory classification of counties in point of num-

establish a new county by dividing an old one, the date of so doing must be proved. *Buckinghouse v. Gregg*, 19 Ind. 401 (1862).

2. *Kent v. Chapman*, 18 W. Va. 485 (1881). That the courts of a given county were open in 1861 and 1862 will be judicially known. *Breckenridge Cannel Coal Co. v. Scott*, (Tenn. 1908) 114 S. W. 930.

3. *Dryden v. Stephens*, 19 W. Va. 1 (1881).

4. *Hix v. Hix*, 25 W. Va. 481 (1885).

5. *Ross v. Austill*, 2 Cal. 183 (1852).

1. *Kansas*.—*Ellis v. Reddin*, 12 Kan. 306 (1873) (tax collector).

*Louisiana*.—*Templeton v. Morgan*, 16 La. Ann. 438 (1862) (tax collector).

*Minnesota*.—*State v. Gut*, 13 Minn. 341 (1868) (auditor).

*Missouri*.—*State v. Gates*, 67 Mo. 139 (1877) (commissioner).

*New Jersey*.—*Campbell v. Dewick*, 20 N. J. Eq. 186 (1869) (constable serving as tax collector).

*New York*.—*New York v. Vander-veer*, 86 N. Y. Suppl. 659, 91 App. Div. 303 (1904) (tax collector).

*Pennsylvania*.—*Rauch v. Com.*, 78 Pa. St. 490 (1875) (treasurer).

*Tennessee*.—*Fancher v. De Montegre*, 1 Head (Tenn.) 40 (1858) (register).

*Texas*.—*Burrow v. Brown*, 59 Tex. 457 (1883) (sheriff).

*West Virginia*.—*Greenbrier County v. Livesay*, 6 W. Va. 44 (1873) (supervisor).

*Wisconsin*.—*Martin v. Aultman*, 80 Wis. 150, 49 N. W. 749 (1891) (sheriff).

2. *Arkansas*.—*Webb v. Kelsey*, 66 Ark. 180, 49 S. W. 819 (1899).

*California*.—*Wetherbee v. Dunn*, 32 Cal. 106 (1867).

*Illinois*.—*Thielmann v. Burg*, 73 Ill. 293 (1874).

*New York*.—*Farley v. McConnell*, 7 Lans. 428 (1872).

*South Carolina*.—*Whaley v. Lawton*, 57 S. C. 256, 35 S. E. 558 (1899).

3. *Ragland v. Wynn*, 37 Ala. 32 (1860) (sheriff).

1. Thus, where it is claimed that the population of a county is in reality greater than as given by the census, the fact must be proved. *Funderburg v. Augusta & A. Ry. Co.*, 81 S. C. 141, 61 S. E. 1075 (1908).

Actual population is not known to the court, as matter either of common or judicial knowledge. *Adams v. Elwood*, 176 N. Y. 106, 68 N. E. 126 (1903).

2. *Supra*, § 731.

ber of inhabitants, a particular one may fall at any mentioned date in its history,<sup>3</sup> and other facts relating to population,<sup>4</sup> is probably a matter of judicial cognizance; certainly it is one of common knowledge. The public institutions of a county, such as a military reservation,<sup>5</sup> are matters of common, and, so far as these are a direct result of public laws, also of judicial knowledge.

**§ 805. (B. What Facts are Covered by the Rule; [6] Facts of History; County); Minor Details.**—Minor details, of county history, as whether there is a newspaper printed in it,<sup>1</sup> or ever has been; whether more than one coroner has held office in it,<sup>2</sup> must be proved.

**§ 806. (B. What Facts are Covered by the Rule; [6] Facts of History); Cities, Towns and Small Localities; Commercial Growth.**—Notorious facts of city or town history are, as a rule, inseparable from the more general history of the state or county. Widely known facts in the commercial life of the large cities within a given jurisdiction need not be proved to its courts. Thus, the early difficulties in enlisting capital in the construction of elevated railroads in New York city<sup>1</sup> and the growth of traffic due to their construction,<sup>2</sup> or a general fall in land values,<sup>3</sup> are known to New York courts. In any state, the growth of business in the great commercial centers, and the way in which it shows itself in the character of the buildings constructed,<sup>4</sup> are facts to which a court will not close its eyes. It is part of the common knowledge of all men who in late years have observed the course

3. *Alameda County v. Dalton*, (Cal. 1905) 82 Pac. 1050. Where the jurisdiction of a court or magistrate is dependant upon the population of a county the court takes *judicial* knowledge of the number of persons residing in it. *Ruckert v. Richter*, 127 Mo. App. 664, 106 S. W. 1081 (1908).

4. *Whitly County v. Garry*, 161 Ind. 464, 68 N. E. 1012.

5. *State v. Tully*, (Mont. 1904) 78 Pac. 760.

1. *Atkeson v. Lay*, 115 Mo. 538, 22 S. W. 481 (1893) (that one is published).

2. *Johnson v. Parke*, 12 U. C. C. P. 179 (1860).

1. *Sun Printing, etc., Assoc. v. New*

*York*, 40 N. Y. Suppl. 607, 8 App. Div. 230 (1896).

2. *Bookman v. New York El. R. Co.*, 137 N. Y. 302, 33 N. E. 333 [reversing 60 N. Y. Super. Ct. 493, 17 N. Y. Suppl. 951] (1893); *Streets v. New York El. R. Co.*, 79 Hun (N. Y.) 288, 29 N. Y. Suppl. 356 (1894). See also *Sloane v. New York El. R. Co.*, 137 N. Y. 595, 33 N. E. 335 [reversing 63 Hun 300, 17 N. Y. Suppl. 769] (1893).

3. *Walker v. Walker*, 3 Abb. N. Cas. (N. Y.) 12 (1887).

4. *Denegre v. Walker*, 114 Ill. App. 234 (1904) [decree affirmed, 73 N. E. 409 (1905)] (Chicago).

of events. The absolute and relative population of cities will be known to the courts.<sup>5</sup> In general, any facts in the history of a city which are either the direct result of law or commonly known in the community need not be proved.<sup>6</sup>

**§ 807. (B. What Facts are Covered by the Rule; [6] Facts of History; Cities, Towns and Small Localities); Minor Facts.**

— But in all instances the fact should be of a public or general nature,<sup>1</sup> and those of limited or merely local interest, such as the private grants of land, even of considerable extent,<sup>2</sup> though, like the quality of light furnished at a given time in a particular town<sup>3</sup> there may be an element of public interest, must, as a general rule, be proved<sup>4</sup> in any but a local court.<sup>5</sup>

*The history of legislation* regarding public municipalities will, when relating to facts of notoriety, present the double claim to the court's attention that they are facts both of judicial and of common knowledge. Thus, it will be known that the legislature has favored and authorized certain encroachments on the public streets of cities.<sup>6</sup>

**§ 808. (B. What Facts are Covered by the Rule; [6] Facts of History; Cities, Towns and Small Localities); Officials.—**

In like manner, the court will know who are the principal officials

5. *State ex rel. Crow v. Page*, (Mo. App. 1904) 80 S. W. 912. That New York City is the only municipality in the state whose population exceeds that of a million persons need not be proved. In *Board of Rapid Transit Com'rs*, 112 N. Y. Suppl. 619, 128 App. Div. 103 (1908).

**Date of founding.**—In this manner no proof need be offered as to the age of a city. *Bailliere v. Atlantic Shingle, etc., Co.*, 150 N. C. 627, 64 S. E. 754 (1909) (Wilmington).

6. *Agnew v. Pawnee City*, (Neb. 1907) 113 N. W. 236.

1. *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 633, 724 (1847).

2. *McKinnon v. Bliss*, 21 N. Y. 206 (1860).

3. *Chicago, I. & L. Ry. Co. v. Town of Salem*, (Ind. 1906) 76 N. E. 631, 634.

4. *McKinnon v. Bliss*, 21 N. Y. 206 (1860); *Morris v. Edwards*, 1 Ohio 189 (1822); *Morris v. Harmer*, 7 Pet. (U. S.) 554, 8 L. ed. 781 (1833); *Stainer v. Droitwich*, 1 Salk. 281 (1695). A state court does not judicially know a particular clearing house or the nature of the clearing house certificates issued by it. *Johnson v. State*, (Ala. 1909) 48 So. 792.

5. *Guckenberger v. Dexter*, 8 Ohio S. & C. Pl. Dec. 530, 5 Ohio N. P. 520 (1898) (that bonds of a department of a city government have sold at a premium).

6. *Empire Realty Corp. v. Sayre*, 95 N. Y. Suppl. 371, 107 App. Div. 415 (1905).

of a city<sup>1</sup> in its executive<sup>2</sup> or legislative<sup>3</sup> departments; but the knowledge does not cover the deputies appointed by these officials.<sup>4</sup> The same rule applies to town officers, so far as the facts are notorious;<sup>5</sup> but the reason of the rule excludes town constables.<sup>6</sup>

**§ 809. (*B. What Facts are Covered by the Rule*); (7) Facts of Business.**— Courts regard as commonly known the facts relating to business matters generally accepted as true in the community. “We cannot close our eyes,” say the Supreme Court of the United States, “to the well-known course of business in the country.”<sup>1</sup> This common course of business,<sup>2</sup> its instrumentalities, the distinctions between them usually made in various branches,<sup>3</sup> and the changes which have taken place in it,<sup>4</sup> are matters of such notoriety and generally recognized importance as to warrant, and in a sense, require, that they be treated as matters of common knowledge.<sup>5</sup> That skill is needed for success in professional<sup>6</sup> or business life; that men engaged in commercial

1. The courts of Missouri decline to take judicial notice of the officers of a municipal corporation. *State v. Brown*, 72 Mo. App. 651 656 (1897).

2. *Himmelmann v. Hoadley*, 44 Cal. 213 (1872) (superintendent of streets); *Fleugel v. Lards*, 108 Mich. 682, 66 N. W. 585 (1896) (marshal); *St. Louis v. Greely*, 14 Mo. App. 578 (1883) (street commissioner); *Alford v. State*, 8 Tex. App. 545 (1880) (marshal).

3. *Fox v. Com.*, 81½ Pa. St. 511 (1875) (aldermen).

4. *Alford v. State*, 8 Tex. App. 545 (1880) (deputy marshal). But see *Himmelmann v. Hoadley*, 44 Cal. 213 (1872) (deputy superintendent of streets).

5. *Inglis v. State*, 61 Ind. 212 (1878) (trustees).

6. *Doe v. Blackman*, 1 D. Chipm. (Vt.) 109 (1797).

1. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 185 (1876).

2. *Illinois*.—*Hart v. Washington Park Club*, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492 (1895).

*Indiana*.—*Howe v. Provident Fund Society*, 7 Ind. App. 586, 594, 34 N. E. 830 (1893) (that applications for in-

surance are usually made to agents of the company).

*Michigan*.—*City of Grand Rapids v. Braudy*, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116 (1895) (thieves dispose of stolen articles through pawn brokers and junk dealers).

*Minnesota*.—*Davis v. Kobe*, 36 Minn. 214, 30 N. W. 662, 1 Am. St. 663 (1886) (storing grain in elevators).

*United States*.—*Richards v. Michigan, etc., R. Co.*, 40 Fed. 165 (1889).

3. *City of Kansas City v. Butt*, 88 Mo. App. 237 (1901) (between wholesaler and manufacturer).

4. *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390 (1878); *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 5 Mo. App. 347 [reversed in 73 Mo. 389, 39 Am. Rep. 519] (1878); *Sacalaris v. Eureka, etc., R. Co.*, 18 Nev. 155, 51 Am. Rep. 737 (1883).

5. See *Farmers', etc., Bank v. Butchers', etc., Bank*, 28 N. Y. 431, 26 How. Pr. (N. Y.) (1863).

6. *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192 (1887) (dentistry and medicine). See also *Pennock v. Fuller*, 41 Mich. 153, 32 Am. Rep. 148 (1879).

pursuits consult the recognized sources of business information as, that in nautical affairs, they constantly refer to "American Lloyds," "The Green Book," and the "Record Book," for the standing of ships,<sup>7</sup> or, in giving credit, rely upon the reports of commercial agencies,<sup>8</sup> are too notorious to require proof. The commercial importance of cities,<sup>9</sup> the figures given by the census as to the capital of the country and the form in which it is invested,<sup>10</sup> require no proof. A court will regard as generally known what business it is necessary should be carried on on Sunday.<sup>11</sup>

*Particular facts*, in a limited art and covered by a specific patent is a proper subject for evidence.<sup>12</sup>

*The extent and intimacy* of commercial relations between two ports may be so marked and extensive<sup>13</sup> as to be notorious.

**§ 810. (B. What Facts are Covered by the Rule; [7] Facts of Business); Evidence of Skilled Witness not Required.**—The jury need no expert assistance as to the methods of transacting ordinary business which the average man does or may do, or has occasion to observe understandingly at frequent intervals.<sup>1</sup> For example, general features of the business of selling lumber;<sup>2</sup> or running wires,<sup>2</sup> are too well known to require professional aid, though as to the more technical features of the business a different rule prevails.<sup>4</sup> In like manner, the distinctive duties of bookkeepers,<sup>5</sup> entry clerks and the like, need not, in the average case, be elucidated by skilled witnesses. Ability to conduct busi-

7. *Slacovich v. Oriental Mut. Ins. Co.*, 108 N. Y. 56 (1888).

8. *Furry v. O'Connor*, 1 Ind. App. 573, 579, 28 N. E. 103 (1891); *Gene-see, etc., Bank v. Michigan Barge Co.*, 52 Mich. 164, 17 N. W. 790 (1883); *Eaton, etc., Co. v. Avery*, 83 N. Y. 31 (1880); *Wilmot v. Lyon*, 7 Ohio Civ. Dec. 394 (1897). See also *Holmes v. Harrington*, 20 Mo. App. 661 (1886).

9. *Wight v. Wolff*, 112 Ga. 169, 37 S. E. 395 (1900) (Atlanta and Savannah).

10. *Wasson v. Indianapolis First Nat. Bank*, 107 Ind. 206, 8 N. E. 97 (1886) (national bank stock).

11. *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 555 (1885) (barber's is not necessary); *McCain v. State*, 2

Ga. App. 389, 58 S. E. 550 (1907) (barber is not).

12. *Parsons v. Seelye*, 100 Fed. 452, 40 C. C. A. 484 (1900).

13. *The Elihu Thompson*, (Wash. 1905) 139 Fed. 89.

1. *Georgia R., etc., Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613 (1894).

2. *Baldwin v. St. Louis, etc., R. Co.*, 68 Iowa 37, 25 N. W. 918 (1885) (piling lumber); *Brown v. Double-day*, 61 Vt. 523, 17 Atl. 135 (1889) (piling bark).

3. *Flynn v. Boston Electric Light Co.*, 171 Mass. 395, 50 N. E. 937 (1898) (among trees).

4. *Infra*, § 820.

5. *McKay v. Overton*, 65 Tex. 82 (1885).

ness successfully, capacity to manage employees,<sup>6</sup> require no technically trained observer for their detection.

*Certain of the more specific of these may be stated.*

**§ 811. (B. What Facts are Covered by the Rule; [7] Facts of Business); Agriculture.**—Notorious agricultural facts affecting the nation at large, as, for example, the areas in which certain standard crops have been found to admit of successful cultivation, e. g., that the great grain fields of America lie west of the Hudson,<sup>1</sup> need not be proved. In like manner, a court will take judicial cognizance of the usual course of husbandry in the jurisdiction for which it is sitting;<sup>2</sup>—and of ordinary soil conditions within these limits.<sup>3</sup> The normal times of the year at which the planting<sup>4</sup> and harvesting<sup>5</sup> of standard crops occur in the government for which the court is sitting will be regarded as matters of common knowledge. In a like way, the conditions attending the growth of particular crops, as that rice cannot mature without the use of water,<sup>6</sup> that irrigation of arid lands is necessary and, under certain conditions, feasible,<sup>7</sup> and the ability

6. *Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 So. 46 (1890).

1. *Soper v. Tyler*, 77 Conn. 104, 58 Atl. 699 (1904); *infra*, §§ 887, 1971, 2387.

2. *Alabama*.—*Wetzler v. Kelly & Co.*, 83 Ala. 440, 3 So. 747 (1887).

*Arkansas*.—*Person v. Wright*, 35 Ark. 169 (1879).

*California*.—*Mahoney v. Aurrecochea*, 51 Cal. 429 (1876).

*Indiana*.—*Ross v. Boswell*, 60 Ind. 235 (1877).

*Iowa*.—*Raridan v. Central Iowa R. Co.*, 69 Iowa 527, 530 (1886).

*Minnesota*.—*Prudoehl v. Randall*, 108 Minn. 185, 121 N. W. 913 (1909) (providing fuel).

*Missouri*.—*Garth v. Caldwell*, 72 Mo. 622 (1880).

*Oklahoma*.—*Payne v. McCormick, etc., Co.*, 11 Okla. 318, 66 Pac. 287 (1901).

3. *City of Chicago v. Duffy*, 117 Ill. App. 261 (1904).

4. *Wetzler v. Kelly*, 83 Ala. 440, 3 So. 747 (1887) (cotton); *Person v.*

*Wright*, 35 Ark. 169 (1879); *Abshire v. Mather*, 27 Ind. 381 (1866).

5. *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374 (1853); *Mahoney v. Aurrecochea*, 51 Cal. 429 (1876); *Garth v. Caldwell*, 72 Mo. 622 (1880); *Piano Mfg. Co. v. Cunningham*, 73 Mo. App. 376 (1897).

The general limits of the pasturage season in a particular climate are well known. *Ross v. Boswell*, 60 Ind. 235 (1877).

6. *Barr v. Cardiff*, (Tex. Civ. App. 1903) 75 S. W. 341 (1903).

7. *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. 781 [citing *Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41 (1892); *Judkins v. Elliot*, (Cal. 1886) 12 Pac. 116; *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678 (1893); *Speake v. Hamilton*, 21 Or. 3, 26 Pac. 855 (1890); *Kaler v. Campbell*, 13 Or. 596, 11 Pac. 301] (1886).

Local customs as to irrigation, though sanctioned in mass by a federal statute (*Lewis v. McClure*, 8 Or. 273 [1880]) must be proved.

of certain sections of the country to grow crops,<sup>8</sup> need not be proved. But the precise date of maturity of a crop, variable in this particular, must be shown by evidence.<sup>9</sup>

*Ordinary farm practices*, as using a scythe to cut weeds,<sup>10</sup> being matters of notoriety about which reasonable men do not differ, will be regarded as matters of common knowledge.

*Minor customs*, especially those of a doubtful nature, e. g., leaving the hay-shoots in a barn open<sup>11</sup> must be established by the party who relies upon them.

**§ 812. (B. What Facts are Covered by the Rule; [7] Facts of Business; Agriculture); Animals.**—The names and characteristic qualities and uses of ordinary farm animals,<sup>1</sup> or common instruments of husbandry,<sup>2</sup> are known to the court,—probably as part of its duty to know the meaning of ordinary English words.<sup>3</sup> A judge does not know the management of horses<sup>4</sup>—that a fence which will restrain sheep will also restrain hogs,<sup>5</sup> or that inspection of fresh beef will not show whether it is diseased.<sup>6</sup> Such facts must be proved.

**§ 813. (B. What Facts are Covered by the Rule; [7] Facts of Business; Agriculture); Crops.**—The judge knows at least the name and general character of ordinary farm products. It need not, for example, be proved that fruit crops do not, in cer-

8. *Gatling v. Newell*, 9 Ind. 572, 583 (1857) (that Ohio, Minnesota and Michigan are wheat growing states).

9. *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312 (1866); *Culverhouse v. Worts*, 32 Mo. App. 419 (1888). See also *Gove v. Downer*, 59 Vt. 139, 7 Atl. 463 (1886).

10. *Post v. Chicago, B. & Q. Ry. Co.*, 121 Mo. App. 562, 97 S. W. 233 (1906).

11. *Moellman v. Gieze-Henselmeir Lumber Co.*, (Mo. App. 1908) 114 S. W. 1023.

1. *Shubrick v. State*, 2 S. C. 21 (1870) ("sow"); *State v. Abbott*, 20 Vt. 537 (1848) ("steer").

2. *Hamilton v. People*, 113 Ill. 34 (1885) (hoe). "A hoe, both in popular and legal signification, is *per se* a deadly weapon,—fully as much so

as a loaded pistol or an axe." *Hamilton v. People*, 113 Ill. 34 (1885).

3. *Supra*, § 762.

4. *Chicago City R. Co. v. Smith*, 54 Ill. App. 415, 417 (1894) (the court knows as little about managing horses, refractory or otherwise, as it knows about navigating a steamship in a storm across the Atlantic ocean).

5. *Enders v. McDonald*, 5 Ind. App. 297, 31 N. E. 1056 (1892).

6. *Minnesota v. Barber*, 136 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455 (1890).

1. *Putnam v. St. Louis Southwestern Ry. Co. of Texas*, (Tex. Civ. App. 1906) 94 S. W. 1102 (no pears or apples on trees in January). Courts know that it requires more than a month to raise a crop of cotton. *First Nat. Bank v. Rogers*, (Okla. 1909) 103 Pac. 582. The judge will

tain states, grow in winter.<sup>1</sup> But such knowledge is, as a rule, general and does not involve intimate and thorough acquaintance.<sup>2</sup>

**§ 814. (B. What Facts are Covered by the Rule; [7] Facts of Business; Agriculture); Stock Raising.**—The court knows the custom of cattle owners to depasture unsurveyed public land,<sup>1</sup> and that pasturing on such lands by anyone is slight evidence of possession.<sup>2</sup> That in New Mexico and other parts of the western portion of the American Union owners recognize their cattle, grazing over large tracts of country, only by the marks branded upon them,<sup>3</sup> is too well known to require proof.

**§ 815. (B. What Facts are Covered by the Rule; [7] Facts of Business); Banking.**—“The general course of business in a community, including the universal practice of banks,” is a matter “of which courts may take judicial notice.”<sup>1</sup> The existence of banks in large centers of commercial life need not be proved.<sup>2</sup> In like manner, the hours for banking<sup>3</sup> and general practice of the banking business, so far as it affects or is, for other reasons, ob-

know, as other people do, that at a certain time of the year particular crops have matured. *McCullough v. Rucker*, (Tex. Civ. App. 1908) 115 S. W. 323.

2. “We are not called upon or qualified by any knowledge which we possess to determine the merits or defects of the well-known substances [butter and oleomargarine] which this statute was intended to suppress.” *Northwestern Mfg. Co. v. Chambers*, 58 Mich 381 (1885). How often Johnson grass goes to seed each year is not a matter of common knowledge. *International & G. N. R. Co. v. Voss*, (Tex. Civ. App. 1908) 109 S. W. 984.

1. *Mathews v. Great Northern R. Co.*, 7 N. D. 81, 72 N. W. 1085 (1897); *infra*, §§ 888, 1975, 2446.

2. *Whitney v. U. S.*, 167 U. S. 529, 17 S. Ct. 857, 42 L. ed. 263 (1897).

3. *Terr. v. Denver & R. G. R. Co.*, 203 U. S. 38, 27 S. Ct. 1, 51 L. ed. 78 (1906) [*affirming* (N. M. 1904) 78 Pac. 74].

1. *Hunter v. N. Y.*, etc., R. R., 116

N. Y. 615 (1889); *Merchants' Bank v. Hall*, 83 N. Y. 338 (1881); *Yerkes v. National Bank*, 69 N. Y. 382 (1877); *infra*, § 834.

2. *Lewis, Hubbard & Co. v. Montgomery Supply Co.*, (W. Va. 1906) 52 S. E. 1017.

3. *Salt Springs Nat. Bank v. Burton*, 58 N. Y. 430, 17 Am. Rep. 265 (1874); *Lewis, Hubbard & Co. v. Montgomery Supply Co.*, (W. Va. 1906) 52 S. E. 1017 (in cities and large towns not earlier than 9 A. M.); *Calisher v. Forbes*, L. R. 7 Ch. 109, 41 L. J. Ch. 56, 25 L. T. Rep. N. S. 772, 20 Wkly. Rep. 160 (1871); *Jameson v. Swinton*, 2 Campb. 373, 2 Taunt. 224 (1809); *Hare v. Henty*, 10 C. B. N. S. 65, 7 Jur. N. S. 523, 30 L. J. C. P. 302, 4 L. T. Rep. N. S. 363, 9 Wkly. Rep. 738, 100 E. C. L. 65 (1861); *Parker v. Gordon*, 7 East 385, 6 Esp. 41, 3 Smith K. B. 358, 8 Rev. Rep. 646 (1806). In case of presentment of a negotiable instrument in a foreign jurisdiction, the court cannot take judicial notice of what constitutes reasonable hours of



vious to the general public, will be noticed.<sup>4</sup> Thus, as to the internal affairs of the bank it is commonly known that employees other than the cashier must have access to the money of the bank,<sup>5</sup> that it is customary for banks to renew or extend the obligations of their customers on payment of new discount.<sup>6</sup> In the same way, the general nature of the business done by banks, as collecting mercantile obligations, with collaterals attached,<sup>7</sup> receiving deposits, authenticating certificates of deposit or notes for circulation, certifying cheques,<sup>8</sup> will be regarded as already known. The rights and duties of depositors, as that the depositor is allowed to cheque out his funds,<sup>9</sup> but is expected to know and conform to the usages of the bank,<sup>10</sup> these and minor facts known to the mercantile community<sup>11</sup> will be judicially, i. e., commonly known. The general custom of bankers and others, in connection with the protest of negotiable paper, of observing Sundays and great holidays like Christmas,<sup>12</sup> to present for payment on the day following the third day of grace,<sup>13</sup> stand in the same position. But banking customs distinctly local as allowing grace on instruments not entitled to it by law,<sup>14</sup> or minor specific facts, as whether there is a bank in a particular town,<sup>15</sup> cannot be so treated. A court

a business day there but it is a matter of proof. *Columbian Banking Co. v. Bowen*, (Wis. 1908) 114 N. W. 451.

4. *Agawam Bank v. Strever*, 18 N. Y. 502 (1859). See also *Selleck v. Manhattan Fire Alarm Co.*, 117 N. Y. Suppl. 964 (1909) (use of collateral); *Mason v. Nelson*, 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221 (1908) (discounting bank does not assume certain contracts). Bearer bonds, foreign or English, are known to be negotiable. *Edelstein v. Schuler*, 71 L. J. K. B. 572, [1902] 2 K. B. 144, 87 L. T. 204, 50 W. R. 493, 7 Com. Cas. 172, per Bigham, J.

5. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805 (1885).

6. *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338, 38 Am. Rep. 434 [affirming 18 Hun 176] (1881).

7. *Birmingham First Nat. Bank v. Newport First Nat. Bank*, 116 Ala. 520, 22 So. 976 (1897).

8. *Farmers', etc., Bank v. Butchers', etc., Bank*, 28 N. Y. 425 (1863). The habit of banks to "certify" cheques is known to the courts. *United States v. Heinze*, (N. Y. 1908), 161 Fed. 425.

9. *Munn v. Burch*, 25 Ill. 35 (1860).

10. *American Nat. Bank v. Bushey*, 45 Mich. 135, 7 N. W. 725 (1881).

11. *Citizens' State Bank v. Cowles*, 39 Misc. (N. Y.) 571, 80 N. Y. Suppl. 598 (1903) (New York city cheques are in demand and command a premium).

12. *Sasscer v. Farmers' Bank*, 4 Md. 409 (1853).

13. *Columbia Bank v. Fitzhugh*, 1 Harr. & G. (Md.) 239 (1827).

14. *Tranter v. Hibbard*, 108 Ky. 265, 56 S. W. 169, 21 Ky. L. Rep. 1710 (1900) (payable in another state); *Goddin v. Shipley*, 7 B. Mon. (Ky.) 575 (1847).

15. *Bartholomew v. Bank*, 18 Wash. 683, 62 Pac. 239 (1898).

will not treat as common knowledge the fact that "bills" means bank bills.<sup>16</sup>

§ 816. (*B. What Facts are Covered by the Rule ; [7] Facts of Business*); Building Trades.—The nature, quality<sup>1</sup> and use of common building materials, including those used in paving,<sup>2</sup> need not be proved. That certain of these articles are not kept in stock but must be specially prepared for use as needed,<sup>3</sup> has also been treated as matter of common knowledge.

*Facts of local interest or knowledge*, as that "waterstone" means the same as "cobblestone,"<sup>4</sup> must be proved.

*Sanitation*.—A court will know, as a matter of common knowledge, the purposes in connection with building construction of doing certain acts such as underdraining cellars or subcellars with tile,<sup>5</sup> designed for improving hygienic conditions. Courts, for example, take judicial notice of the reason for placing perforated pipes in cellars and subcellars and connecting them with valves on the outside of the building.<sup>6</sup>

§ 817. (*B. What Facts are Covered by the Rule ; [7] Facts of Business*); Education.—Notorious facts relating to the interests of education are commonly known to the courts. Thus, the existence of the great national institutions of learning<sup>1</sup> or their objects, need not be proved. The well-known history of educational work, as that methods of instruction change from time to time<sup>2</sup> and the various branches, as the kindergarten,<sup>3</sup> through

16. *Hart v. State*, 55 Ind. 599, 601 (1877).

1. *Conde v. Schenectady*, 29 N. Y. App. Div. 604, 51 N. Y. Suppl. 854 (1898) (best quality of lake asphaltum "requires use of product of Lake Asphaltum in island of Trinidad"); *infra*, §§ 883, 1958, 2382.

2. *Duby v. Jackson*, 69 Minn. 342, 72 N. W. 568 (1897); *Doyle v. New York*, 69 N. Y. Suppl. 120, 58 App. Div. 588 (1901); *Conde v. Schenectady*, 51 N. Y. Suppl. 854, 29 App. Div. 604 (1898).

3. *Duby v. Jackson*, 69 Minn. 342, 72 N. W. 568 (1897) ("crushed stone").

4. *Doyle v. New York*, 69 N. Y. Suppl. 120, 58 App. Div. 588 (1901).

5. *Lantry v. Hoffman*, 55 Misc. (N. Y.) 261, 105 N. Y. Suppl. 353 (1907).

6. *Lantry v. Hoffman*, 109 N. Y. Suppl. 1135, 124 App. Div. 937 (1908) [*affirmed*, 105 N. Y. Suppl. 353, 55 Misc. 261 (1907)].

1. *In re Oxford Rate Poor-Rate*, 8 E. & B. 184, 92 E. C. L. 184 (1857) (University of Oxford). The State University will be known to be at Eugene. *Mayhew v. City of Eugene*, (Or. 1909) 104 Pac. 727.

2. *People v. Maxwell*, 84 N. Y. Suppl. 947, 87 App. Div. 391 (1903) (25 years). The court will know, as a matter of common knowledge, that by reason of these changes, one competent to teach 20 years ago is not necessarily so at the present time. *People v. Maxwell*, 84 N. Y. Suppl. 947, 87 App. Div. 391 (1903).

3. *Sinnott v. Colombet*, 107 Colo. 187, 40 Pac. 329 (1895).

which educational work is customarily carried on, will be regarded as well-established facts.

**§ 818. (B. What Facts are Covered by the Rule; [7] Facts of Business); Insurance; Fire.**—Common methods of conducting the business of fire insurance,<sup>1</sup> as that applicants, as a rule, resort to the representatives of the insurance companies in order to place their risks,<sup>2</sup> will be treated as commonly known. So of other usual incidents of the business, as that the risk from fire is greater in November than in June.<sup>3</sup> Proof will not be required that certain acts which obviously increase the risk assumed by insurance companies as the storage of explosives<sup>4</sup> or leaving buildings vacant,<sup>5</sup> have that effect.

**§ 819. (B. What Facts are Covered by the Rule; [7] Facts of Business; Insurance); Life.**—Notorious facts regarding the business of life insurance, as that formal application accompanied by a medical examination of the applicant is usually required,<sup>1</sup> is part of the common knowledge of the community. In rendering a particular life uninsurable, the effect of certain habits, such as habitual drunkenness,<sup>2</sup> need not be proved, unless it be a constituent fact.

**§ 820. (B. What Facts are Covered by the Rule; [7] Facts of Business); Mechanic Arts.**—Long-established and familiar methods of achieving mechanical results, are well known in the community and need not, therefore, be proved by evidence. The fact is of constant use in patent causes in respect to the "state of the art" in any given connection. Thus, a court will know for itself as to the ordinary operation of an ice cream freezer,<sup>1</sup> the

1. *Williams v. Niagara F. Ins. Co.*, 50 Iowa 561 (1879) (adjusting loss); *Perkins v. Augusta Ins. Co.*, 10 Gray (Mass.) 312, 77 Am. Dec. 654 (1858); *infra*, §§ 890, 1976, 2393.

2. *Howe v. Provident Fund Society*, 7 Ind. App. 586, 594, 34 N. E. 830 (1893).

3. *Barry v. Boston, etc., Ins. Co.*, 62 Mich. 424, 29 N. W. 31 (1886).

4. *Belcher v. Capital F. Ins. Co.*, 78 Minn. 240, 80 N. W. 971 (1899).

5. *White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167 (1891).

1. *Taylor v. Grand Lodge A. O. U. W.*, 101 Minn. 72, 111 N. W. 919 (1907).

**Customary methods of conducting the business of life insurance** need not be proved. Thus, it is a matter of common knowledge that life insurance is solicited by agents. *Modern Woodmen of America v. Lawson*, (Va. 1909) 65 S. E. 509 (use of agents); *infra*, §§ 891, 1976, 2396.

2. *Rawls v. American Mut. L. Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280 (1863).

1. *Brown v. Piper*, 91 U. S. 37 (1875); *supra*, § 765; *infra*, §§ 902, 1988, 2404.

effect of a winnowing machine in separating chaff and other light substances of little or no value from grain and the like.<sup>2</sup> In general, courts will, in patent and other appropriate cases, notice, as facts of common knowledge devices in common use which may be similar to or identical with in point of principle, those utilized in a given device.<sup>3</sup> The general nature of the means employed for extracting crude petroleum and natural gas from the soil, and the necessity of boring in order to detect their presence in the soil at a particular point,<sup>4</sup> are already known to the court.

*Dangerous Devices.*—Where a machine or mechanical appliance is notoriously dangerous or harmless<sup>5</sup> the court will know it. Where, however, an act is not obviously and palpably dangerous, the fact of danger cannot be taken to be one of common knowledge.<sup>6</sup>

§ 821. (*B. What Facts are Covered by the Rule; [7] Facts of Business*); *Mercantile Agencies.*—The customary method of conducting the business of a mercantile agency<sup>1</sup> will be known to the court.

§ 822. (*B. What Facts are Covered by the Rule; [7] Facts of Business*); *Mining.*—The business of mining and the methods and instrumentalities by which it is customarily conducted are familiar to communities in which mining is a prominent feature of industrial life.<sup>1</sup> The court, therefore, may dispense with proof of them, or of the common use of hoppers, chutes<sup>2</sup> and other apparatus or workings.<sup>3</sup> Usages common to all districts with regard to the location of claims, as designating mines by a serial

2. *Baker v. F. A. Duncombe Mfg. Co.*, 146 Fed. 744, 77 C. C. A. 234 (1906).

3. *Baker v. F. A. Duncombe Mfg. Co.*, 146 Fed. 744, 77 C. C. A. 234 (1906).

4. *State v. Indianapolis Gas Co.*, (Ind. 1904) 71 N. E. 139.

5. *Dolan v. Callender, McAuslan & Troup Co.*, 26 R. I. 198, 58 Atl. 655 (1904) (double-swing doors).

6. *Herlihy v. Little*, 200 Mass. 284. 86 N. E. 294 (1908) (full shipper of elevator).

1. *Holmes v. Harrington*, 20 Mo. App. 661 (1886); *Wilmot v. Lyon*, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394 (1888); *Ernst v. Cohn*,

(Tenn. Ch. App. 1900) 62 S. W. 186.

1. *Fox v. Hale, etc.*, *Silver Min. Co.*, 108 Cal. 369, 41 Pac. 308 (1895); *supra*, § 795; *infra*, §§ 908, 2032. 2430.

2. *Black Diamond Coal-Min. Co. v. Excelsior Coal Co.*, 156 U. S. 611, 15 S. Ct. 482, 39 L. ed. 553 (1895).

3. "The true meaning of such expressions as shaft, tunnels, levels, chutes, slopes, uprisings, crossings, inclines, etc., signifies instrumentalities whereby and through which such mines are opened, developed, prospected, improved and worked," need not be proved. *Hines v. Miller*, 122 Cal. 517, 519, 55 Pac. 401 (1898).

number above or below a common base, known as "No. 1,"<sup>4</sup> need not be proved. The ordinary dangers of mining, as that coal mines generate gas,<sup>5</sup> or that it is inherently dangerous to use dynamite in tunnelling under a closely populated district,<sup>6</sup> will be known to the court. No proof need be offered that mining for certain minerals or other valuable products<sup>7</sup> is conducted in the court's jurisdiction.

§ 823. (*B. What Facts are Covered by the Rule; [7] Facts of Business*); *Minor Business Facts*.— But local usages,<sup>1</sup> as those relating to the location of claims in a particular district,<sup>2</sup> even when confirmed, in mass, by a public statute,<sup>3</sup> must be established by evidence; as also the minutiae or technicalities of the business which are matters distinctly and solely of trade skill. The court, for example, does not know how a salt well should be bored.<sup>4</sup> In Florida, where a leading industry is the production of rosin and turpentine, otherwise known as "naval stores," courts "judicially" know that these products are manufactured from gum extracted from pine trees; and that the crude gum is called "dip" because dipped up from "boxes" cut into the growing pine trees near the ground.<sup>5</sup> The minor business facts which a court will regard as matters of common knowledge may well occupy a wide range. Thus, in mercantile affairs, the regular course of business is a matter of common knowledge.<sup>6</sup> In like manner facts com-

4. *Butler v. Good Enough Min. Co.*, 1 Alaska 246 (1901). A method of numbering mining claims common to all the districts of a state may be noticed as a matter of common knowledge. *Butler v. Good Enough Min. Co.*, 1 Alaska 246 (1901).

5. *Poor v. Watson*, 92 Mo. App. 89 (1902).

6. *City of Chicago v. Murdoch*, 113 Ill. App. 656 (1904).

7. *State v. Jacksonville*, (Fla. 1904) 37 So. 652 (phosphate).

1. *California*.—*Harvey v. Ryan*, 42 Cal. 626 (1872).

*Colorado*.—*Sullivan v. Hense*, 2 Colo. 424 (1874)

*Montana*.—*King v. Edwards*, 1 Mont. 235 (1870)

*Nevada*.—*Poujade v. Ryan*, 21 Nev. 449, 33 Pac. 659 (1893).

*United States*.—*Meydenbauer v. Stevens*, 78 Fed. 787 (1897).

2. *Poujade v. Ryan*, 21 Nev. 449, 33 Pac. 659 (1893).

3. *Sullivan v. Hense* 2 Colo. 424, 429 (1874).

4. *Clark v. Babcock*, 23 Mich. 164 (1871). It cannot be known that the cutting and boxing of pine trees for turpentine, destroys their value as timber, such not being a uniform result of experience. *Board of Sup'rs of Hancock Co. v. Imperial Naval Stores Co.*, (Miss. 1908) 47 So. 177.

5. *Knight v. Empire Land Co.*, (Fla. 1908) 45 So. 1025.

6. *Grant v. Powers Dry Goods Co.*, (S. D. 1909) 121 N. W. 95 (mortgaging entire stock). The general deterioration of stock will be noticed. *People v. State Board of Tax Com'rs*,

monly known in the paving trade, e. g., that certain pavements are not laid during the winter months,<sup>7</sup> need not be established by evidence. A court cannot take judicial knowledge of the different methods or systems of bookkeeping.<sup>8</sup>

**§ 824. (B. What Facts are Covered by the Rule; [7] Facts of Business); Professional Services; Legal.**—The court knows without proof what occupations are properly classified as professions.<sup>1</sup> As members of the legal profession judges are familiar with the usual methods of conducting legal business. It will not be necessary, for example, to prove that in order to collect a note, an attorney is obliged to render valuable services,<sup>2</sup> the general range of compensation for professional services,<sup>3</sup> or as to what is the usual course of conveyancing.<sup>4</sup> But unusual matters, as the meaning of the phrase “cost book principle,” when applied to mining,<sup>5</sup> cannot be so treated.

196 N. Y. 39, 89 N. E. 581 (1909) [*order modified*, 112 N. Y. Suppl. 392, 128 App. Div. 13 (1908)]; [*reargument denied*, 197 N. Y. 33, 90 N. E. 112]. The rate of interest necessary to attract investors is known to the courts. *People v. State Board of Tax Com'rs*, 196 N. Y. 39, 89 N. E. 581 (1909) [*order modified*, 112 N. Y. Suppl. 392, 128 App. Div. 13 (1908)]; [*reargument denied*, 197 N. Y. 33, 90 N. E. 112].

“Cost book principle.”—The court originally declined to take judicial notice of the nature of an association on the cost-book principle. *In re Bodmin United Mines*, 23 Beav. 370, 26 L. J. Ch. 570 (1857), Romilly, M. R. The constitution of these associations has, however, since been recognized by the legislature in *Stannaries Act*, 1869, 32 & 33 V. c. 19.

**In England** “when a general usage has been judicially ascertained and established, it becomes part of the law merchant which courts of justice are bound to recognize.” *Brandao v. Barnett*, 3 C. B. 519, 530 (1857), *per* Ld. Campbell, C. See also *Edelstein v. Schuler*, 2 K. B. 144 (1902) (bonds to bearer); *Ex parte Reynolds*, 15 Q. B. D. 184, 185 (1885).

*per* Brett, M. R.; *Lethulier's Case*, 2 Salk. 443 (1822).

7. *Barber Asphalt Pav. Co. v. City of Wabash*, (Ind. App. 1909) 86 N. E. 1034.

8. *Walker Bros. v. Skliris*, 34 Utah 353, 98 Pac. 114 (1908).

1. *O'Reilly v. Erlanger*, 95 N. Y. Suppl. 760, 108 App. Div. 318 (1905); *infra*, § 910.

2. *Stephenson v. Allison*, 123 Ala. 439, 26 So. 290 (1898).

3. *Gates v. McClenahan*, (Iowa 1905) 103 N. W. 969. No further evidence than the record of the proceedings will be required. *Pearce v. Albright*, (N. Mex. 1904) 76 Pac. 286. It will be noticed that a charge of \$50 for collecting \$268.26 is a reasonable attorney-fee. *Warnock v. Itawis*, 38 Wash. 144, 80 Pac. 297 (1905).

4. *Doe v. Hilder*, 2 B. & Ald. 782, 21 Rev. Rep. 488 (1819); *Rowe v. Grenfel*, R. & M. 396, 27 Rev. Rep. 761, 21 E. C. L. 778 (1824); *Willoughby v. Willoughby*, 1 T. R. 763, 1 Rev. Rep. 397 (1787).

5. *Matter of Pennant, etc., Consol. Lead Min. Co.*, 4 De G. M. & G. 285, 2 Eq. Rep. 944, 22 L. J. Ch. 692, 2 Wkly. Rep. 282, 43 Eng. Reprint 517 (1854).

§ 825. (*B. What Facts are Covered by the Rule; [7] Facts of Business; Professional Services*); Medical.—A court will treat medical terms, even of a technical class, requiring resort to standard medical works necessary,<sup>1</sup> as matters of common knowledge.

§ 826. (*B. What Facts are Covered by the Rule; [7] Facts of Business*); Railroadings.—In matter of fact, moreover, the community is familiar with the certain general, obvious facts, concerning the construction and operation of railroads;—and, as part of the community, judges and juries take them for granted as among the data of a judicial investigation. The general features of the railroad-operating business<sup>1</sup> require no proof by skilled witnesses.

§ 827. (*B. What Facts are Covered by the Rule; [7] Facts of Business; Railroadings*); Construction.—Among these facts are those usually attending the laying out of such roads;—as that its lines are located and grades established by the company's engineers.<sup>1</sup>

*But minor details* of construction, as that a railroad is fenced in as the roadbed is built<sup>2</sup> the court may reasonably require should be proved.

§ 828. (*B. What Facts are Covered by the Rule*); [7] *Facts of Business; Railroadings*); Customs.—Business customs established in case of railroad transportation, as that of carrying commercial samples as personal baggage,<sup>1</sup> may well be regarded as matters of common knowledge.

1. *State v. Wilhite*, (Iowa 1907) 109 N. W. 730 ("pathological neurology"); *supra*, § 766; *infra*, §§ 911, 1991, 2413.

1. *Illinois Cent. R. Co. v. People*, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119 (1892) (running passenger trains); *Moore v. Chicago, etc., Ry. Co.*, 65 Iowa 505, 22 N. W. 650, 54 Am. Rep. 26 (1885) (qualification of baggage master); *Stumore v. Shaw*, 68 Md. 11, 11 Atl. 360, 6 Am. St. Rep. 412 (1887) (freighting); *Nutt v. Southern Pac. R. Co.*, 25 Or. 291, 35 Pac. 653 (1894) (unloading drain

tiles); *supra*, § 796; *infra*, §§ 919, 2035, 2435.

1. *Alabama, etc., R. Co. v. Coskry*, 92 Ala. 254, 9 So. 202 (1890). In like manner the art of measuring railroad embankments, need not be proved. *Scanlan v. Ry. Co.*, (Cal. 1898) 55 Pac. 694.

2. *Chicago & M. Electric R. Co. v. Diver*, 213 Ill. 26, 72 N. E. 758 (1904).

1. *Fleischman, Morris & Co. v. Southern Ry.*, 76 S. C. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519 (1907).

*General facts in relation to railroad operation*, as that a road engaged in interstate commerce may operate certain trains entirely within the state,<sup>2</sup> will be treated as notorious. The practice of trainmen to call out the name of the station, and the effect of such a notice in constituting an invitation to alight<sup>3</sup> are known to the judge.

**§ 829. (B. What Facts are Covered by the Rule; [7] Facts of Business; Railroadings); Equipment.**—So facts relating to general equipment, as, for example, the method of hanging lamps on cars,<sup>1</sup> the position and object of the “cow-catcher,”<sup>2</sup> or the office and effect of lanterns on switches.<sup>3</sup> Facts notoriously demonstrated by railroad experience, as that no device has yet been invented which *completely* prevents the escape of sparks,<sup>4</sup> need not be proved, while it is easily possible to construct one which will prevent the escape of *some* sparks<sup>5</sup> may be taken for granted.

*Maintenance.*—Facts relating to the maintenance of the track and roadbed;—as that sectionmen burn brush growing along the roadbed at certain seasons of the year,<sup>6</sup> need not be proved.

**§ 830. (B. What Facts are Covered by the Rule; [7] Facts of Business; Railroadings); Operation.**—Salient facts relating to the operation of the road as a whole;—as that the successful management of a railroad requires the use of the telegraph,<sup>1</sup> that trains are directed and controlled by the owners of the road,<sup>2</sup> that it is usual to separate freight from passenger trains,<sup>3</sup> will be

2. U. S. v. Adair, 152 Fed. 737 (1907).

3. Bridges v. North London Ry. Co., L. R. 6 Q. B. 377, per Willis, J.

1. Lamson Consol. Service Co. v. Seigel-Cooper Co., 106 Fed. 734 (1901).

2. San Antonio & A. P. Ry. Co. v. Mertink, (Tex. Civ. App. 1907) 102 S. W. 153 [reversed in 105 S. W. 485].

3. Southern Ry. Co. v. Blanford's Adm'r, (Va. 1906) 54 S. E. 1.

4. White v. New York Cent. & H. R. R. Co., 181 N. Y. 577, 74 N. E. 1126 (1905); Menominee River Sash, etc., Co. v. Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176 (1895).

5. White v. New York Cent. & H.

R. R. Co., 85 N. Y. Suppl. 497, 90 App. Div. 356 (1904).

6. Baxter v. Great Northern R. Co., 73 Minn. 189, 75 N. W. 1114 (1898).

1. Youree v. Vicksburg, etc., R. Co., 110 La. 791, 34 So. 779 (1903); State v. Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502 (1892).

2. South, etc., R. Co. v. Pilgreen, 62 Ala. 305 (1878); Evansville, etc., R. Co. v. Smith, 65 Ind. 92 (1878); Slater v. Jewett, 85 N. Y. 61, 29 Am. Rep. 627 (1881). See also Pittsburg, etc., R. Co. v. Callaghan, 50 Ill. App. 676 (1893).

3. Atchison, etc., R. Co. v. Headland, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822 (1893).



accepted as true without proof. In like manner, circumstances widely known relating to the general nature of the relations between the company and its employees, for example, the effect of a "clearance card"<sup>4</sup> and the general duties of these employees to the company,<sup>5</sup> each other and the public, will be regarded as notorious;—especially, perhaps, in case of such as conductors,<sup>6</sup> ticket or station<sup>7</sup> agents, whose duties bring them into immediate relations to the public.<sup>8</sup> But the minutiae of railroad regulation, such as the time of the arrival and departure of trains,<sup>9</sup> the running time between places on the schedule,<sup>10</sup> the powers and duties

4. *McDonald v. Illinois Cent. R. Co.*, 187 Ill. 529, 58 N. E. 463 (1900); *Cleveland, etc., R. Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811, 66 Am. St. Rep. 296, 62 L. R. A. 922 (1898) (railroad custom).

5. *Galveston, H. & H. R. Co. v. Scott*, (Tex. Civ. App. 1904) 79 S. W. 642 (conductor to eject persons not paying fare).

6. *Chicago, M. & St. P. Ry. Co. v. Anderson*, (Minn. 1909) 168 Fed. 901, 94 C. C. A. 241 (conductors duties).

The habit of the conductors of passenger trains to enter and leave trains while in motion has been noticed. *Daily v. Preferred Masonic, etc., Ass'n*, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171 (1894).

7. *Brown v. Minneapolis, etc., R. Co.*, 18 N. W. 834 (1884).

8. *District of Columbia*.—*Dye v. Virginia Midland R. Co.*, 20 D. C. 63 (1891).

*Michigan*.—*Dailey v. Preferred Masonic, etc., Ass'n*, 102 Mich. 289, 57 N. W. 184 (1894).

*Mississippi*.—*Mobile, etc., R. Co. v. Stinson*, 74 Miss. 453, 21 So. 14, 522 (1896) (duty of section foreman to keep right of way in suitable condition).

*Missouri*.—*Travers v. Kansas Pac. R. Co.*, 63 Mo. 421 (1876).

*United States*.—*Condran v. Chicago, etc., R. Co.*, 67 Fed. 522, 523 (1895).

The duties of a passenger brakeman

must, it is said, be proved. *Cleveland, etc., R. Co. v. McLean*, 1 Ohio Cir. Ct. 112, 1 Ohio Cir. Dec. 67 (1885). This has been denied. *Matchett v. R. Co.*, 132 Ind. 334, 31 N. E. 792 (1892). The authority of a brakeman to eject trespassers will not be judicially noticed.

*Illinois*.—*Illinois Cent. R. Co. v. King*, 179 Ill. 91, 53 N. E. 552, 553 (1899).

*Indiana*.—*Lake Shore, etc., R. Co. v. Peterson*, 144 Ind. 214, 42 N. E. 480 (1895).

*Iowa*.—*Marion v. Chicago, etc., R. Co.*, 59 Iowa 428, 13 N. W. 415 (1882).

*Missouri*.—*Farber v. Missouri Pac. R. Co.*, 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350 (1893).

*Pennsylvania*.—*Cauley v. Pittsburg, etc., R. Co.*, 98 Pa. St. 498 (1881).

*Texas*.—*International, etc., R. Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039 (1891).

*West Virginia*.—*Bess v. Chesapeake, etc., R. Co.*, 35 W. Va. 492, 14 S. E. 234 (1891). The customary duties of Pullman car porters and brakemen in assisting passengers to leave or enter trains are matters of notoriety. *Gannon v. Chicago, R. I. & P. Ry. Co.*, (Iowa 1908) 117 N. W. 966.

9. *Bishop v. Covenant Mut. L. Ins. Co.*, 85 Mo. App. 302 (1900).

10. *Wiggins v. Burkham*, 10 Wall. (U. S.) 129, 19 L. ed. 884 (1869).

of officers, like the superintendent,<sup>11</sup> general manager,<sup>12</sup> road-master<sup>13</sup> or yardmaster,<sup>14</sup> which rather concern the internal management of the company than directly affect the traveling public, must be proved. The general time system adopted in the railroad of a jurisdiction, if long established, need not be proved.<sup>15</sup>

**§ 831. (B. What Facts are Covered by the Rule; [7] Facts of Business; Railroad; Operation); Freight Transportation.—**

In like manner usual incidents in the carrying of freight; — as that it is customary to haul the cars of other roads,<sup>1</sup> that in the actual operation of freight trains, there is, of necessity, more or less oscillation or jerking,<sup>2</sup> and that it is frequently necessary for trainmen to walk ahead of trains while in motion to throw switches or to couple or uncouple the cars while they are moving,<sup>3</sup> will be taken as commonly known.

11. *Southern R. Co. v. Hagan*, 103 Ga. 564, 29 S. E. 760 (1897) (in a particular town); *Brown v. Missouri*, etc., R. Co., 67 Mo. 122 (1877).

12. For ordering medical aid to a person injured by the operation of the road the superintendent or general manager will be known to be the agent of the company. *Louisville*, etc., R. Co. v. *McVay*, 98 Ind. 391, 49 Am. Rep. 770 (1884); *Union Pac. R. Co. v. Winterbotham*, 52 Kan. 433, 34 Pac. 1052 (1893); *Pacific R. Co. v. Thomas*, 19 Kan. 256 (1877); *Sax v. Detroit*, etc., R. Co., 125 Mich. 252, 84 N. W. 314 (1900); *Sacalaris v. Eureka*, etc., R. Co., 18 Nev. 155, 1 Pac. 835 (1883).

13. *Louisville*, etc., R. Co. v. *McVay*, 98 Ind. 391, 49 Am. Rep. 70 (1884) (as to authority, to contract for medical attendance and nursing of an injured person).

14. *Highland Ave.*, etc., R. Co. v. *Walters*, 91 Ala. 435, 8 So. 357 (1890) (place of duty is on footboard in front of switching engine).

15. *Orvik v. Casselman*, (N. D. 1905) 105 N. W. 1105.

1. *Louisville*, etc., R. Co. v. *Boland*, 96 Ala. 626, 11 So. 667, 18 L. R. A. 260 (1892); *Hart v. Ogdensburg*, etc.,

R. Co., 67 Hun (N. Y.) 556, 52 N. Y. St. Rep. 799 (1893).

2. *Illinois Cent. R. Co. v. Green*, 81 Ill. 19 (1875); *Chicago*, etc., R. Co. v. *Hazzard*, 26 Ill. 373 (1861); *President*, etc. v. *Cason*, 72 Md. 377, 20 Atl. 113 (1890); *Siner v. Great Western R. Co.*, L. R. 4 Exch. 117 (1869). See also *Moore v. Saginaw*, etc., R. Co., 115 Mich. 103, 72 N. W. 1112 (1897); *Hite v. Metropolitan*, etc., R. Co., 130 Mo. 132, 31 S. W. 262 (1895).

3. *Indianapolis*, etc., R. Co. v. *Clay*, 4 Ind. App. 282, 28 N. E. 567 (1891). See also *New York Cent. & H. R. R. Co. v. Williams*, 118 N. Y. Suppl. 785, 64 Misc. 15 (1909) (collecting freight money). A court may judicially know the distance between two important cities in the United States and the approximate length of time required for freight transportation between them. *Philadelphia*, B. & W. R. Co. v. *Diffendal*, 109 Md. 494, 72 Atl. 193 (1909) [rehearing denied, 109 Md. 494, 72 Atl. 458 (1909)].

**Grain transportation in Chicago.—** It is a matter of common knowledge that grain transported to the city of Chicago may be transferred by means of the belt-roads to any warehouse in

*Details, of a minor or technical nature, as whether a freight train, under given conditions, can<sup>4</sup> or cannot<sup>5</sup> be stopped without a jerk, require proof.*

**§ 832. (B. What Facts are Covered by the Rule; [7] Facts of Business; Railroading; Operation); Passenger Service.**---

So the habits of the public in their use of railroad facilities,<sup>1</sup> the dangers ordinarily attendant upon their operation<sup>2</sup> and how these may be eliminated or diminished;<sup>3</sup> need not be proved. Facts of notoriety concerning the carrying of passengers,<sup>4</sup> that trains designed for their conveyance move at a high rate of speed<sup>5</sup> and that it is necessary that they should do so,<sup>6</sup> may be taken as commonly known.

*Safety of Travel.*—But a court has declined to know within what distance a passenger train going at a certain rate of speed can be stopped.<sup>7</sup> And courts have declined partly perhaps because of the *res gestæ* or constituent<sup>8</sup> nature of the fact to notice that operating a train at a particular rate of speed is dangerous;<sup>9</sup> or,

any part of the city. *People v. Illinois Cent. R. Co.*, 233 Ill. 378, 84 N. E. 368 (1908); *People v. Chicago, B. & Q. R. Co.*, 233 Ill. 378, 84 N. E. 368 (1908); *People v. Chicago, R. I. & P. Ry. Co.*, 233 Ill. 378, 84 N. E. 368 (1908).

4. *Moore v. Saginaw, etc., R. Co.*, 115 Mich. 103, 72 N. W. 1112 (1897).

5. *Jonas v. Long Island R. Co.*, 21 Misc. (N. Y.) 306, 47 N. Y. Suppl. 149 (1897).

1. *Leary v. Fitchburg Ry. Co.*, 173 Mass. 373, 53 N. E. 817 (1899) (custom in alighting from cars). It need not be proved to a court that more passengers and other persons frequent a station in a large city than in a small town. *Cincinnati, N. O. & T. P. Ry. Co. v. Harrod's Adm'r*, (Ky. 1909) 115 S. W. 699. Courts know that a passenger need not retire beyond the range of flying cinders to escape them. He can effectually accomplish the same result simply by shading his eyes. *Houston & T. C. Ry. Co. v. Pollock*, (Tex. Civ. App. 1909) 115 S. W. 843.

2. *Louisville, etc., R. Co. v. Cos-*

*tello*, 9 Ind. App. 462, 36 N. E. 299 (1893); *Cincinnati, etc., R. Co. v. Davis*, 126 Ind. 99, 25 N. E. 878 (1890); *Union Pac. R. Co. v. Winterbotham*, 52 Kan. 433, 34 Pac. 1052 (1893).

3. *Richmond Union Pass. R. Co. v. Richmond, etc., R. Co.*, 96 Va. 670, 32 S. E. 787 (1899) (establishing gates and flagman at dangerous crossing).

4. *Pittsburg, etc., R. Co. v. Callaghan*, 50 Ill. App. 676, 681 (1893). *Hoskins v. Northern Pac. Ry. Co.*, 39 Mont. 394, 102 Pac. 988 (1909) (late trains do not follow time schedule).

5. *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274 (1872); *Wiggins v. Burkham*, 10 Wall. (U. S.) 129, 19 L. ed. 884 (1869).

6. *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274 (1872).

7. *Southern Ry. Co. v. Gullatt*, (Ala. 1907) 43 So. 577.

8. *Supra*, § 47.

9. *Texas & N. O. R. Co. v. Langham*, (Tex. Civ. App. 1906) 95 S. W. 686 (50-60 miles an hour).

on the other hand, is not hazardous. What are safe speed limits for passenger trains run outside of a city,<sup>10</sup> or what is a suitable length of stop at a small station,<sup>11</sup> have been treated as matters of common knowledge.

*The habits of the traveling public* will, so far as notorious, be known to the courts. It will not, for example, be necessary to prove the frequency with which stop-over privileges, unlimited transfers and the like, are usually claimed.<sup>12</sup>

**§ 833. (B. What Facts are Covered by the Rule; [7] Facts of Business); Real Estate.**—The fact is commonly known that persons frequently buy real estate with the expectation of reselling at an advance before they may be compelled to accept title.<sup>1</sup> While the general customs of doing business at the land office are known,<sup>2</sup> local usages regarding the location of land<sup>3</sup> must be proved. The weight of authority seems in favor of the proposition that the customs of the country relating to the appropriation of water rights for irrigation or other purposes,<sup>4</sup> is a matter of common notoriety;—though there is authority to the contrary.<sup>5</sup> The general price of land may be so well known as to dispense with proof,<sup>6</sup> and it is said that an obvious increase<sup>7</sup> or decrease in land values will be noticed in like manner. This, however, can scarcely be said to be a uniform rule.<sup>8</sup>

10. *Benson v. Ry. Co.*, 98 Cal. 45, 48, 32 Pac. 809 (1893) (15 miles per hour).

11. *Louisville, etc., Ry. Co. v. Costello*, 9 Ind. App. 462, 36 N. E. 299 (1893) (three minutes).

12. *Edson v. Southern Pac. R. Co.*, 144 Cal. 182, 77 Pac. 894 (1904).

1. *Anderson v. Blood*, 86 Hun (N. Y.) 244, 33 N. Y. Suppl. 233 (1895).

**Mortgagor's payment of charges of negotiating mortgage.** The custom of requiring one borrowing on mortgage to pay all incumbrances and expenses of effecting the loan out of the amount of the loan is a proper subject for judicial knowledge. *Pennsylvania Steel Co. v. Title Guarantee & Trust Co.*, 193 N. Y. 37, 85 N. E. 820 (1908) [judgment reversed, 105 N. Y. Suppl. 1135, 120 App. Div. 879 (1907)] [which affirms 100 N. Y. Suppl. 299, 50 Misc. 51 (1906)].

2. *Supra*, § 652. The use of powers of attorney after location of certificate and before receiving a patent is a matter of common knowledge. *Sims v. Sealy*, (Tex. Civ. App. 1909) 116 S. W. 630.

3. *Longes v. Kennedy*, 2 Bibb (Ky.) 607 (1812) (locator takes one-third of the land for his services).

4. *Clough v. Wing*, (Ariz. 1888) 17 Pac. 453; *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. 781.

5. *Lewis v. McClure*, 8 Or. 273 (1880).

6. *Green v. Chicago*, 97 Ill. 370 (1881); *Parks v. Boston*, 15 Pick. (Mass.) 198 (1834).

7. *Ludlow v. Brewster*, 3 Ohio Cir. Ct. 82, 2 Ohio Cir. Dec. 47 (1888) (leases).

8. *Dayton v. Multnomah County*, 34 Or. 239, 55 Pac. 23 (1898).

**§ 834. (B. What Facts are Covered by the Rule; [7] Facts of Business; Stock Transactions.**— The notorious facts of the stock exchange and the habits of those who deal in negotiable securities need not be proved. Such facts are known, e. g., that shares of stock are a vendible commodity,<sup>1</sup> that failure to procure their listing on the stock exchange tends to depreciate the price,<sup>2</sup> that municipal bonds usually command a premium,<sup>3</sup> that bearer bonds are negotiable without endorsement.<sup>4</sup> Prominent features in the brokerage business,<sup>5</sup> as the relations between a broker and his customers, in a certain class of transactions as settled by repeated decisions,<sup>6</sup> may be regarded as established without proof. But matters of local interest and slight importance, as the regulation of a brokers' board,<sup>7</sup> must be proved.

**§ 835. (B. What Facts are Covered by the Rule; [7] Facts of Business); Street Railways.**— Facts of notoriety concerning the history of street railway travel, as when electricity succeeded animals as the motive power,<sup>1</sup> may well be treated as matters of common knowledge. It will be known without proof that a street railway has a greater value as a "going concern" than the aggregate price for which its rolling stock, roadbed, etc., could be sold were the road dismantled.<sup>2</sup> In like manner, the nature and operation of elevated railroads may be regarded by the court as a matter of notoriety.<sup>3</sup> The court may dispense with proof as to the existence of local prejudice against a street railway.<sup>4</sup> The meaning of common terms used in connection with the business of carrying on a street railway will, in general, require no proof.<sup>5</sup>

1. *Reg. v. Aspinwall*, 2 Q. B. D. 48, 46 L. J. M. C. 145, 36 L. T. Rep. (N. S.) 297, 25 Wkly. Rep. 283 (1876); *infra*, §§ 927, 2041, 2447.

2. *Reg. v. Aspinwall*, 2 Q. B. D. 48, 46 L. J. M. C. 145, 36 L. T. Rep. (N. S.) 297, 25 Wkly. Rep. 283 (1876).

3. *Guckenberger v. Dexter*, 8 Ohio S. & C. Pl. Dec. 530, 5 Ohio N. P. 429 (1898).

4. *Edelstein v. Schuler*, L. R. 2 K. B. 144, 71 L. J. K. B. 572, 87 L. T. Rep. (N. S.) 204, 50 Wkly. Rep. 493 (1902).

5. *Jones v. Peppercorne*, 5 Jur. (N. S.) 140, 28 L. J. Ch. 158, 7 Wkly. Rep. 103 (1858).

6. *Fox v. Hale, etc., Silver Min. Co.*, 108 Cal. 369, 41 Pac. 308 (1895).

7. *Goldsmith v. Sawyer*, 46 Cal. 209 (1873) (San Francisco board).

1. *Meyer v. Krauter*, 56 N. J. L. 696, 29 Atl. 426 (1894).

2. *Cook v. Decker*, 63 Mo. 328 (1876); *Towne v. St. Anthony, etc., Co.*, 8 N. Dak. 200, 77 N. W. 608 (1898).

3. *Bookman v. N. Y. Elevated R. R. Co.*, 137 N. Y. 302 (1893).

4. *Geist v. Detroit City R. Co.*, 91 Mich. 446, 51 N. W. 1112 (1892).

5. It is known that all the inter-urban railways have a terminus in a city. *Halladay v. Detroit United Ry.*, 155 Mich. 436, 119 N. W. 445,

§ 836. (*B. What Facts are Covered by the Rule; [7] Facts of Business; Street Railways); Equipment.*—A court will not require that anyone should prove to it the general construction of a street horse-car.<sup>1</sup> In like manner, it will not be demanded that the purposes for which customary equipment is intended should be proved. Thus, a court will take notice of the uses for which an ordinary street car fender was designed.<sup>2</sup> In general, the dereliction of street railway companies in failing to provide adequate accommodations for their passengers is so generally known that the courts will take notice of it.<sup>3</sup>

§ 837. (*B. What Facts are Covered by the Rule; [7] Facts of Business; Street Railways); Operation.*—Everyday facts relating to the operation of street cars, as that persons ride on the platforms,<sup>1</sup> that trolley cars stop on street corners to receive passengers and to allow them to alight,<sup>2</sup> and that so doing constitutes a general invitation to proposing passengers to enter the car<sup>3</sup> whether crowded or not,<sup>4</sup> or that a trolley stick is not submitted to such a strain as to tear it from the hands of the conductor except where there is carelessness,<sup>5</sup> require no proof. Usual incidents in the operation of cable cars, as that jerks are inevitable where the cable cannot be kept taut,<sup>6</sup> are within the range of public knowledge. So of any other widely-known fact, as, for example, that the company has changed the motive power used for operating its cars.<sup>7</sup> Though the fact, under given conditions, may be a *res gestæ* one, the judge may know, as a matter of common knowledge, in a general way, within what distance an electric car can be stopped.<sup>8</sup>

15 Detroit Leg. N. 1050 (1909);  
Watkins v. Detroit United Ry., 155  
Mich. 447 (1909).

1. Kleffmann v. Dry Dock, E. B. &  
B. R. Co., 93 N. Y. Suppl. 741, 104  
App. Div. 416 (1905).

2. Spiking v. Consol. Ry. & Power  
Co., (Utah 1908) 93 Pac. 838.

3. Capital Traction Co. v. Brown,  
29 App. D. C. 473, 12 L. R. A. (N.  
S.) 831.

1. Metropolitan R. Co. v. Snashall,  
3 App. Cas. (D. C.) 420, 433 (1894).

2. Baskett v. Metropolitan St. Ry.  
Co., 123 Mo. App. 720, 101 S. W. 138  
(1907).

3. Baskett v. Metropolitan St. Ry.  
Co., 123 Mo. App. 725, 101 S. W. 138  
(1907).

4. Baskett v. Metropolitan St. Ry.  
Co., 123 Mo. App. 720, 101 S. W.  
138 (1907).

5. Manning v. Ry. Co., 166 Mass.  
230, 44 N. E. 155 (1896).

6. Pryor v. Metropolitan St. R. Co.,  
85 Mo. App. 367 (1900).

7. Meyer v. Krauter, 56 N. J. L.  
696, 29 Atl. 426, 24 L. R. A. 575  
(1894).

8. Kotila v. Houghton County St.  
R. Co., 96 N. W. 437 (1903). The  
court cannot assume that it can be

*The comparative danger of certain acts in connection with the operation of a street railway may be notorious. Thus, for example, no evidence is needed to establish the fact that it is more dangerous to ride on the running board of a street car than upon either the seat of the car, or even on its platform.*<sup>9</sup>

**§ 838. (B. What Facts are Covered by the Rule; [7] Facts of Business); Surveying.**—Notorious facts of science with regard to a magnetic meridian<sup>1</sup> and also as to the variation of the compass,<sup>2</sup> both in itself and as related to the meridian are known to the courts. Facts in regard to surveying generally known, as the inaccuracy of early surveys, even where, as in case of the wide difference in three surveys of logs in the Penobscot river,<sup>3</sup> the notoriety is purely local, need not be proved. The court cannot know without proof the area of land embraced within certain courses and distances,<sup>4</sup> or the capacity of a railroad freight car.<sup>5</sup>

**§ 839. (B. What Facts are Covered by the Rule; [7] Facts of Business); Telegraphing.**—Certain facts with regard to lines for telegraphic communication, as that the building of such a line in a public improvement<sup>1</sup> and notorious facts regarding their operation, as that telegraph messages are usually written<sup>2</sup> or that the use of the telegraph is necessary to the successful operation of a railroad,<sup>3</sup> but that care is required on the part of a telegraph company that its wires may not obstruct a public highway,<sup>4</sup> will be known. But facts of a technical nature, as what space along a railroad location is required for the repair of the wires,<sup>5</sup> must be proved.

done within a distance of 150 feet. *Kotila v. Houghton County St. Co.*, 96 N. W. 437, 10 *Detroit Leg. N.* 461 (1903).

9. *Bridges v. Jackson Electric Ry., Light & Power Co.*, (Miss. 1905) 38 So. 788.

1. *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 *Am. Dec.* 575 (1866); *infra*, §§ 886, 1970, 2384.

2. *Bryan v. Beckley*, *Litt. Sel. Cas.* (Ky.) 91, 12 *Am. Dec.* 276 (1809).

3. *Putnam v. White*, 76 *Me.* 551 (1884).

4. *Tison v. Smith*, 8 *Tex.* 147 (1852).

5. *South Alabama, etc., R. Co. v.*

*Wood*, 74 *Ala.* 449, 49 *Am. Rep.* 819 (1883).

1. *Mobile & O. R. Co. v. Postal T. C. Co.*, 120 *Ala.* 21, 24 *So.* 408 (1897).

2. *People v. Western Union Tel. Co.*, 166 *Ill.* 15, 46 *N. E.* 731 (1897).

3. *State v. Indiana, etc., R. Co.*, 133 *Ind.* 69, 32 *N. E.* 817, 18 *L. R. A.* 502 (1892); *Youree v. Vicksburg, etc., R. Co.*, 110 *La.* 791, 34 *So.* 779 (1903).

4. *Postal Telegraph Co. v. Jones*, 133 *Ala.* 217, 32 *So.* 500 (1901).

5. *Youree v. Vicksburg, etc., R. Co.*, 110 *La.* 791, 34 *So.* 779 (1903).

§ 840. (*B. What Facts are Covered by the Rule; [7] Facts of Business*); **Trading**.—The general nature of the distinction between wholesale and retail trade, or between a wholesale trader and a manufacturer,<sup>1</sup> that certain food products, as oleomargarine,<sup>2</sup> are articles of commerce, require no proof. Peculiarities in handling certain commodities, as that “patent medicines” sell not so much on their merits as on account of advertising expedients,<sup>3</sup> well known facts in wholesale trade, as packing goods in layers under pressure,<sup>4</sup> facts well established in retail trading, as the use of corner sockets for show cases,<sup>5</sup> will be treated as matters of common knowledge.

§ 841. (*B. What Facts are Covered by the Rule; [7] Facts of Business*); **Transportation; Course of Mail**.—No proof need be offered of notorious facts regarding transportation of the mails;—e. g., the length of time between two points. That an affidavit can be carried in a few days from New Orleans to New York,<sup>1</sup> is a matter of common knowledge.

§ 842. (*B. What Facts are Covered by the Rule; [7] Facts of Business; Transportation*); **Established Routes**.—The long established and generally known lines or routes for transportation need not be proved.<sup>1</sup>

§ 843. (*B. What Facts are Covered by the Rule; [7] Facts of Business; Transportation*); **Express Companies**.—Courts know, as other people do, that express companies are selected by

1. *Kansas City v. Butt*, 88 Mo. App. 237 (1901).

2. *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49 (1897).

3. *Fowle v. Park*, 48 Fed. 789 (1892).

4. *King v. Gallum*, 109 U. S. 99, 3 S. Ct. 85, 27 L. ed. 870 (1883) (plasterer's hair).

5. *Terhune v. Phillips*, 99 U. S. 592, 25 L. ed. 293 (1878).

1. *Bouden v. Long Acre Square Bldg. Co.*, 86 N. Y. Suppl. 1080, 92 App. Div. 325 (1904). *Ætna Indemnity Co. of Hartford, Conn. v. George A. Fuller Co.*, 111 Md. 321, 73 Atl. 738 (1909) [reargument *denied*, 74 Atl. 369].

1. *Gibson v. Stevens*, 8 How. 384, 399 (1850). In speaking of the usual course of the great inland commerce for agricultural produce between the Mississippi Valley and markets, the United States Supreme Court says;—“It has existed long enough to assume a regular form of dealing and it embraces such a wide extent of territory and is of such general importance, that its ordinary course and usages are now publicly recognized and understood; and it is the duty of the court to recognize them, as it judicially recognizes the general and established usages of trade on the ocean.” *Gibson v. Stevens*, 8 How. 384, 399 (1850).



shippers because of their greater rapidity when compared with freight trains.<sup>1</sup> Within outside limits, a judge will know what delay is unreasonable.<sup>2</sup>

**§ 844. (B. What Facts are Covered by the Rule; [7] Facts of Business; Transportation); Knowledge Approximate Merely.**

—But this knowledge is merely general and approximate. If more exactness as to time is required, as how long it should take an express company to carry a sum of money between given places,<sup>1</sup> a resort to evidence is necessary.

**§ 845. (B. What Facts are Covered by the Rule; [7] Facts of Business; Transportation); Length of Transit.**—The length of time customarily consumed in traveling from place to place by the usual routes and methods of conveyance is a fact of notoriety.<sup>1</sup>

**§ 846. (B. What Facts are Covered by the Rule; [7] Facts of Business; Transportation); Meaning of Phrases.**—Abbreviations used in the business of transportation, such as “f. o. b.” for “free on board,”<sup>1</sup> are matters of common knowledge.

**§ 847. (B. What Facts are Covered by the Rule; [7] Facts of Business; Transportation); Methods.**—The methods in which transportation of mails<sup>1</sup> or of persons and property<sup>2</sup> is conducted are sufficiently notorious in the community to dispense with proof. Combination of connecting lines to establish joint through rates<sup>3</sup> and to issue through checks for baggage,<sup>4</sup> is well

1. *Harper Furniture Co. v. Southern Express Co.*, 144 N. C. 639, 57 S. E. 758 (1907).

2. *Harper Furniture Co. v. Southern Express Co.*, 144 N. C. 639, 57 S. E. 458 (1907).

1. *Rice v. Montgomery*, 20 Fed. Cas. No. 11,753, 4 Biss. 75 (1866). The course of business relating to the transportation of money is not, it is said, a fact to be judicially noticed. *Downs v. Pacific Express Co.*, 135 Mo. App. 330, 116 S. W. 9 (1909).

1. *Illinois*.—*National Masonic Acc. Assoc. v. Seed*, 95 Ill. App. 43 (1900).

*Indiana*.—*Hipes v. Cochran*, 13 Ind. 175 (1859).

*Iowa*.—*State v. Seery*, 95 Iowa 652, 64 N. W. 631 (1895).

*New York*.—*Williams v. Brown*, 65

N. Y. Suppl. 1049, 53 App. Div. 486 (1900); *Oppenheim v. Leo Wolf*, 3 Sandf. Ch. (N. Y.) 571 (1846).

*Pennsylvania*.—*Pearce v. Langfit*, 101 Pa. St. 507, 47 Am. Rep. 737 (1882).

1. *Kilmer v. Moneyweight Scale Co.*, (Ind. App. 1905) 76 N. E. 271; *Vogt v. Shienebeck*, (Wis. 1904) 67 L. R. A. 756, 100 N. W. 820.

1. *Gamble v. Central R. Co.*, 80 Ga. 595, 12 Am. St. 276, 7 S. E. 315 (1888).

2. *Michigan R. Co. v. McDonough*, 21 Mich. 165, 194 (1870) (cattle).

3. *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. Rep. 477 (1891).

4. *Isaacson v. New York Cent., etc., R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142 (1884).

known. In like manner, changes in method facilitating traffic, the use of the car ferry in carrying freight across rivers without breaking bulk,<sup>5</sup> the instrumentalities, omnibuses,<sup>6</sup> railroads, steamboat lines, trolley lines, express companies, bicycles,<sup>7</sup> and the like, by which transportation is accomplished, will be regarded as matters of common knowledge.

*Methods of loading* particular articles of merchandise, for example, railroad ties,<sup>8</sup> may be judicially noticed.

*Minor details*, as the custom of railroads with regard to carrying drummers' samples as baggage,<sup>9</sup> have also been regarded as sufficiently notorious to be viewed as matters of common knowledge.

**§ 848. C. How Actual Knowledge May be Acquired.**—In matters of fact, the actual knowledge of a particular judge may be either greater or less than that of the general community. His knowledge is greater when the attempt is made by him to dispense with evidence of a fact because he chances to know one which is not generally known or ascertainable by resort to a recognized source of information. When it is said that a judge judicially knows a fact, i. e., accepts it as one of common knowledge, it is by no means implied that the judge actually knows it. All that is meant is that he either knows the fact or as to how he may readily learn the truth with regard to it.<sup>1</sup> Undoubtedly such facts, as a practical matter, are frequently not proved by the party who would normally be proponent because the offering of evidence to establish a mental state on the part of the judge which already exists is clearly superfluous and passes *sub silentio* the party adversely affected not objecting. This rests rather on the basis of waiver<sup>2</sup> than on that of common knowledge. If proof of such facts is insisted upon, it should be presented.

*Where the judge's actual knowledge is less than that of the average member of the community, or where, for any reason, he*

5. Wiggins Ferry Co. v. Chicago, etc., R. Co., 5 Mo. App. 347, 375 (1878).

6. Parmelee v. McNulty, 19 Ill. 556 (1858) (common carrier of passengers).

7. Rochester, etc., Turnpike Rd. Co. v. Joel, 58 N. Y. Suppl. 346, 41 App. Div. 43 (1899).

8. Ayer & Lord Tie Co. v. Keown, 29 Ky. L. Rep. 110, 400, 93 S. W. 588 (1906).

9. McKibbin v. Great Northern R. Co., 78 Minn. 232, 80 N. W. 1052 (1899).

1. Ball v. Flora, 26 App. Cas. (D. C.) 394 (1905).

2. *Infra*, § 869.

declines to know a particular fact, he may do one of several things: (1) He may absolutely decline to know the fact, (2) he may invoke the assistance of the party who requests judicial cognizance, (3) he may investigate the question for himself as a matter of administration, with or without the aid of the parties, i. e., he may gain such light as he can from them and seek fuller mental certitude by an examination conducted in his own way and on his own initiative.<sup>3</sup>

**§ 849. (C. How Actual Knowledge May be Acquired);**

**(1) Judge May Decline to Know Fact.**—There is authority for the proposition that it is the duty of the court to take cognizance of facts of common knowledge,<sup>1</sup> if a party asks for it.<sup>2</sup> Thus, the supreme court of Michigan say:<sup>3</sup> “There are a vast variety of things which must be regarded as matters of common knowledge; things which every adult person of ordinary experience or intelligence must be presumed to know; things which do not require to be pleaded or to be made the subjects of specific proof; and it is not within the province of a court to leave it to a jury to find contrary to this knowledge.” The rules of right reasoning are, indeed, always to be enforced by the judge;<sup>4</sup> and these may involve a question of law, as applied to given facts, which the court is not permitted to disregard. But in such cases the knowledge is judicial, i. e., as to matter of law, and the cognizance is compulsory and not permissive. But, regarding matters of fact, the better rule is that the court may decline to take any fact as being one of common knowledge—even when it is only a probative one.—and may require proof of it.<sup>5</sup> A judge is not required to know a particular

3. *Atty.-Gen. v. Dublin*, 38 N. H. 459 (1859); *Atty.-Gen. v. Drummond*, 1 C. & L. 210, 1 Dr. & Wal. 353 (1842).

1. *State v. Magers*, 35 Or. 520, 57 Pac. 197 (1899) (time of sunset); *Gilbert v. Flint, etc.*, R. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592 (1883).

2. *Amundson v. Wilson*, 11 N. D. 193, 91 N. W. 37 (1902).

3. *Gilbert v. The Flint, etc., Ry. Co.*, 51 Mich. 488 (1883). Judicial notice does not depend on the actual knowledge of the judges; they being required, when the fact is alleged, to

investigate and refresh their recollection by resorting to any means which they may deem sufficient and proper. *Haaren v. Mould*, (Iowa 1909) 122 N. W. 921.

4. *Supra*, §§ 385 *et seq.*

5. *People v. Mayes*, 113 Cal. 618, 45 Pac. 861 (1896); *Littlehale v. Dix*, 11 Cush. (Mass.) 364 (1853) (distance between places). The superior court may permit the judge of the district court to examine a complaint and warrant issued by him, and allow him to testify that his signature appears on the warrant, as against the objection that the superior court

fact judicially.<sup>6</sup> He may decline to take any cognizance whatever of an alleged fact of common knowledge.<sup>7</sup>

**§ 850. (C. How Actual Knowledge May be Acquired); (2) May Require Aid of Parties.**—In such an event, the party is put to his proof.<sup>1</sup> A judge may properly decline to take for granted the existence of a fact claimed to be of common knowledge. As is said by the supreme judicial court of Massachusetts:<sup>2</sup> “If the court had entertained any doubt on the subject it might have required evidence to be produced.”

**§ 851. (C. How Actual Knowledge May be Acquired; [2] May Require Aid of Parties); Matter of Law.**—While a judge may properly require that the parties aid him by evidence in completing or refreshing his knowledge as to matters of general notoriety, he cannot require evidence from the parties as to matters which he is required *judicially* to know, e. g., the adoption of a constitution or of an amendment to it.<sup>1</sup> Naturally, however, a judge is at liberty to use his common knowledge in discharging his judicial function in announcing a rule of law. In construing statutes the court is ruling on a matter of law.<sup>2</sup> The judge may, therefore, in preparing to do so, reject any evidence offered by the party which is contrary to his judicial knowledge<sup>3</sup> or may, in his discretion, request such evidence, or take judicial cognizance of relevant facts.<sup>4</sup> But, in such cases, the knowledge is *judicial*, rather than common.

will take judicial notice of the fact. *Williams v. Smith*, 29 R. I. 562, 72 Atl. 1093 (1909).

6. *Hunter v. N. Y., O. & W. R. Co.*, 116 N. Y. 615, 621, 23 N. E. 9 (1889); *In re Osborne*, 52 C. C. A. 595, 115 Fed. 1 (1902). On the contrary, a judge cannot well regard a fact as of common knowledge which is recognized as being otherwise by a statute. *Timson v. Manufacturers' Coal & Coke Co.*, 220 Mo. 580, 119 S. W. 565 (1909).

7. *Cary v. State*, 76 Ala. 78 (1884); *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813 (1883); *Kaolatype Engraving Co. v. Hoke*, 30 Fed. 444 (1887).

1. *People v. Mayes*, 113 Cal. 618, 45 Pac. 861 (1896); *Kaolatype Engraving Co. v. Hoke*, 30 Fed. 444 (1887).

2. *Com. v. King*, 150 Mass. 221 (1889).

3. *State v. Board of Com'rs of Silver Bow County*, 34 Mont. 426, 87 Pac. 450 (1906).

4. *Supra*, § 128.

5. *Com. v. Marzynski*, 149 Mass. 68, 21 N. E. 228 (1889).

6. *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, 93 Am. St. Rep. 431 (1901).

§ 852. (*C. How Actual Knowledge is Acquired*); (3) **Examination by Judge.**—The course and range of any investigation carried on by the judge, or under his direction, is entirely within his administrative power;—i. e., as is commonly said, it is a matter entirely within his own discretion. As in cases involving judicial knowledge of law,<sup>1</sup> the judge is preparing himself to discharge a judicial function. The responsibility is entirely his and the test from the sources from which information is to be sought is absolutely subjective;—i. e., as to what is helpful to him, individually.<sup>2</sup> He is controlled by no rules of evidence. Nor need he be required to hear testimony on such a subject;<sup>3</sup> “nor does

1. *Supra*, § 571.

2. *California*.—*Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100 (1894).

*Illinois*.—*Jones v. Lake View*, 151 Ill. 663, 38 N. E. 688 (1894).

*Massachusetts*.—*Littlehale v. Dix*, 11 Cush. 364 (1853).

*New York*.—*Hunter v. New York*, etc., R. Co., 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246 (1889).

*Utah*.—*Hilton v. Raylance*, 25 Utah 129, 69 Pac. 660 (1902) (meaning of “sealing” from books on Mormon religion).

*United States*.—*Underhill v. Hernandez*, 168 U. S. 250, 18 S. Ct. 83, 42 L. ed. 456 (1897); *Gonzales v. Ross*, 120 U. S. 605 (1886).

*England*.—Answer of the Judges to H. of L., 22 How. St. Tr. 302 (1789) (lexicons, grammars, etc.) “This cognizance may often extend far beyond the actual knowledge, or even the memory of judges, who may therefore resort to such documents of reference, or other authoritative sources of information as may be at hand, and may be deemed worthy of confidence.” *Gordon v. Tweedy*, 74 Ala. 237 (1883). The judge “is authorized to avail himself of any source of information which he may deem authentic, either by inquiring of others, or by the examination of books, or by receiving the testimony of witnesses.” *People v. Mayes*, 113 Cal. 618, 45 Pac. 861 (1896). “On

demurrer, a judge may well inform himself from dictionaries or books on the particular subject concerning the meaning of any word. If he does so at *nisi prius*, and shews them to the jury, they are not to be considered as evidence, but only as the grounds on which the judge has formed his opinion.” *Attorney-General v. Cast-plate Glass Co.*, 1 Anstr. 39, 44 (1792).

3. *Alabama*.—*White v. Rankin*, 90 Ala. 541, 8 So. 118 (1890).

*California*.—*People v. Mayes*, 113 Cal. 618, 45 Pac. 860 (1896).

*Connecticut*.—*State v. Main*, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623 (1897) (what “peach yellows” means).

*Maine*.—*White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167 (1891).

*Massachusetts*.—*Com. v. Marzynski*, 149 Mass. 68, 21 N. E. 228 (1889) (meaning of phrase “drugs and medicines”).

*Mississippi*.—*Rodgers v. Kline*, 56 Miss. 808, 31 Am. Rep. 389 (1879).

*England*.—*Page v. Faucet*, Cro. Eliz. 227 (1591). “Ordinarily whether a substance or article comes within a given description is a question of fact, but some facts are so obvious and familiar that the law takes notice of them and receives them into its own domain. . . . Cigars are manufactured articles familiar to everybody.” *Com. v. Marzynski*, 149 Mass. 68 (1889).

the fact that the information thus sought by the judge has been laid before him in the presence of the jury without any distinct ruling that it was designed for the court alone, give a party the right to insist that the jury shall pass upon it.”<sup>4</sup> He may inquire of others, in whom he has confidence.<sup>5</sup> It is open to him to adopt or reject the suggestion of a party,<sup>6</sup> as he deems most in accordance with his own needs.

§ 853. (*C. How Actual Knowledge is Acquired; [3] Examination by Judge*); Official Records.—The judge may consult, if so disposed, the records of the governmental departments of the state<sup>1</sup> or nation;—such as the navy<sup>2</sup> or state<sup>3</sup> departments or of any bureau<sup>4</sup> organized in a department. In like manner, he may examine any other public documents<sup>5</sup> which he deems to be sufficiently authenticated.<sup>6</sup> For example, in construing a law, a court may take judicial notice of the report of the commission from which the act emanated.<sup>7</sup>

4. *State v. Wagner*, 61 Me. 178 (1873); *Mobile, etc., R. R. v. Ladd*, 92 Ala. 287 (1890).

5. *People v. Mayes*, 113 Cal. 618, 45 Pac. 860 (1896). “The rule has been held in many instances to embrace information derived informally by inquiry from experts.” *Gordon v. Tweedy*, 74 Ala. 232 (1883).

6. *Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100 (1894); *Atty-Gen. v. Dublin*, 38 N. H. 459 (1859).

1. *Cary v. State*, 76 Ala. 73 (1884); *Kirby v. Lewis*, 39 Fed. 66 (1889).

2. *The Paquete Habana*, 175 U. S. 677, 20 S. Ct. 290, 44 L. ed. 320 (1899) (exemption of coast-fishing boats from seizure).

3. *Koehler v. Hill*, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609 (1883); *Underhill v. Hernandez*, 168 U. S. 250, 18 S. Ct. 83, 42 L. ed. 456 (1897); *Jones v. U. S.*, 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691 (1890) (jurisdiction over a Guano island); *Foster v. Globe Venture Syndicate*, 1 Ch. 811, 69 L. J. Ch. 375, 82 L. T.

Rep. (N. S.) 253 (1900); *Taylor v. Barclay*, 2 Sim. 213, 7 L. J. Ch. (O. S.) 65, 29 Rev. Rep. 22, 2 Eng. Ch. 213 (1828).

4. *People v. Williams*, 64 Cal. 87, 27 Pac. 939 (1883) (census); *State v. Wagner*, 61 Me. 178, 186 (1873) (census); *Whiton v. Albany City Ins. Co.*, 109 Mass. 24 (1871) (census); *Kirby v. Lewis*, 39 Fed. 66 (1889) (land office).

5. *Keyser v. Coe*, 37 Conn. 597 (1871); *McMillen v. Blattner*, 67 Iowa 237, 25 N. W. 245 (1885); *Com. v. Alburger*, 1 Whart. (Pa.) 469 (1836); *U. S. v. One Thousand Five Hundred Bales of Cotton*, 27 Fed. Cas. No. 15,958 (1872). See also *In re Decatur St. in City of New York*, 117 N. Y. Suppl. 855, 133 App. Div. 321 (1909) [order reversed, *Walker v. Schauf*, 196 N. Y. 286, 89 N. E. 829].

6. *McMillen v. Blattner*, 67 Iowa 237, 25 N. W. 245 (1885).

7. *People v. Butler*, 109 N. Y. Suppl. 900, 125 App. Div. 384 (1908).

§ 854. (*C. How Actual Knowledge is Acquired; [3] Examination by Judge*); *Almanacs*.—An almanac<sup>1</sup> or calendar<sup>2</sup> may be used to establish relevant facts of chronology.

§ 855. (*C. How Actual Knowledge is Acquired; [3] Examination by Judge*); *Historical Works*.—Naturally, the well-recognized channels of information are customarily employed. On a matter of history, a judge may consult not only the original documents on file in public offices,<sup>1</sup> private records or journals;<sup>2</sup> he may also examine general<sup>3</sup> or local<sup>4</sup> histories,<sup>5</sup> encyclopaedias,<sup>6</sup> books, or even more fugitive publications, addresses<sup>7</sup> and the like.

§ 856. (*C. How Actual Knowledge is Acquired*); *Function of the Jury*.—In cases where the jury are to decide an issue of fact on which they use matters as to which they may take judicial

1. *Alabama*.—*Louisville, etc., R. Co. v. Brinkerhoff*, 119 Ala. 606, 24 So. 892 (1898).

*California*.—*People v. Chee Kee*, 61 Cal. 404 (1882).

*Connecticut*.—*State v. Morris*, 47 Conn. 179 (1879).

*Nebraska*.—*Stewart v. Rosengren*, 92 N. W. 586 (1902).

*New York*.—*Montenes v. Metropolitan St. R. Co.*, 78 N. Y. Suppl. 1059, 77 App. Div. 493 (1902).

*England*.—*Page v. Faucet, Cro. Eliz.* 227 (1591). "The fact (time of sunrise) for the proof of which the almanac was offered, was one of those facts of which a court may take judicial notice; formal proof of it was therefore unnecessary. It would have been sufficient to have called it to the knowledge of the judge at the trial; and if his memory was at fault or his information not sufficiently full and precise to induce him to act upon it, he had the right to resort to an almanac, or any other book of reference, for the purpose of satisfying himself about it; and such knowledge would have been evidence." *People v. Chee Kee*, 61 Cal. 404 (1882).

2. *Cohn v. Kahn*, 14 Misc. (N. Y.) 255, 35 N. Y. Suppl. 829 (1895).

1. See also *Neale v. Fry* [cited in

*Stainer v. Droitwich*, 1 Salk. 281] (1695).

2. *Hilton v. Roylance*, 25 Utah 129, 69 Pac. 660 (1902) (Mormon church receives; "sealing").

3. *Darby v. Ouseley*, 1 H. & N. 1, 12 (1856) (Papal excommunication of kings, etc.).

4. *Charlotte v. Chouteau*, 33 Mo. 194, 201 (1862) (Garner's History of Canada). A history of the Southern Confederacy, "The Lost Cause," may be resorted to for dates and events. *Swinerton v. Columbian Ins. Co.*, 37 N. Y. 174 (1867).

5. *Keyser v. Coe*, 37 Conn. 597 (1871); *Com. v. Alburger*, 1 Whart. (Pa.) 469 (1836); *U. S. v. One Thousand Five Hundred Bales of Cotton*, 27 Fed. Cas. No. 15,958 (1872). "Information to guide their judgment may be obtained by resort to original documents in the public archives or to books of history or science or to any other proper source." *Hoyt v. Russell*, 117 U. S. 401 (1885).

6. *Steinbrunner v. R. Co.*, 146 Pa. 504, 515, 23 Atl. 239 (1892) (*Britannica*; preparation of life tables).

7. *Burdine v. Alabama Grand Lodge*, 37 Ala. 478 (1861); *People v. Mayes*, 113 Cal. 618, 45 Pac. 860 (1896).

cognizance, the judge may properly permit them to examine publications such as histories,<sup>1</sup> encyclopaedias<sup>2</sup> and the like, which he feels will aid them in reaching a correct conclusion as to the fact to be judicially known. He will so exercise his administrative power as to allow them to consider only such printed statements as are relevant, because made by a person of adequate knowledge and without motive to misrepresent.<sup>3</sup>

**§ 857. (*C. How Actual Knowledge is Acquired; Function of the Jury*); "Hearsay Rule" Inapplicable.**—It has been suggested that the declarant must be dead,<sup>1</sup> in order to excuse his nonproduction. This is probably insisting upon the hearsay rule to an undue extent in a proceeding in part designed to avoid its operation. That the fact so to be established should be one of public notoriety and public importance is well settled.<sup>2</sup> Upon principle, however, no more simple or reasonable way could be suggested for establishing the existence of historical facts of less public notoriety than for the parties, under the direction of the court, to call the attention of the jury to the written or printed statements of competent persons, made without bias, as a means of refreshing their judicial memories. The statements, indeed, may well be said to *prove* the facts. This use of them is prevented by the rule against hearsay.<sup>3</sup> The theory that the statement refreshes a memory which never has existed, if satisfactory in case of the judge should be equally available in that of the jury.

**§ 858. (*C. How Actual Knowledge is Acquired; Function of the Jury*); Books not Evidence.**—While facts of which the court takes cognizance may be established by resort to encyclopaedias the converse is not equally true. A fact is not necessarily one within the scope of judicial knowledge merely because

1. *McKinnon v. Bliss*, 21 N. Y. 206 (1860); *Gregory v. Baugh*, 4 Rand. (Va.) 611 (1827); *Brounker v. Atkyns*, Skin. 14 (1681); *In re St. Catherine's Hospital*, 1 Vent. 149 (1671).

2. *Stainer v. Droitwich*, 1 Salk. 281 (1695) (*Camden's Britannica*).

3. *Evans v. Getting*, 6 C. & P. 586, 25 E. C. L. 587 (1834).

1. *Morris v. Harmer*, 7 Pet. (U. S.) 554, 8 L. ed. 781 (1833).

2. *McKinnon v. Bliss*, 21 N. Y. 206, 217 (1860); *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 633, 724 (1847); *Morris v. Harmer*, 7 Pet. (U. S.) 554, 8 L. ed. 781 (1833); *Stainer v. Droitwich*, 1 Salk. 281 (1695) (*custom of Droitwich*).

3. *Infra*, § 2700.



it can be ascertained by examining such a treatise.<sup>1</sup> As the judge is able to dispense with evidence entirely if he sees fit, it follows that the introduction of improper evidence to prove the fact is not error<sup>2</sup> although it may well be unnecessary.<sup>3</sup> The publications resorted to for the purpose of enabling the judge to ascertain a fact of common knowledge are not, in reality, evidence at all.<sup>4</sup> They are used merely for the purpose of aiding the "memory and understanding of the court."<sup>5</sup> While therefore the publications, books and other documents may be rejected when offered as evidence,<sup>6</sup> as it is deemed irregular to receive them,<sup>7</sup> the irregularity of receiving them as evidence may take place and still no error be committed.<sup>8</sup> The parties, in fact, have no rights in the matter whatever.

**§ 859. (*C. How Actual Knowledge is Acquired; Function of the Jury*); Standard Treatises.**—On a matter pertaining to geography resort may be had to maps,<sup>1</sup> geographies,<sup>2</sup> histories,<sup>3</sup> public documents<sup>4</sup> in general. The meaning of words as a rule

1. Kaolatype Engraving Co. v. Hoke, 30 Fed. 441 (1887).

2. People v. Mayes, 113 Cal. 618, 45 Pac. 860 (1896); State v. Main, 68 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623 (1897); Rowland v. Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182 (1893).

3. Louisville, etc., R. Co. v. Brinkerhoff, 119 Ala. 606, 24 So. 892 (1898); Cook v. State, 110 Ala. 40, 47, 20 So. 360 (1895); Mobile, etc., R. Co. v. Ladd, 92 Ala. 287, 9 So. 169 (1890).

4. Alabama.—Mobile, etc., R. Co. v. Ladd, 92 Ala. 287, 9 So. 169 (1890) (almanac).

California.—People v. Chee Kee, 61 Cal. 404 (1882) (almanac).

Connecticut.—State v. Morris, 47 Conn. 179 (1879) (almanac).

United States.—Brown v. Piper, 91 U. S. 37, 42, 23 L. ed. 200 (1875) (dictionaries).

England.—Shore v. Atty.-Gen., 9 Cl. & F. 355, 8 Eng. Reprint 450 (1839) (dictionaries).

5. Nix v. Hedden, 149 U. S. 304, 13 S. Ct. 881, 37 L. ed. 745 (1892).

6. Louisville & N. R. Co. v. Brinkerhoff, 119 Ala. 606, 24 So. 893 (1898) (almanac to show sunset); Com. v. Marzynski, 143 Mass. 68, 21 N. E. 228 (1889); Rodgers v. Kline, 56 Miss. 808, 31 Am. Rep. 389 (1879); Atty.-Gen. v. Dublin, 38 N. H. 459 (1859).

7. Rodger v. Kline, 56 Miss. 808, 31 Am. Rep. 389 (1879).

8. Cook v. State, 110 Ala. 40, 47, 20 So. 360 (1895) (Webster's International Dictionary). But see Atty.-Gen. v. Dublin, 38 N. H. 459, 516 (1859); Atty.-Gen. v. Drummond, 1 C. & L. 210, 1 Dr. & Wal. 353 (1842).

1. Wainright v. Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530 (1901).

2. U. S. v. The Montello, 11 Wall. (U. S.) 411, 20 L. ed. 191 (1870).

3. Keyser v. Coe, 37 Conn. 597 (1871); State v. Wagner, 61 Me. 178 (1873); U. S. v. The Montello, 11 Wall. (U. S.) 411, 20 L. ed. 191 (1870).

4. Keyser v. Coe, 37 Conn. 597 (1871); State v. Wagner, 61 Me. 178, 190 (1873).

may be ascertained by a resort to the dictionary,<sup>5</sup> glossaries,<sup>6</sup> grammars,<sup>7</sup> for scientific words to an appropriate treatise,<sup>8</sup> or, in case of a word of archaic or other than current meaning, to works of history,<sup>9</sup> or other publications.<sup>10</sup>

*Statutory Relief.*—Relief from this situation, which practically forces the litigant into the expensive uncertainties and unreliabilities of “expert” testimony<sup>11</sup> has, especially in the western portions of the United States,<sup>12</sup> been afforded by statutes making statements in standard treatises or history, science, art, geography, etc., made by persons indifferent between the parties, *prima facie* evidence of the facts stated.

**5. Alabama.**—Cook v. State, 110 Ala. 40, 20 So. 360 (1895) (Webster’s International; Century); Dantzler v. D. C. & I. Co., 101 Ala. 309, 314, 14 So. 10 (1893); Cook v. State, 110 Ala. 40, 20 So. 360 (1895).

**Connecticut.**—State v. Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623 (1897) (Century; Webster’s International).

**Illinois.**—Parker v. Orr, 158 Ill. 609, 41 N. E. 1003 (1895) (Webster).

**Massachusetts.**—Nelson v. Cushing, 2 Cush. 519, 532 (1848).

**Mississippi.**—Rodgers v. Kline, 56 Miss. 808, 31 Am. Rep. 389 (1879).

**Utah.**—Hilton v. Raylance, 25 Utah 129, 69 Pac. 660 (1902) (“sealing”).

**Virginia.**—Kimball v. Carter, 95 Va. 77, 27 S. E. 823 (1897) (Webster; Worcester).

**United States.**—Nix v. Hedden, 149 U. S. 304, 13 S. Ct. 881, 37 L. ed. 745 (1892) (“fruit” and “vegetable”); Jones v. U. S., 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691 (1890); Brown v. Piper, 91 U. S. 37, 23 L. ed. 200 (1875); Mutual Ben. L. Ins. Co. v. Robison, 19 U. S. App. 266, 272, 7 C. C. A. 444, 58 Fed. 723 (1893) (Century; Quain’s Dictionary of Medicine;—“spitting of blood”); Koehl v. U. S., 28 C. C. A. 458, 84 Fed. 448 (1898) (“vaccine”).

**England.**—Page’s Case, 1 Leon. 242 (1587); Attorney-General v. Castplate Glass Co., 1 Anstr. 39, 44

(1792). “Judges can collect the intrinsic sense and meaning of a paper in the same manner that other readers do.” Answer of the Judges to the House of Lords, 22 How. St. Tr. 302 (1789).

**6.** Answer of Judges, 22 How. St. Tr. 302 (1789).

**7.** Answer of the Judges to the House of Lords, 22 How. St. Tr. 302 (1789).

**8.** State v. Wilhite, (Iowa 1907) 109 N. W. 730 (medical).

**9.** Atty.-Gen. v. Dublin, 38 N. H. 459, 516 (1859); Kniskern v. St. John’s, etc., Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439 (1844); Atty.-Gen. v. Drummond, 1 C. & L. 210, 1 Dr. & Wal. 353 (1842); Shore v. Atty.-Gen., 9 Cl. & F. 255, 8 Eng. Reprint 450 (1839).

**10.** Com. v. Kneeland, 20 Pick. (Mass.) 206 (1838); Atty.-Gen. v. Dublin, 38 N. H. 459 (1859); Kniskern v. St. John’s, etc., Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439 (1844); Atty.-Gen. v. Drummond, 1 C. & L. 210, 1 Dr. & Wal. 353 (1842); Shore v. Atty.-Gen., 9 Cl. & F. 355, 8 Eng. Reprint 450 (1839).

**11.** *Infra*, §§ 2371 *et seq.*

**12.** Among states conferring a *prima facie* quality on statements in standard treatises are California, Idaho, Iowa, Nebraska, and Utah.

South Carolina provides a more limited relief on special issues.

§ 859a. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises*); Probative Facts.—As has been said the only administrative danger in the use of standard treatises is that the jury may abuse the statements by taking them as probative facts. It may be convenient to examine this aspect of the question first. In so doing, a primary consideration seems to consist in the circumstance that the administrative danger against which the practice of excluding the statements of scientific authorities from the jury was intended to provide, varies greatly according to the extent to which the written declaration is a necessary result of established or uncontroverted facts. Where, for example, the induction which results in the authoritative declaration of the writer is a *complete* one,<sup>1</sup> i. e., embraces all instances which can arise, the personal equation of the writer is practically eliminated, the opportunity for error greatly reduced and the administrative danger of admitting the statement as proof of the facts asserted correspondingly minimized. On the other hand, where the induction is *incomplete*,<sup>2</sup> i. e., fails to cover all instances in which the question may arise, a far greater variety of opinion and opportunity for error is presented. Situations arise upon which opposing views may reasonably be held and incessantly clash. Persons of equal training and intelligence may not unnaturally “take sides” on such a question and partisanship thus replace the disinterested search for truth. But it is evident that these characteristic differences between a complete and an incomplete induction in reality sketch the essential differentiations between an exact and an inexact science. Where the statement of a standard authority relates to some part of the subject-matter of an exact or mathematical science, i. e., where the deduction follows from the relations between the parts of hypothetical constructions involving no observation of fact but taking cognizance only of the creations of the mind,<sup>3</sup> the danger of error is reduced to a minimum. The result *must*, if correctly worked out, correspond to the postulate;—for the dealing is altogether with arbitrary subjective conceptions rather than with the realities of objective existence.

Where the science with regard to which the treatise speaks is an inexact or moral one, an entirely different administrative

1. *Infra*, § 1731.

3. *Cent. Dict. in verbo* SCIENCE.

2. *Infra*, § 1731.

situation is presented. The conclusions of the text writer now rest not, as in case of the exact science, upon arbitrary assumptions or hypotheses, but upon the objective reality of nature;—from the intricacy of whose manifestations various inferences may properly be drawn. The administrative danger of permitting the unsworn written statement of an author to act with an undiscriminating tribunal as proof of the facts asserted in it remains unabated.

§ 859b. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises; Probative Facts*); **Inexact Sciences.**—It is stating the same truth in a slightly different form to say that the administrative danger as to misuse by the jury of the statements of a treatise is most keenly to be apprehended when the text-book relates not so much to mathematical deductions from exact postulates by inflexible methods, but where the results reached are those of inexact knowledge. The danger lurks in this realm of theory, explanation and hypothesis, in the inferences or conclusions from observed data. Judicial administration views therefore with conspicuous apprehension and suspicion the use in dealing with the jury of works of science containing a large proportion of statements resting upon incomplete observation and moral evidence. Yet this is precisely the fog-enshrouded mirage-haunted home of the expert. Here is the battle-ground of theory;—a region where inference takes the place of fact and vigorous assertion of the merits of a controverted hypothesis assumes the role of proof. In the present undeveloped stage of the so-called inexact sciences many legal contests must be fought out with these unsubstantial weapons;—matters of mental soundness, of the causes of injury, the probability of complete or partial recovery and the like. To issues of this nature the probative facts testified to by the witness relate. The specialist is then asked for his conclusion or judgment regarding them. There is, therefore, appreciable administrative danger that should the statements of the text-book bearing on the same questions be admitted as deliberative facts that the jury will continue to treat them as they have been treating similar statements, i. e., as probative. Such books of inexact science are therefore rejected.<sup>1</sup>

1. *Georgia.*—Cook v. Coffey, 103 Mill Co. r. Monka, 107 Ill. 340 Ga. 684, 30 S. E. 27 (1898). (1883).

*Illinois.*—North Chicago Rolling *Massachusetts.*—Ashworth v. Kit-

*Medical Matters.*—As the supreme court of the state of New York say;<sup>2</sup>—“The weight of authority on that subject is to the effect that books of inductive science, within which are standard medical works, are not admissible as affirmative evidence.”<sup>3</sup>

“*Medicine is not considered* as one of the exact sciences. It is of that character of inductive sciences which are based on data which each successive year may correct and expand, so that, what is considered a sound induction last year may be considered an unsound one this year, and the very book which evidences the induction, if it does not become obsolete, may be altered in material features from edition to edition, so that we cannot tell, in citing from even a living author, whether what we read is not something that this very author now rejects.”<sup>4</sup>

*In criminal cases*, the rule is enforced with even greater care to avoid a confusion on the part of the jury which may prejudice the accused.<sup>5</sup>

tridge, 12 Cush. 193, 59 Am. Dec. 178 (1853).

*Michigan.*—Fox v. Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203 (1891).

*Mississippi.*—Tucker v. Donald, 60 Miss. 460, 45 Am. Rep. 416 (1882).

*New Jersey.*—New Jersey Zinc, etc., Co. v. Lehigh Zinc, etc., Co., 59 N. J. L. 189, 35 Atl. 915 (1896).

*New York.*—McEvoy v. Lommel, 80 N. Y. Suppl. 71, 78 App. Div. 324 (1903). See also Green v. Cornwell, 1 City Hall Rec. 11 (1816).

*North Carolina.*—Melvin v. Easley, 46 N. C. 386, 62 Am. Dec. 171 (1854); Huffman v. Click, 77 N. C. 55 (1877).

*South Dakota.*—Brady v. Shirley, 14 S. D. 447, 85 N. W. 1002 (1901).

*Texas.*—Fowler v. Lewis, 25 Tex. Suppl. 380 (1860).

*Wisconsin.*—Boyle v. State, 57 Wis. 472, 15 N. W. 827, 46 Am. Rep. 41 (1883).

*United States.*—Union Pac. R. Co. v. Yates, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553 (1897). For a valuable article as to the use of scientific books and treatises as evidence, see 40 L. R. A. 553.

2. Foggett v. Fischer, 48 N. Y. Suppl. 741, 23 App. Div. 207, 209 (1897).

3. To the same effect, see Epps v. State, 102 Ind. 539 (1885); Washburn v. Cuddihy, 8 Gray (Mass) 430 (1857); People v. Millard, 53 Mich. 63 (1884); Matter of Mason, 60 Hun 46 (1891); Harris v. The Panama R. Co., 3 Bosw. 7 (1858).

4. Gallagher v. Market St. R. Co., 67 Cal. 13, 16, 6 Pac. 869, 51 Am. Rep. 680 (1885).

5. *Delaware.*—State v. West, 1 Houst. Cr. Cas. 371 (1880).

*Indiana.*—Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408 (1890).

*Kansas.*—State v. Baldwin, 36 Kan. 1, 12 Pac. 318 (1886).

*Maryland.*—Davis v. State, 38 Md. 15 (1873).

*Michigan.*—People v. Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477 (1882).

*Rhode Island.*—State v. O'Brien, 7 R. I. 336 (1862).

§ 859c. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises; Probative Facts*); **Exact Sciences**.—Where the fact stated in a standard treatise which it is sought to use in a probative capacity is a familiar one covered by an exact science, it is frequently received, not by virtue of its inherent probative effect, but as a matter of common knowledge.<sup>1</sup> These facts of exact science alone possess those attributes of certainty and invariability which warrant the tribunal in merely looking to see what they are and accepting the results of such examination as final. They possess certain characteristics which are unmistakable. “What are facts of general notoriety and interest?” asks the supreme court of California.<sup>2</sup> “We think the terms stand for facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from facts of a private nature existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of the exact sciences, and of literature or art, when relevant to a cause that, under the provisions of the Code, proof may be made by the production of books of standard authority.”<sup>3</sup>

*Mathematical Calculations*.—Mathematical calculations, under formulae well established in the so-called exact sciences, are of great assistance as probative facts;—constituting part of the fund of common knowledge, which, though not actually known to the jury, is of recognized accessibility and not subject to substantial variation. Such books are admissible.<sup>4</sup> Perhaps the most

1. *Supra*, §§ 691 *et seq.*

2. *Gallagher v. Market St. R. Co.*, 67 Cal. 13, 15, 6 Pac. 869, 51 Am. Rep. 680 (1885).

3. “Such facts include the meaning of words and allusions, which may be proved by ordinary dictionaries and authenticated books of general literary history, and facts in the exact sciences founded upon conclusions reached from certain and constant data by processes too intricate to be elucidated by witnesses when on examination (1 Whart. Ev., § 667). Thus mortuary tables for estimating the probable duration of the life of a party at a given age, chronological

tables, tables of weights, measures and currency, annuity tables, interest tables, and the like, are admissible to prove facts of general notoriety and interest in connection with such subjects as may be involved in the trial of a cause.” *Gallagher v. Market St. R. Co.*, 67 Cal. 13, 16, 6 Pac. 869, 51 Am. Rep. 680 (1885). See also *Donaldson v. Missouri R. R. Co.*, 18 Iowa 280 (1865); *Schell v. Plumb*, 55 N. Y. 592 (1874); *Wager v. Schuyler*, 1 Wend. 553 (1828); *Mills v. Catlin*, 23 Vt. 98 (1849).

4. *Huffman v. Click*, 77 N. C. 55 (1877).

familiar example of this use of this class of book is when the court or jury consult an almanac.<sup>5</sup>

*Mortality Tables.*—Prominent among books of this class are mortality tables of recognized standing,<sup>6</sup> the “American experience tables,”<sup>7</sup> the “Carlisle tables,”<sup>8</sup> the “Northampton tables,”<sup>9</sup>

5. *Mobile, etc., R. Co. v. Ladd*, 92 Ala. 287, 9 So. 169 (1891); *State v. Morris*, 47 Conn. 179 (1879); *Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414 (1880).

6. *Supra*, § 732.

*Colorado.*—*Denver, etc., R. Co. v. Woodward*, 4 Colo. 1 (1877).

*Georgia.*—*Atlanta R., etc., Co. v. Monk*, 118 Ga. 449, 45 S. E. 494 (1903).

*Illinois.*—*Henderson v. Harness*, 184 Ill. 520, 56 N. E. 786 (1900).

*Indiana.*—*Indianapolis v. Marold*, 25 Ind. App. 428, 58 N. E. 512 (1900).

*Iowa.*—*Keyes v. Cedar Falls*, 107 Iowa 509, 78 N. W. 227 (1899); *Pearl v. Omaha, etc., R. Co.*, 115 Iowa 538, 88 N. W. 1078 (1902).

*Kansas.*—*Atchison, etc., R. Co. v. Ryan*, 62 Kan. 682, 64 Pac. 603 (1901).

*Kentucky.*—*Louisville, etc., R. Co. v. Mahony*, 7 Bush 235 (1870).

*Michigan.*—*Jones v. McMillan*, 129 Mich. 86, 88 N. W. 206 (1901).

*New York.*—*Sternfels v. Metropolitan St. R. Co.*, 174 N. Y. 512, 66 N. E. 1117 [*affirming* 77 N. Y. Suppl. 309, 73 App. Div. 494] (1903).

*Texas.*—*Galveston, etc., R. Co. v. Johnson*, 24 Tex. Civ. App. 180, 58 S. W. 622 (1900).

*Washington.*—*Suell v. Jones*, 49 Wash. 582, 96 Pac. 4 (1908).

*Wisconsin.*—*Crouse v. Chicago, etc., R. Co.*, 102 Wis. 196, 78 N. W. 446, 778 (1899).

*United States.*—*Whelan v. New York, etc., R. Co.*, 38 Fed. 15 (1889). The court takes judicial notice of standard mortality tables, and, if it is satisfied that one offered is of that character, no further identification is necessary, and it may be read by an

attorney not sworn as a witness. *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45 (1907).

7. *Alabama.*—*Louisville, etc., R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130 (1893).

*Iowa.*—*Pearl v. Omaha, etc., R. Co.*, 115 Iowa 535, 88 N. W. 1078 (1902).

*Missouri.*—*Boettger v. Scherpe, etc., Iron Co.*, 136 Mo. 531, 38 S. W. 298 (1896).

*New York.*—*Atty.-Gen. v. North America L. Ins. Co.*, 82 N. Y. 172 (1880) [*distinguishing* *People v. Security L. Ins., etc., Co.*, 78 N. Y. 114, 34 Am. Rep. 522] (1879).

*Texas.*—*San Antonio, etc., R. Co. v. Engelhorn*, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68 (1900).

For examining the Northampton and American life tables, resort may be had to “Johnson’s New Universal Encyclopædia.” *Scagel v. Chicago, etc., R. Co.*, 83 Iowa 380, 48 N. W. 990 (1891).

8. *Colorado.*—*Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94 (1876).

*Georgia.*—*Atlanta R., etc., Co. v. Monk*, 118 Ga. 449, 45 S. E. 494 (1903).

*Indiana.*—*Louisville, etc., R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343 (1895).

*Iowa.*—*Pearl v. Omaha, etc., R. Co.*, 115 Iowa 535, 88 N. W. 1078 (1902); *Allen v. Ames, etc., R. Co.*, 106 Iowa 602, 76 N. W. 848 (1898); *Nelson v. Chicago, etc., R. Co.*, 38 Iowa 564 (1874).

*Minnesota.*—*Scheffler v. Minneapolis, etc., R. Co.*, 32 Minn. 518, 21 N. W. 711 (1884).

*Nebraska.*—*Chicago, etc., R. Co. v. Hambel*, 89 N. W. 642 (1902); *Friend v. Burleigh*, 53 Neb. 674, 74 N. W. 50 (1898); *Sellers v. Foster*, 27 Neb.

“Wadsworth's life tables,”<sup>10</sup> or any work of similar standing on the subject.<sup>11</sup> Standard life tables,<sup>12</sup> or, indeed, any mortality or annuity tables used by reputable insurance companies,<sup>13</sup> may be employed in the same way. The tables, however, must show the expectancy of life of a person of about the age of the one involved in the issue in the case<sup>14</sup> and the person whose life is in question must come within the class of those on the basis of which the computations have been made.<sup>15</sup> For example, if the basis is that of

118, 42 N. W. 907 (1889); *New Jersey, Camden, etc., R. Co. v. Williams*, 61 N. J. L. 646, 40 Atl. 634 (1898).

*Pennsylvania*.—*Kerrigan v. Pennsylvania R. Co.*, 194 Pa. St. 98, 44 Atl. 1069 (1899); *Campbell v. York*, 172 Pa. St. 205, 33 Atl. 879 (1896).

*Texas*.—*San Antonio, etc., R. Co. v. Engelhorn*, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68 (1900).

*England*.—*Rowley v. London, etc., R. Co.*, L. R. 8 Exch. 221, 42 L. J. Exch. 153, 29 L. T. Rep. N. S. 180, 21 Wkly. Rep. 869 (1873).

The place where these tables are found is unimportant, provided it be accurate. Thus resort may be had to the *Encyclopædia Britannica* for their examination. *Pearl v. Omaha, etc., R. Co.*, 115 Iowa 539, 88 N. W. 1078 (1902); *Atchison, etc., R. Co. v. Ryan*, 62 Kan. 682 (1901). Such tables may be used as printed in a standard law book. *Sellers v. Foster*, 27 Neb. 118, 42 N. W. 907 (1889). This facility of resort to any available source of information is characteristic of the administrative methods employed by the court in dealing with matters of common knowledge (*supra*, § 698). An interesting instance of the application of this rule is given in *Gorman v. Minneapolis, etc., R. Co.*, 78 Iowa 509, 43 N. W. 303 (1889).

9. *Georgia R., etc., Co. v. Oaks*, 52 Ga. 410 (1874); *Schell v. Plumb*, 55 N. Y. 592 (1874); *Banta v. Banta*, 82 N. Y. Suppl. 113, 84 App. Div. 138 (1903); *Peterson v. Oleson*, 47 Wis. 122, 2 N. W. 94 (1879).

10. *Louisville, etc., R. Co. v. Kelly*, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, 19 Ky. L. Rep. 69 (1897).

11. *Missouri, etc., R. Co. v. Hines*, 18 Tex. Civ. App. 582 (1898) (life tables); *Crouse v. Chicago, etc., R. Co.*, 102 Wis. 196, 78 N. W. 446, 778 (1899) (annuity tables).

12. *Henderson v. Harness*, 184 Ill. 520, 56 N. E. 786 (1900); *Indianapolis v. Marold*, 25 Ind. App. 428, 58 N. E. 512 (1900).

*Flatchcraft's Insurance Manual*.—*Missouri, etc., R. Co. v. Ransom*, 15 Tex. Civ. App. 689, 41 S. W. 826 (1897).

*Wigglesworth's life tables*.—*Louisville, etc., R. Co. v. Kelly*, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, 19 Ky. L. Rep. 69 (1897).

13. *Alabama*.—*Mary Lee Coal, etc., Co. v. Chambliss*, 97 Ala. 171, 11 So. 897 (1893).

*Georgia*.—*Central R. Co. v. Richards*, 62 Ga. 306 (1879).

*Iowa*.—*Pearl v. Omaha, etc., Co.*, 115 Iowa 535, 88 N. W. 1078 (1902).

*Tennessee*.—*Mississippi, etc., R. Co. v. Ayres*, 16 Lea 725 (1886).

*Texas*.—*Gulf, etc., R. Co. v. Smith*, (Civ. App. 1894) 26 S. W. 644.

14. *Pearl v. Omaha, etc., R. Co.*, 115 Iowa 535, 88 N. W. 1078 (1902); *Decker v. McSorley*, 111 Wis. 91, 86 N. W. 554 (1901).

15. *Vicksburg R., etc., Co. v. White*, 82 Miss. 468, 34 So. 331 (1903).



sound, healthy, temperate persons, the individual in question must possess these bodily attributes. Minor discrepancies, as that the tables are computed on the basis of health and the person involved in the issue was of impaired bodily condition,<sup>16</sup> that the tables do not cover the *exact* age involved in the inquiry;<sup>17</sup> or that the employment of the person in the case was extra hazardous,<sup>18</sup> will be deemed consistent with the use of the table. The facts shown by the mortality tables are, as is pointed out elsewhere,<sup>19</sup> merely deliberative ones—designed to be used by the jury, together with all other facts in weighing the force of the *res gestæ* or constituent facts of the case, or in estimating damages. So regarded, the lack of entire adaptability of a deliberative fact may be given proper allowance by the tribunal.

*Proof of Accuracy.*—No further proof of authenticity or accuracy is required,<sup>20</sup> where, as in case of the tables mentioned, they are of standard authority. The authoritative character of these tables is a fact of common<sup>21</sup> knowledge.<sup>22</sup>

*Standard Tables.*—Much the same may be found to be true in case of the mathematical tabulations of observed results, in which questions of the inferences properly to be deduced from facts can seldom arise. Of this nature are mortality tables,<sup>23</sup> millwrights' lists<sup>24</sup> and the like.

*Trade Manuals.*—Among compendia of useful knowledge, known to be accurate are certain trade text-books, hand-books or manuals, containing, in a convenient form, the tabulated results of experience, computations of weight, strain, dimensions and the like. These are the usual reference books used by the

16. *Smiser v. State*, 17 Ind. App. 519, 47 N. E. 229 (1897).

17. *Missouri, etc., R. Co. v. Hines*, (Tex. Civ. App. 1897) 40 S. W. 152.

18. *Galveston, etc., R. Co. v. Johnson*, 24 Tex. Civ. App. 180, 58 S. W. 622 (1900) (locomotive engineer).

19. *Supra*, § 52.

20. *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256, 68 Pac. 771 (1902); *Atlanta R., etc., Co. v. Monk*, 118 Ga. 449, 45 S. E. 494 (1903).

21. *Supra*, § 732.

22. *Atchison, etc., R. Co. v. Ryan*, 62 Kan. 682, 64 Pac. 603 (1901); *Scheffler v. Minneapolis, etc., R. Co.*,

32 Minn. 518, 21 N. W. 711 (1884). Where the standard nature of the tables is not a matter of common knowledge, it must be proved. Otherwise, the evidence will be rejected. Thus, the accuracy of a life table contained in a book entitled "A Million Facts; Conkling's Handy Manual of Useful Information" must be established by evidence. *Galveston, etc., R. Co. v. Arispe*, 81 Tex. 517, 17 S. W. 47 (1891).

23. *Supra*, § 732.

24. *Garwood v. New York Cent., etc., R. Co.*, 45 Hun (N. Y.) 128 (1887).

community as a whole,<sup>25</sup> and no good reason has been perceived, in this connection, why the jury, in their search for truth, should be deprived of that which other members of the community enjoy. So, on a matter of insurance, the jury may have the use of "Flatchcraft's Insurance Manual,"<sup>26</sup> or some equivalent work. Computations of the rise and fall of the tides, etc., made by the United States government for the guidance of navigation on the waters of Puget sound,<sup>27</sup> have been held to be within the scope of the same principle of administration.

*The statements of such hand-books* may well be read to the jury by a skilled witness;—although, if the jury could understand the book without explanation, there is no administrative reason why it could not simply be handed to them. Thus, on an action growing out of the fall of a building, a civil engineer may read to the jury from standard hand-books showing resisting strength of the materials of which the building was composed.<sup>28</sup> The "Catechism of a Locomotive" (Forney) may be used to show facts demonstrated by experience regarding the locomotive engine.<sup>29</sup> This is quite different from an attempt to prove a proposition in mechanics, for example, to use Knight's Mechanical Dictionary in support of a claim as to the action of "Sister hooks."<sup>30</sup>

**§ 859d. (C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises; Probative Facts); Historical Works.**—Where the effort is to use the fact stated in a historical treatise in a probative capacity, the established administrative practice seems to be as follows. Should it happen that the fact to be so made out is an ancient one, whatever may be its relation to the proposition in issue, proof frequently can alone be made by showing the existence of the statements of historians on the subject, reinforced by any inferences to be drawn from contemporaneous and subsequent acquiescence in the truth of the declara-

25. *Western Assur. Co. v. J. H. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561 (1897) (engineers' tables on strength of materials).

26. *Jones v. McMillan*, 129 Mich. 86, 88 N. W. 206 (1901); *Galveston, etc., R. Co. v. Johnson*, 24 Tex. Civ. App. 180, 58 S. W. 622 (1900).

27. *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55 (1901).

28. *Western Assur. Co. v. J. H. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561 (1897).

29. *Sioux City, etc., R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860, 49 Am. St. Rep. 724 (1884).

30. *North Chicago Rolling Mill Co. v. Monka*, 107 Ill. 340 (1883).

tions thus publicly made.<sup>1</sup> The existence of an historical fact of recent happening, cannot, however, be used in a probative, i. e., assertive capacity by the mere statements contained in the works of a living author.<sup>2</sup> The rule is clearly stated by the supreme court of the United States:<sup>3</sup> "Historical facts of general and public notoriety may indeed be proved by reputation, and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts which do not presuppose better in existence, and where from the nature of the transaction or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. But the work of a living author, who is within the reach of the process of the court, can hardly be deemed of this nature."<sup>4</sup>

**§ 859e. (C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises; Probative Facts); Market Reports.**—The use of stock market reports, prices current, commercial reports and the like, for the purpose of determining market value may best be regarded as an application of the rule under consideration. They are admissible,<sup>1</sup> even though contained in newspapers, or even more fugitive and ephemeral forms, as a ready and recognized means of acquiring what is at least potentially, common knowledge. Otherwise considered, their use, except in connection with the evidence of a witness, is objectionable as hearsay. In certain jurisdictions the further requirement has been imposed by the court, that the reliability of the methods by which these reports are made up or tabulated should first be shown to the satisfaction of the court.<sup>2</sup>

1. *Morris v. Harmer*, 7 Pet. (U. S.) 554, 8 L. ed. 781 (1833).

2. *Morris v. Harmer*, 7 Pet. (U. S.) 554, 8 L. ed. 781 (1833).

3. *Morris v. The Lessees of Harmer's Heirs*, 7 Pet. (U. S.) 558 (1833), per Mr. Justice Story.

4. See also *Bogardus v. Trinity Church*, 4 Sandf. 633 (1847); *Missouri v. Kentucky*, 11 Wall. 395 (1870).

1. *Nash v. Classen*, 163 Ill. 409, 45 N. E. 276 (1896); *Aulls v. Young*, 98 Mich. 231, 57 N. W. 119 (1893); *Terry v. McNiel*, 58 Barb. (N. Y.)

241 (1870); *Cliquot v. U. S.*, 3 Wall. (U. S.) 114, 18 L. ed. 116 (1865).

2. *California*.—*Vogt v. Cope*, 66 Cal. 31, 4 Pac. 915 (1884).

*Colorado*.—*Willard v. Mellor*, 19 Colo. 534, 36 Pac. 148 (1894).

*Missouri*.—*Golson v. Ebert*, 52 Mo. 260 (1873).

*New York*.—*Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202 (1875).

*North Carolina*.—*Fairley v. Smith*, 87 N. C. 367, 42 Am. Rep. 522 (1882).

§ 859f. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises; Probative Facts*); Registers of Pedigree, Record, etc.—Books recording the pedigree and maximum speed attained by animals on different occasions will be received as matters of common knowledge,<sup>1</sup> when published by persons or associations recognized by those conversant with such matters as reliable and trustworthy authorities. A private book of pedigree kept by a party to the action is not admissible for the purpose.<sup>2</sup> So, by statute, a “herd book” acknowledged as authentic by breeders of cattle may be submitted to the court by a printed copy to show matters of pedigree.<sup>3</sup>

§ 859g. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises*); Deliberative Facts.—But it is possible not only to use a standard treatise for the purpose of establishing a probative fact but for that of showing the existence of a *deliberative* one. The administrative considerations attaching to the use of a standard treatise in proof of a deliberative fact are so different from those which relate to the use of such a publication in establishing probative facts that a separate consideration may with propriety be applied to the subject. These deliberative facts of common or special knowledge which the scientific treatise sets forth for the information of the jury—for the refreshing of their minds, rather than proof of anything—stand in a certain definite relation to the issue. They are not the litigated, disputed *constituent* or *res gestæ* facts which determine the truth of the propositions in issue. Nor are they of the class of facts which tend to establish, circumstantially,<sup>1</sup> as is said, the constituent<sup>2</sup> or *res gestæ* facts. They are, on the contrary, the unlitigated, undisputed deliberative<sup>3</sup> facts by which those more directly or strongly relevant to the issue are weighed or tested—part of the mental scales established by the general knowledge of the weigher.

*Administrative Considerations.*—To prove a constituent or *res gestæ* fact by the unsworn statements of a scientific treatise is a

1. Pittsburgh, etc., R. Co. v. Shepard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732 (1897).

2. Louisville, etc., R. Co. v. Frazee, 71 S. W. 437, 24 Ky. L. Rep. 1273 (1903).

3. Kuhns v. Chicago, etc., R. Co.,

65 Iowa 528, 22 N. W. 661 (1885); Crawford v. Williams, 48 Iowa 247 (1878).

1. *Supra*, § 15.

2. *Supra*, § 47.

3. *Supra*, § 52.

serious matter, calling for greatly increased administrative inertia, when compared with the use of the same treatise for the purpose of giving to the jury in a convenient form a fact of common knowledge. Such a fact is absolutely settled, one way or the other. The truth about it may be ascertained by simply referring to a recognized source of information, which every one knows and no one disputes. There is, for example, a great administrative or forensic difference between, on the one hand, attempting to prove a constituent fact of a medical nature by reading statements from a medical treatise; and, on the other, exhibiting to the jury and leaving with them, in order that the matter may be readily available, the tabulations, undisputed and undisputable, of certain engineering results, reached by a mathematical or algebraic process from certain fixed data by the use of well established *formulæ*. In the latter case, the results are to be used by the tribunal merely for the purpose of understanding and giving just weight to the *res gestæ* or probative facts.<sup>4</sup> In general, the standard treatise may assist the jury in acquiring deliberative facts in one of two ways;—(1) It may *directly* increase the jury's stock of special knowledge; (2) It may accomplish the same result *indirectly* by making the potential knowledge of the jury actual.

§ 859h. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises; Deliberative Facts*); (1) **Direct Increase of Special Knowledge.**—Statements in technical treatises introduced in evidence as deliberative facts may constitute, as it were, a species of special knowledge<sup>1</sup> within the grasp and comprehension of the jury;—who may, thereupon, use them, like any other knowledge, as deliberative facts. For example, a doctor as a witness, may read extracts from medical text-books for the purpose of explaining to the jury the technical medical terms connected with the case.<sup>2</sup>

§ 859i. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises; Deliberative Facts*); (2) **Indirect Supplementation by Reducing Common Knowledge to Possession.**—A somewhat different use of the statements of stand-

4. *Western Assur. Co. v. Mohlman*  
Co., 83 Fed. 811, 28 C. C. A. 157,  
40 L. R. A. 561 (1897).

1. *Infra*, §§ 870 *et seq.*

2. *Oakley v. State*, 135 Ala. 29, 33  
So. 693 (1903).

ard treatises as deliberative facts may be made in connection with the common knowledge of the jury. In many cases the technical statement is submitted to the tribunal not for the sake of supplementing *common* knowledge by the addition of *special*, but for the purpose of reducing to possession, as it were, in available form, common knowledge which the jury already had in a *constructive* and inert condition. In other words, *potential* knowledge is thus made *actual*. The jury know that the fact as to a given matter has been settled. They know it is only necessary to resort to a recognized source of information and ascertain how the fact is.<sup>1</sup> But as to that particular fact, they have never made the attempt to find out. This the counsel may do for them by reading extracts from an appropriate authority. As a matter of administration, the party who desires to have the benefit of the fact may produce the encyclopaedia or equivalent work to the jury,<sup>2</sup> call their attention to what he desires them to notice and, if it seems wise, may leave the book with them. As is more fully stated elsewhere,<sup>3</sup> facts of certain classes, although of a scientific nature and usually set forth in technical treatises, are yet part of the common knowledge of the community and, as being so, need not be proved. The presiding judge could readily, being a unit and the executive head of the mixed tribunal, look up the matter for himself at any time and use the results or impart them to the jury. The jury, being many and, for trial purposes less mobile and under their own initiative than is the judge, present a practical administrative necessity that the scientific treatise, in the points mentioned, should be read to them, and then, usually, left in their hands for inspection or perusal. This is not placing the book in evidence — in the strict sense of that expression. The dictionary and the almanac, for example, are not evidence. They contain memoranda, conveniently arranged, as to certain facts of common knowledge as to which no evidence is needed, or, perhaps, permitted. It is, in any event, necessary for the use of the treatise in reducing to immediate possession the constructive or potential knowledge of the jury in the common affairs of life that

1. That is known which may readily become so. Atchison, etc., R. Co. v. Ryan, 62 Kan. 682, 64 Pac. 603 (1901).

2. Pearl v. Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078 (1902); 3. *Supra*, § 698.

the fact sought to be shown in this way should have some bearing on a proposition in issue in the case.<sup>4</sup>

*Evidence Limited to Facts of a Public Nature.*—As a rule, “such evidence is only admissible to prove facts of a general and public nature, and not those which concern individuals or mere local communities.”<sup>5</sup> Where the facts are not among those of common knowledge, the book is not admissible. Thus, for example, a *local* history cannot be used as establishing purely local happenings, especially where these are of recent date and admit of proof in more satisfactory ways.<sup>6</sup> Some question may readily arise as to what are in reality matters of public and general interest and notoriety. Much will depend as to what a particular community finds interesting and what is notorious throughout it. Thus in Utah, the “sealing ordinance” of the Latter Day Saints of the Mormon Church is so considered.<sup>7</sup>

§ 859j. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises; Deliberative Facts; [2] Indirect Supplementation by Reducing Common Knowledge to Possession*); Dictionaries.—It is easy to recognize that in dictionaries the court is using a mere instrument of common knowledge, rather than dealing with evidence of any kind. Dictionaries may be used by the court and jury for the purpose of refreshing memory or acquiring the knowledge contained in them.<sup>1</sup>

§ 859k. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises; Deliberative Facts; [2] Indirect Supplementation by Reducing Common Knowledge to Possession*); Encyclopaedias, etc.—Common knowledge may consist, in many particulars, in a cognizance as to where exact infor-

4. Decker v. McSorley, 111 Wis. 91, 86 N. W. 554 (1900).

5. McKinnon v. Bliss, 21 N. Y. 206 (1860).

6. Roe v. Strong, 107 N. Y. 350, 14 N. E. 294 (1887); McKinnon v. Bliss, 21 N. Y. 206 (1860); Evans v. Getting, 6 C. & P. 586, 25 E. C. L. 587 (1834); Stainer v. Droitwich, 1 Salk. 281 (1695). See also Onondaga Nation v. Thacher, 29 Misc. (N. Y.)

428, 61 N. Y. Suppl. 1027 [affirmed in 65 N. Y. Suppl. 1014, 53 App. Div. 561] (1899).

7. Hilton v. Roylance, 25 Utah 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723 (1902).

1. Nix v. Hedden, 149 U. S. 304, 13 S. Ct. 881, 37 L. ed. 745 (1893); Zante Currants, 73 Fed. 183 (1896). See also Cook v. State, 110 Ala. 40, 20 So. 360 (1895).

mation regarding certain facts may be obtained, rather than in possession of knowledge itself upon these points. Should a question arise regarding the existence of certain familiar subjects, the average man would consult a reliable encyclopaedia. The jury may do the same.

§ 859l. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises; Deliberative Facts; [2] Indirect Supplementation by Reducing Common Knowledge to Possession*); *Histories*, etc.—Prominent among statements in standard treatises which may be used for the purpose of supplementing the common knowledge<sup>1</sup> are the agreed facts of history. These may be shown to the jury in the same way that any intelligent member of the community would satisfy himself on the point. Histories of recognized value, contained in encyclopaedias, independent works,<sup>2</sup> original materials,<sup>3</sup> or even historical data themselves, may be examined and submitted to the jury.

§ 859m. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises; Deliberative Facts; [2] Indirect Supplementation by Reducing Common Knowledge to Possession*); *Law Dictionaries*.—Practically the same relation which dictionaries sustained to the community at large, law dictionaries hold to the legal profession. These works when of recognized authority are freely received not only upon questions of definition but as to propositions of domestic,<sup>1</sup> foreign<sup>2</sup> or international<sup>3</sup> law. It is to be observed that, in addition to the element of common knowledge, there is, in the use of law dictionaries an application of the rules regulating judicial knowledge—the characteristic function of the court.<sup>4</sup>

1. *Supra*, §§ 691 *et seq.*

2. *Morris v. Harmer*, 7 Pet. (U. S.) 554, 8 L. ed. 781 (1833).

3. *Bow v. Allentown*, 34 N. H. 351, 69 Am. Dec. 489 (1857) (report of secretary of state from a state historical collection); *Com. v. Alburger*, 1 Whart. (Pa.) 469 (1836).

1. *Charlotte v. Chouteau*, 33 Mo. 194 (1862); *The Pawashick*, 19 Fed. Cas. No. 10,851, 2 Lowell 142 (1872). See also *Lacon v. Higgins*, D. & R.

N. P. 38, 3 Stark. 178, 25 Rev. Rep. 779, 16 E. C. L. 425 (1822).

2. *Banco de Sonora v. Bankers' Mut. Casualty Co.*, (Iowa 1903) 95 N. W. 232 (Bouvier's Dictionary as to law of Mexico).

3. *Hilton v. Guyot*, 159 U. S. 113, 16 S. Ct. 139, 40 L. ed. 95 (1895).

4. See *The Paquete Habana*, 175 U. S. 677, 20 S. Ct. 290, 44 L. ed. 320 (1900).



§ 859n. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises; Deliberative Facts; [2] Indirect Supplementation by Reducing Common Knowledge to Possession*); Law Reports.—The judge may consult domestic law reports on the question of the domestic law.<sup>1</sup> It has, however, been suggested that the printed volume is only secondary evidence of the action of the court;<sup>2</sup>—the original papers or a certified copy of them being the highest evidence.<sup>3</sup> He may use foreign or other reports, or the official reports of a sister state for a similar purpose. In this connection, the tribunal freely resorts, wherever the law of a foreign country,<sup>4</sup> sister state,<sup>5</sup> or colonial dependency is involved, to the printed volumes reporting the action of their courts.<sup>6</sup> It has, however, been required that the law of a sister state<sup>7</sup> should be proved by the skilled witnesses who are acquainted with it, as a matter of special knowledge.<sup>8</sup> Such a witness may authenticate and identify, upon production, the regular reports of the forum with which he is acquainted.<sup>9</sup> The same procedure has been authorized or required by statutes passed in several states.<sup>10</sup>

§ 859o. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises; Deliberative Facts*); Statutory Modifications.—Resort to treatises for facts of common knowl-

1. *Supra*, § 635; *Mackay v. Easton*, 19 Wall. (U. S.) 619, 22 L. ed. 211 (1873) [*affirming* 16 Fed. Cas. No. 8,843, 2 Dill. 41]. See also *Stayner v. Baker*, 12 Mod. 86 (1796).

2. *Donellan v. Hardy*, 57 Ind. 393 (1877).

3. *Freeman v. Bigham*, 65 Ga. 580 (1880).

4. *Charlotte v. Chouteau*, 33 Mo. 194 (1862); *Marguerite v. Chouteau*, 33 Mo. 540 (1862).

5. *Inge v. Murphy*, 10 Ala. 885 (1846); *Billingsley v. Dean*, 11 Ind. 331 (1858); *Musser v. Stauffer*, 192 Pa. St. 398, 43 Atl. 1018 (1899).

6. This is precisely what counsel would do in arguing to the court a question of domestic law as formulated by a legal text writer of recognized authority. It is practically what the judge would do if he were examining the statements of a foreign jurist regarding a question of foreign law.

But the first is a matter of law, the second is a question of fact as to which the judge is bound to inform himself. It is difficult to perceive precisely why a course helpful to judicial administration when adopted by the judge, is dangerous to the search for truth when applied to the jury.

7. *Gardner v. Lewis*, 7 Gill (Md.) 377 (1848).

8. *Infra*, §§ 870 *et seq.*

9. *Congregational Unitarian Soc. v. Hale*, 51 N. Y. Suppl. 704, 29 App. Div. 396 (1898) (Massachusetts reports from a law library).

10. *Chicago, etc., R. Co. v. Tuite*, 44 Ill. App. 535 (1892); *Ames v. McCamber*, 124 Mass. 85 (1878). See also *French v. Lowell*, 18 Pick. (Mass.) 34 (1836). It has been provided that dissenting opinions are not to be considered in this connection. *Chicago, etc., R. Co. v. Tuite*, 44 Ill. App. 535 (1892).

edge has frequently been authorized by statute.<sup>1</sup> These add, in most cases, but little to the administrative practice of the courts. They do not, for example, permit the use of medical text-books,<sup>2</sup> even when of standard authority. Nor do they, as a rule, admit other classes of text-books relating to the inexact sciences where danger exists lest the jury may use the statements of the text writer as probative facts.<sup>3</sup>

**§ 860. (*C. How Actual Knowledge is Acquired; Standard Treatises*); Administrative Advantages of Receiving Treatise.—**

The advantages of receiving such statements in evidence, to be accorded such weight as they are logically entitled to have,<sup>1</sup> are uncontestable. The lion in the path is the rule against hearsay. The entire reasoning on which the exclusion is based is pithily summed up in a single sentence by Chief Justice Shaw, of Massachusetts.<sup>2</sup> "The substantial objection is that they are statements wanting the sanction of an oath, and the statement thus proposed is made by one not present and not liable to cross-examination." Such are the reasons universally given.<sup>3</sup> To criticize them, is merely to criticize the rule itself. These reasons have not seemed entirely satisfactory to the conscience of the courts.<sup>4</sup> As has been said by an excellent authority on the law of evidence,<sup>5</sup> they "man-

1. *Burg v. Chicago, etc.*, R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419 (1894).

2. *Gallagher v. Market St. R. Co.*, 67 Cal. 13, 6 Pac. 869, 51 Am. Rep. 680 (1885); *Stewart v. Equitable Mut. L. Assoc.*, 110 Iowa 528, 81 N. W. 782 (1900); *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295 (1897); *Union Pac. R. Co. v. Yates*, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553 (1897).

3. *Supra*, § 51.

1. *Ripon v. Bittel*, 30 Wis. 614, 619 (1872).

2. *Ashworth v. Kittredge*, 12 Cush. 194 (1853).

3. *California*.—*Gallagher v. R. Co.*, 67 Cal. 13, 17, 6 Pac. 869 (1885).

*Kansas*.—*State v. Baldwin*, 36 Kan. 17, 12 Pac. 318 (1886).

*Maine*.—*Ware v. Ware*, 8 Me. 56 (1831).

*Michigan*.—*People v. Millard*, 53 Mich. 63, 76, 18 N. W. 562 (1884).

*Minnesota*.—*Payson v. Everett*, 12 Minn. 219 (1867).

*Mississippi*.—*Tucker v. McDonald*, 60 Miss. 460 (1882).

*North Carolina*.—*Melvin v. Easty*, 1 Jones L. 388 (1854).

*Rhode Island*.—*State v. O'Brien*, 7 R. I. 336 (1862).

*Texas*.—*Fowler v. Lewis*, 25 Tex. (Suppl.) 381 (1860).

*Wisconsin*.—*Soquet v. State*, 72 Wis. 666, 40 N. W. 391 (1888).

*England*.—*R. v. Talor*, 13 Cox Cr. 77 (1875).

*Canada*.—*Brown v. Sheppard*, 13 U. C. Q. B. 179 (1856).

4. *Western Assur. Co. v. Mohlman Co.*, 28 C. C. A. 157, 83 Fed. 811 (1897).

5. *Simon Greenleaf Crosswell* (1 Grlf. [15th ed.], § 497, n.).

ifest a consciousness of the want of principle upon which the ruling excluding such testimony rests." Some attempt has, therefore, naturally been made by judges who felt the inadequacy of these general considerations to suggest that the statements of learned authors were unreliable, i. e., the existence of a given statement was not sufficiently probative that the fact was as stated.<sup>6</sup> If this were so, no special need exists for the hearsay or any other rule of exclusion. The statements, if they are not relevant, are not evidence and so not within the scope of any exclusionary rule. Whatever is not relevant is not evidence.<sup>7</sup> The judge who is in the constant habit of consulting the same class of treatises to aid his judicial knowledge of law,<sup>8</sup> or to assist him to know matters of common knowledge,<sup>9</sup> and citing the results of his investigations in authoritative support of his findings and opinions,<sup>10</sup> is hardly in a position consistently to say that the basis of his own action has no logical value.<sup>11</sup>

**§ 861. (C. How Actual Knowledge is Acquired; Standard Treatises); Incidental Use.**—The inconsistency of the present administrative course pursued by the courts becomes still more striking when it is observed that the statements of the text writer, supposed to be excluded, are in constant use, as a practical matter, during the whole examination of the skilled witness, in amplify-

6. *California*.—*Gallagher v. R. Co.*, 67 Cal. 13, 16, 6 Pac. 869 (1885).

*Maine*.—*Ware v. Ware*, 8 Me. 57 (1831).

*Massachusetts*.—*Ashworth v. Kittredge*, 12 Cush. 195 (1853).

*Michigan*.—*People v. Hall*, 48 Mich. 490, 12 N. W. 665 (1882).

*North Carolina*.—*Huffman v. Click*, 77 N. C. 57 (1877).

7. *Supra*, §§ 54 *et seq.*

8. *Supra*, §§ 570 *et seq.*

9. *Supra*, §§ 691 *et seq.*

10. *California*.—*Sinnott v. Colombet*, 107 Cal. 187, 40 Pac. 329 (1895) ("kindergarten").

*Georgia*.—*Smith v. State*, 23 Ga. 297, 306 (1857) (lectures on midwifery).

*Michigan*.—*Garbutt v. People*, 17 Mich. 9, 17 (1868) (insanity).

*Minnesota*.—*Steenerson v. R. Co.*, 69 Minn. 353, 72 N. W. 713 (1897) (financial publications, works on political economy as to income from a railroad investment).

*New York*.—*Devenbagh v. Devenbagh*, 5 Paige Ch. 554, 557 (1836) (Beck's Medical Jurisprudence).

11. This somewhat inconsistent course has occasionally been adopted by the court. *State v. Baldwin*, 36 Kan. 17, 20, 12 Pac. 318 (1886) ("eribbing"); *Washburn v. Cuddihy*, 8 Gray (Mass.) 431 (1857) (poisons). The course, however, was a wise one. So long as the rule against hearsay excludes the statements themselves, the most available relief is through the administrative power of the court to acquire common knowledge.

ing, corroborating,<sup>1</sup> explaining, illustrating<sup>2</sup> his evidence on direct, or testing it, on cross-examination.<sup>3</sup> This testing of the skilled witness may take the form of showing contradiction of his

1. *Indiana*.—Carter v. State, 2 Ind. 619 (1851).

*Kansas*.—State v. Baldwin, 36 Kan. 17, 12 Pac. 318 (1886).

*Michigan*.—Pinney v. Cahill, 48 Mich. 586, 12 N. W. 862 (1882).

*Oregon*.—Scott v. R. Co., (Or. 1903) 72 Pac. 594.

*Pennsylvania*.—Earls' Trial, Pa. 36 (1836).

Direct quotation by the expert from standard authors has been held incompetent. Fox v. Peninsular Works, 84 Mich. 681, 48 N. W. 203 (1891); People v. Millard, 53 Mich. 76, 18 N. W. 562 (1884).

2. *Illinois*.—Yoe v. People, 49 Ill. 412 (1868) (theories).

*Indiana*.—Baldwin v. Bricker, 86 Ind. 223 (1882).

*Kansas*.—State v. O'Neil, 51 Kan. 651, 674, 33 Pac. 287 (1893).

*New Hampshire*.—Ordway v. Haynes, 50 N. H. 164 (1870).

*Ohio*.—Legg v. Drake, 1 Ohio St. 288 (1853).

*Texas*.—Wade v. DeWitt, 20 Tex. 400 (1857).

Counsel may be permitted to read extracts from standard treatises, in the discretion of the court. State v. Soper, 148 Mo. 217, 49 S. W. 1007 (1899). If the matter is one as to which a jury may properly take judicial knowledge the practice is apparently a convenient one. In Connecticut, this course is permitted by local usage. State v. Hoyt, 46 Conn. 337 (1878).

The prevailing opinion is to the effect that the difficulty likely to be experienced by the jury in receiving the statements of text-books merely as illustrations and giving them no weight as evidence of the facts asserted is too great to warrant the court in receiving the quotations for

any purpose. They are accordingly, as a rule, rejected.

*California*.—People v. Wheeler, 60 Cal. 581 (1882).

*Massachusetts*.—Washburn v. Cudihy, 8 Gray 431 (1857).

*Michigan*.—People v. Millard, 53 Mich. 77, 18 N. W. 562 (1884).

*North Carolina*.—State v. Rogers, 112 N. C. 874, 877, 17 S. E. 297 (1893).

*Tennessee*.—Byers v. R. Co., 94 Tenn. 350, 29 S. W. 129 (1894).

*Wisconsin*.—Boyle v. State, 57 Wis. 480, 15 N. W. 827 (1883).

*England*.—R. v. Taylor, 13 Cox Cr. 77, 78 (1875); R. v. Crouch, 1 Cox Cr. 94 (1844).

3. *Indiana*.—Louisville N. A. & C. R. Co. v. Howell, 147 Ind. 266, 45 N. E. 584 (1896); Hess v. Lowery, 122 Ind. 233, 23 N. E. 156 (1889).

*Kentucky*.—Williams v. Nally, (Ky. 1898) 46 S. W. 274.

*New Hampshire*.—State v. Wood, 53 N. H. 495 (1873).

*Tennessee*.—Sale v. Eichberg, (Tenn. 1900) 59 S. W. 1020 (experience of the witness); Byers v. R. Co., 94 Tenn. 569, 29 S. W. 128 (1894).

*Washington*.—Clukey v. Electric Co., 27 Wash. 70, 67 Pac. 379 (1901).

*England*.—Gardner Peerage Case, Le Marchant's Rep. 22 (1825).

*Canada*.—Brownell v. Black, 31 N. Br. 594 (1890).

Evasion of the hearsay rules by a counsel who seeks to use extensive extracts from standard treatises in their assertive capacity under guise of cross-examination, will be prevented by the court. Hall v. Murdock, 114 Mich. 233, 72 N. W. 150 (1897).

Production of the treatise itself is usually required. Exceptional rulings have been occasionally made. Brodhead v. Wiltse, 35 Iowa 430 (1872).

statements,<sup>4</sup> his mistaken reliance on authority which in fact does not sustain the position of the witness,<sup>5</sup> and the like.

**§ 862. (*C. How Actual Knowledge is Acquired; Standard Treatises*); More Valid Objections.**—More valid objections to allowing the use of standard text-books and other scientific treatises as evidence of the facts asserted have been suggested;—(1) that the jury may be confused or misled by technical writings when placed before them without simplification or suitable comment;<sup>1</sup> or, (2) that extracts may be selected, by accident or design, which when introduced in evidence, would fail to represent the real opinion of the writer, who has modified, in essential particulars, in other parts of his work, the effect of the passages quoted.<sup>2</sup> But these criticisms apply, with almost equal force, to all evidence; and it will rarely be found that either difficulty will prove formidable to a counsel who has made adequate preparation for the trial of the cause. The eminent authority who has written the treatise is, as a rule, more competent,<sup>3</sup> as well as more disinterested and loyal to truth for truth's sake,<sup>4</sup> than the average "expert", while a thoroughly competent man could be procured as a witness only at an entirely disproportionate expense.

**§ 863. (*C. How Actual Knowledge is Acquired; Function of the Jury; Standard Treatises*); No Exception to Hearsay Rule.**—However desirable it would be that the rule should be otherwise, and however unscientific and practically harmful to the interests of justice it may be that the rule should be as it is, it

No objection exists in point of principle, to asking a properly skilled witness as to what is the general professional opinion. The evidence has, however, been rejected. *State v. Winter*, 72 Iowa 627, 632, 34 N. W. 475 (1887); *Davis v. U. S.*, 165 U. S. 373, 17 Sup. 360 (1896) (at least in the court's discretion).

4. *Davis v. State*, 38 Md. 36 (1873).

5. *Florida*.—*Eggart v. State*, 40 Fla. 527, 25 So. 144 (1899).

*Illinois*.—*Bloomington v. Schrock*, 110 Ill. 222 (1884).

*Kentucky*.—*Clark v. Com.*, 111 Ky. 443, 63 S. W. 740 (1901).

*Michigan*.—*People v. Vanderhoof*, 71 Mich. 179, 39 N. W. 28 (1888).

*New Jersey*.—*New Jersey Zinc & I. Co. v. L. Z. & I. Co.*, 59 N. J. L. 189, 35 Atl. 915 (1896).

*North Carolina*.—*Butler v. R. Co.*, 130 N. C. 15, 40 S. E. 770 (1902).

*Wisconsin*.—*Knoll v. State*, 55 Wis. 256, 12 N. W. 369 (1882).

*Canada*.—*Brown v. Sheppard*, 13 U. C. Q. B. 178 (1856).

1. *Ashworth v. Kittredge*, 12 Cush. (Mass.) 195 (1853).

2. *Gallagher v. R. Co.*, 67 Cal. 13, 6 Pac. 869 (1885).

3. *Dole v. Johnson*, 50 N. H. 456 (1870).

4. See 24 Alb. Law Journ. 268 (1881).

is settled, as stated elsewhere,<sup>1</sup> that there is no general exception to the hearsay rule admitting the statements of writers of recognized authority.<sup>2</sup> Indeed the drift of decision is increasingly unfavorable to the creation of such an exception. Jurisdictions which in their earlier decisions recognized that the necessity and relevancy of these scientific statements entitled them to be received in evidence, as, for example, Alabama,<sup>3</sup> Iowa,<sup>4</sup> Nebraska,<sup>5</sup> Wisconsin,<sup>6</sup> later reversed their rulings, admitting such evidence.<sup>7</sup>

**§ 864. (C. How Actual Knowledge is Acquired; Standard Treatises); Relief Through Administration.**—So far as statutory relief is not offered, much assistance may be rendered the parties by a reasonable use of the administrative power of the court in ascertaining facts of common knowledge, by personal resort to standard treatises and other well-recognized sources of informa-

1. *Supra*, § 698.

2. *Georgia*.—*Johnston v. R. Co.*, 95 Ga. 685, 687, 22 S. E. 694 (1895).

*Illinois*.—*Bloomington v. Schrock*, 110 Ill. 221 (1884).

*Indiana*.—*Epps v. State*, 102 Ind. 539, 550, 1 N. E. 491 (1885).

*Massachusetts*.—*Com. v. Marzynski*, 149 Mass. 72, 21 N. E. 228 (1889).

*Michigan*.—*People v. Vanderhoof*, 71 Mich. 158, 179, 39 N. W. 28 (1888).

*New Hampshire*.—*Dole v. Johnson*, 50 N. H. 452, 456 (1870).

*New Jersey*.—*New Jersey Z. & I. Co. v. L. Z. & I. Co.*, 59 N. J. L. 189, 35 Atl. 915 (1896).

*South Dakota*.—*Brady v. Shirley*, 14 S. D. 447, 85 N. W. 1002 (1901) (veterinary surgery).

*Wisconsin*.—*Kreuziger v. R. Co.*, 73 Wis. 160, 40 N. W. 657 (1888).

*United States*.—*Union P. R. Co. v. Yates*, 25 C. C. A. 103, 79 Fed. 584 (1897).

*England*.—*R. v. Taylor*, 13 Cox Cr. 78 (1874); *Darby v. Ouseley*, 1 H. & N. 8, 12 (1856) (history of papal excommunication of heretical sovereigns); *R. v. Crouch*, 1 Cox Cr. 94 (1844).

3. *Bales v. State*, 63 Ala. 30 (1879); *Merkle v. State*, 37 Ala. 139 (1861).

4. *Peck v. Hutchinson*, 88 Iowa 320, 325 (1893) (Wells Treatise on the Eye, admitted); *Bowman v. Woods*, 1 G. Greene (Iowa) 445 (1848).

5. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860 (1884) "Catechism of a Locomotive."

6. *Luning v. State*, 1 Chand. 185 (1849).

7. *Alabama*.—*Timothy v. State*, 130 Ala. 68, 30 So. 339 (1900).

*California*.—*Gallagher v. R. Co.*, 67 Cal. 13, 6 Pac. 869 (1885).

*Iowa*.—*Stewart v. Equit. M. L. Ass'n*, 110 Iowa 528, 81 N. W. 782 (1900); *Bixby v. Bridge Co.*, 105 Iowa 293, 75 N. W. 182 (1898) (medical books rejected); *Burg v. R. Co.*, 90 Iowa 106, 114, 57 N. W. 680 (1894) (Railway Age; American Mechanical Dictionary, rejected).

*Nebraska*.—*Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295 (1897) (books on surgery, excluded).

*United States*.—*Union P. R. Co. v. Yates*, 25 C. C. A. 103, 79 Fed. 584 (1897) (Treatise on Nervous Shock, excluded).

tion, which would in the case of other members of the community assist in rendering actual their potential knowledge.<sup>1</sup> The administrative value of the expedient is greatly diminished in usefulness by the necessary restriction of judicial cognizance to facts which are neither *res gestæ* or constituent;<sup>2</sup> — except so far as this matter is affected in any particular case, by the operation of *waiver*.<sup>3</sup>

**§ 865. (C. How Actual Knowledge is Acquired); Testimony of Skilled Witnesses.**—Should the court decline to learn, in this way, the existence of a fact of common knowledge, the only available method is to use the witness of special knowledge, the “expert,” as he is called.<sup>1</sup> In the average instance such a witness will be found to testify more or less immediately and exclusively from his reading, i. e., from the statements of standard treatises.<sup>2</sup> The additional elements of proof which the experienced witness would supply, in the average instance, are two. (1) Whether the statements of the book accorded with the results of his personal experience, a fact usually of little value, even when obtainable, notwithstanding the statement of Chief Justice Tindal,<sup>3</sup> that “Physic depends more upon practice than law does.”<sup>4</sup> (2) As to the technical or professional standing of the treatise itself, which is usually a fact of notoriety. The authoritative character of the treatise, and the qualification of the text-writer,<sup>5</sup> must affirmatively appear in all cases.<sup>6</sup>

**§ 866. D. How Far Knowledge is Binding.**—The effect of the court’s taking judicial or common knowledge has been said, by

1. *Supra*, § 698.

2. *Supra*, § 700.

3. *Infra*, § 869.

1. *Infra*, § 1949; *Stoudenmeier v. Williamson*, 29 Ala. 558 (1857).

2. In medical jurisprudence, so called, this is especially true. “Medical evidence altogether is little else than a reference to authority.” 19 *Edinburgh Med. & Surg. Jour.*, 480.

3. *Collier v. Simpson*, 5 C. & P. 73 (1831).

4. Prior to this time rulings had been in a very confused state. The evidence of statements of medical authorities had been received. *Spenser Cowper’s Trial*, 13 *How. St. Tr.* 1163 (1699).

5. *Alabama*.—*Merkle v. State*, 37 Ala. 141 (1861); *Stoudenmeier v. Williamson*, 29 Ala. 558 (1857).

*Iowa*.—*Crawford v. Williams*, 48 Iowa 249 (1878) (herd book).

*Pennsylvania*.—*Spalding v. Hedges*, 2 Pa. St. 243 (1845) (gazetteer).

*Tennessee*.—*Railroad Co. v. Ayres*, 84 Tenn. 729 (1886) (mortality tables).

*England*.—*Rowley v. R. Co.*, L. R. 8 Ex. 227 (1873).

6. “If the witness says: ‘I know the law and the book truly states the law,’ then you have the authority of the witness and of the book.” *Sussex Peerage Case*, 11 C. & F. 113 (1844).

certain courts, to be final. The reasoning is that judicial knowledge takes the place of *proof*—consequently, that it *is* proof and equally conclusive.<sup>1</sup> A marked difference apparently exists, however, in this connection, according as the knowledge of the judge is judicial or common;—i. e., according as the court's knowledge relates to matter of law, or to matter of fact.

§ 867. (*D. How Far Knowledge is Binding*); *Matter of Fact.*

—The line of demarkation between law and fact is frequently, however, hard to draw. This is not to be regarded as unexpected in case of a differentiation which has no basis in the reality of things.<sup>1</sup> Indeed, to refuse to hear evidence, whether this is done by way of a so-called “conclusive presumption,”<sup>2</sup> or of judicial cognizance, is, in itself, to leave the field of fact and lay down a rule of substantive law. But so far as the court's knowledge retains the position of an assumption of the truth of a notorious fact or of easily accessible statements, a party should be permitted to contravene and, if possible, control, the judge's opinion. To the extent that the court's knowledge of common facts is limited, as it properly should be,<sup>3</sup> to probative facts, i. e., those not *res gestæ* or constituent of the right or liability asserted, which it would be in the discretion of the judge to reject entirely, a party is, as a rule, concluded by the judge's declining to know such facts. In case of constituent facts or those in the *res gestæ*<sup>4</sup> a party

1. *Connecticut*.—*State v. Morris*, 47 Conn. 179, 180 (1879).

*Maryland*.—*Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414 (1880).

*Massachusetts*.—*Com. v. Marzynski*, 149 Mass. 68 (1889).

*Minnesota*.—*Thomson-Houston, etc., Co. v. Palmer*, 52 Minn. 174, 177, 53 N. W. 1137 (1893).

*North Carolina*.—*Hooper v. Moore*, 5 Jones L. (N. C.) 130, 132 (1857).

*United States*.—*Brown v. Piper*, 91 U. S. 37, 43 (1875). “Judicial notice, takes the place of proof, and is of equal force. As a means of establishing facts, it is therefore superior to evidence. In its appropriate field, it displaces evidence, since, as it stands for proof, it fulfills the object which

evidence is designed to fulfill, and makes evidence unnecessary. The true conception of what is judicially known is that of something which is ‘not, or rather need not, unless the tribunal wishes it, be the subject of either evidence or argument—something which is already in the court's possession, or, at any rate, is so accessible that there is no occasion to use any means to make the court aware of it.’” *State v. Main*, 69 Conn. 123, 61 Am. St. 30, 39 (1897). See also *State v. Wagner*, 61 Me. 178 (1873).

1. *Supra*, § 41.

2. *Infra*, §§ 1160 *et seq.*

3. *Supra*, § 51.

4. *Supra*, § 47.



may insist upon introducing evidence<sup>5</sup> — under his substantive right to prove his contention. A litigant in whose favor a fact is noticed may well be denied the right to introduce evidence to the same effect.<sup>6</sup> The language of an interesting Massachusetts case<sup>7</sup> is sufficiently sweeping to sustain the contrary contention. The case may, however, be distinguished; in that the ruling itself was merely as to the right of the court to reject evidence to aid it in construing the unambiguous language of a statute. The court's assumed knowledge may be regarded, under these circumstances, as *judicial*, rather than common;<sup>8</sup> and it seems undoubted that a court may reasonably decline to receive evidence to control its judicial knowledge, or that on which it sees fit to act in discharging an administrative function.

**§ 868. (*D. How Far Knowledge is Binding*); Matter of Law.**

—As a matter of course the action of the parties cannot conclude the judicial knowledge of the court with regard to matters of law. For example, the recognition of a foreign government by the executive department of the forum cannot be concluded contrary to the fact, by a stated agreement of the parties. Thus, where a bill in equity alleged that a certain government had been recognized by the British executive, and the fact was otherwise, the court refused to give effect, in this particular, to the admission of a demurrer to the bill. "I am bound to take the fact as it really exists," said the court, "and not as it is averred to be."<sup>1</sup> The doctrine regarding the finality of the court's action in taking judicial knowledge, properly so-called, i. e., when he announces that he knows, as judge, a rule of law or one of its primary effects, is the same as it is with regard to other rulings on matter of law. In this class would therefore fall the construction of a document, the effect of a public statute and so on.<sup>2</sup> The court may properly

5. *People v. Mayes*, 113 Cal. 618, 45 Pac. 860 (1896).

6. *State v. Chingren*, 105 Iowa 169, 74 N. W. 946 (1898).

7. *Com. v. Marzynski*, 149 Mass. 68 (where it was held that the court was justified in rejecting evidence that a sale of cigars by a tobaccoist in his shop in the usual way and for ordinary use on the Lord's Day was a sale of "drugs and medicines"

within the meaning of an exception to the operation of a statute).

8. This construction of statutes is a well settled function of the court. *Com. v. Crowley*, 145 Mass. 340 ("baker"). *Supra*, § 128.

1. *Taylor v. Barclay*, 2 Sim. 213 (1828).

2. *People v. Oakland Water-Front Co.*, 118 Cal. 234, 50 Pac. 305 (1897) (incorporation of a city).

decline to hear evidence to aid it in construing a statute,<sup>3</sup> or other document. It is eminently proper to hold, in such cases, that where a judge reaches a wrong conclusion in knowing judicially such a fact the act is as much error as if he had mistaken a rule of law.<sup>4</sup>

*A Dual Function.*—The question as to how far the knowledge of the court as to matters of notoriety may be regarded as binding upon the parties brings in sharp contrast the dual function of a presiding judge. He is, in the first place, appointed for the ascertainment of truth and the furtherance of justice; in the second place to administer the rules of law upon such facts as the parties may see fit to offer and such contentions as they may deem it advisable to make. A very considerable strain is placed upon a judge who is called upon to permit a fact to be proved to an effect contrary to what he actually knows to be the truth. It is a burden which the American system of jurisprudence apparently places upon its judges and of which it allows them to relieve themselves only by the entirely disproportionate expedient of ordering that the case be tried again. As has been said<sup>5</sup> the parties are at liberty to attempt to prove, if they can, a *res gestæ* or constituent fact even contrary to the common knowledge of the court and jury. Whether the parties are at liberty to stipulate or agree to the existence of a fact which the court knows to be untrue is a matter of some doubt. Agreements contrary to judicial knowledge have been sustained.<sup>6</sup> The same rule has been applied to the court's judicial knowledge of the direct results of law, e. g., the official reports of a railroad to the authorities of the state, as required by law.<sup>7</sup> Where a demurrer concedes the navigability of a stream it has been held that the court's common knowledge could not be utilized to the contrary effect.<sup>8</sup> On the other hand, it has been intimated that the court will not act upon such an arrangement.<sup>9</sup> Unless rigidly limited, the latter doctrine is a dan-

3. *Com. v. Marzynski*, 149 Mass. 68, 72, 21 N. E. 228 (1889). *Supra*, § 128.

4. *Gilbert v. Flint, etc., R. Co.*, 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592 (1883); *U. S. v. One Thousand Five Hundred Bales of Cotton*, 27 Fed. Cas. No. 15,958 (1872).

5. *Supra*, § 700.

6. *North Hempstead v. Gregory*, 65 N. Y. Suppl. 867, 53 App. Div. 350

(1900). See also *Walton v. Stafford*, 43 N. Y. Suppl. 1049, 14 App. Div. 310 (1897).

7. *People v. Michigan Cent. R. Co.*, (Mich. 1906) 13 Detroit Leg. N. 552, 108 N. W. 772.

8. *State v. Norcross*, (Wis. 1907) 112 N. W. 40.

9. *Russ v. Boston*, 157 Mass. 60, 31 N. E. 708 (1892).

gerous one. The tribunal is not, however, required to act upon uncontroverted evidence, tending to establish a fact contrary to its own judicial knowledge.<sup>10</sup>

*Where the knowledge is judicial*, i. e., relates to matter of law, the action of the judge is final, for the purposes of the case;—even in connection with the direct results of law, or with respect to the construction of a statute, where the matter is for the judge, though properly one of fact.<sup>11</sup> Thus, a judge in construing a statute is not required to hear evidence to an effect which he feels is contrary to common knowledge.<sup>12</sup> In other words, the situation is administrative where the knowledge of the trial judge is *judicial*. The parties have no more right to control by their agreements the action of the court than they would have to determine, in the same way, what should be the rule of law applicable to the case. The judge is preparing to discharge an administrative function and he is entirely unfettered, except by the rules of reason, as to what effect he may give the information, arguments or agreements of the parties.

**§ 869. E. Cognizance as Affected by Action of the Parties; Waiver.**—To the number of facts not requiring proof because judicially noticed as commonly known may properly be added facts of little or no notoriety which are assumed as true during the course of the trial because asserted on the one side and not denied on the other. No rule of law demands that a party should insist upon proof of such facts. Few administrative expedients for expediting trials<sup>1</sup> are more effective in the hands of a competent judge than this recognition that not all facts are controverted between the parties with equal vehemence. While not intruding into the actual management of the case so far as to remove the function of initiative from the parties where it properly belongs, wise judicial administration may well employ a considerable portion of its energy in increasing, in any given case, the number of uncontroverted facts. It not infrequently happens that this is, intentionally or unintentionally, accomplished by the presiding justice through the formula of announcing that he judicially

10. *Lidwinofsky's Petition*, 7 Pa. Dist. 188 (1898). See also *Com. v. Marzynski*, 149 Mass. 68, 21 N. E. 228 (1889).

11. *Supra*, § 128.

12. *Ex parte Kair*, (Nev. 1905) 80 Pac. 463 (that prolonged labor in a mill for reducing ores is not prejudicial to health).

1. *Supra*, §§ 544 *et seq.*

knows a certain fact, or that it is commonly known. No small portion of the advantage in practical administration, which attended the use of a common law system of pleading consists in the aid which it furnishes to this salutary principle of administration. On the contrary, no objection to the use of a diffuse system of code pleadings,— which instead of stating propositions on one side or the other puts forth a *situation* in the complaint to be answered by another situation set up in the answer,— is, in reality, more weighty than that it undermines clear thinking by placing the important and the unimportant on the same logical level and confuses the jury by a large number of disputes which, at best, merely protract the trial, but, usually, assist in creating a necessity for a new trial or reversal. In other words, a presiding judge may well be alert in noticing any *waiver*, by either party, upon strictness of proof, in any given connection. No public policy, except, occasionally, in criminal cases, is opposed to such a course on the part of the judge. “As the rules of evidence” said Chief Justice Shaw<sup>2</sup> “are made for the security and benefit of the parties, all exceptions may be waived by mutual consent.”

*Sound administration requires* that a distinction be observed as to what matters of proof or other procedural requirement a litigant may properly waive as distinguished from those which he may not. That upon which a party is, as of right, entitled to insist, he may also waive. Applying this test to the facts covered by common knowledge, it would seem that the party was entitled to demand or waive the advantage of such rules of procedure, practice or administration as were primarily designed to assist the litigants, foster the litigious elements in litigation; but that he was not concerned with provisions directly designed for the furtherance of the social objects which the proceedings seek to reach.<sup>3</sup> In other words, so far as administration or positive law establishes rules for the protection of substantive rights,<sup>4</sup> they may be waived by the party. Where the object of the rule is to further justice,<sup>5</sup> expedite causes,<sup>6</sup> or give certainty to substantive law,<sup>7</sup> the litigant has no right to insist; and, consequently, has nothing to waive. For example, either party is entitled to insist

2. Shaw v. Stone, 1 Cust. (Mass.) 228, 243 (1848).

3. *Supra*, § 303.

4. *Supra*, §§ 332 et seq.

5. *Supra*, §§ 463 et seq.

6. *Supra*, §§ 544 et seq.

7. *Supra*, §§ 556 et seq.

upon proving a *res gestæ* or constituent fact material to his case.<sup>8</sup> He may therefore waive the benefit of such proof. Where, however, the question is as to the right of a presiding judge to do justice or expedite a trial by investigating into the existence of a notorious historical fact, a litigant has no rights, nothing to waive, and is not even entitled to be heard.

8. *Supra*, §§ 358, 700.

## CHAPTER X.

### KNOWLEDGE; SPECIAL.

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*Technical or scientific facts.**mechanic arts, 902.**dangers, 903.**proper management of business, 904.**strength of mechanical appliances, 905.**use of firearms, 906.**value of materials, 907.**mining, 908.**natural history, 909.**professional facts, 910.**law, 910.**medicine, 911.**effect of drugs, poisons, etc., 912.**qualifications of witnesses, 913.**state of medical knowledge, 914.**symptoms of bodily or mental disease; injuries, etc., 915.**treatment; possibilities and probabilities, 916.**surgery, 917.**veterinary surgery, 918.**railroad facts, 919.**duties of officers or employees, 920.**operation, 921.**freight transportation, 922.**minor facts, 923.**passenger transportation, 924.**possibilities and probabilities, 925.**roadbed and equipment, 926.**street railway matters, 927.**duties of officers or employees, 928.**operation; possibilities, 929.*

§ 870. **Special Knowledge.**—Secondary in importance only to the judicial or law knowledge of the judge<sup>1</sup> and the common knowledge of both judge and jury as to facts of notoriety<sup>2</sup> is the *special* knowledge of skilled or experienced witnesses;—the consideration of which will occupy the present chapter. The judicial office of special knowledge is to supply the inadequacies of the common knowledge of the jury. The underlying necessity for

1. *Supra*, § 571.2. *Supra*, § 699.

using it is the limited experience of the average member of the community. As is elsewhere observed, and as, indeed, is obvious, the inferences which both court and jury are constantly drawing as a very large part of the required exercise of reason in connection with their judicial acts, rest ultimately upon some general proposition of experience which is part of common knowledge.<sup>3</sup> From this as a major premise, and some fact in evidence as a minor, a conclusion is reached. This, in its turn, alone or in connection with other facts, becomes the major premise of a second and usually more comprehensive syllogism, and so on, until the supposed *res gestæ* are established. At this point legal reasoning,<sup>4</sup> operating by employment of the constituent relevancy<sup>5</sup> existing between the *res gestæ* or constituent facts and some proposition in issue but presenting a general similarity to this logical process, but also revealing certain essential differences, is used to arrive at the judicial decision which the proceedings seek to reach. Cases, however, may arise where this element of general experience founding the major premise is necessarily absent from the jury. To coördinate technical experience with a rational conclusion may require specially trained faculties, which the jury may not possess and cannot readily acquire. In the first case, the special knowledge of the skilled technical witness will be placed by the proponent at the service of the jury, leaving them to draw the inferences from it. In the second, the skilled witness, frequently testifying as an "expert" i. e., upon hypothetical questions<sup>6</sup>, will be permitted not only to state the special knowledge on which he bases his conclusion or judgment but also these mental results themselves and the processes of inference by which he reaches them.

**§ 871. (*Special Knowledge*); Reason for Excluding Knowledge in General.**— In testifying to special knowledge, rather than particular knowledge a witness is exercising a function usually denied to those who testify. Witnesses are not to reason.<sup>1</sup> The precise basis for this rule is that it is not, in general, within the province of a witness to state *knowledge*. In view of the fact, just mentioned, that the major premise of reasoning is some proposition derived ultimately from experience in the community which, as affected by reflection and the experience of others constitutes

3. *Supra*, § 694.

4. *Supra*, § 63.

5. *Infra*, § 1710.

6. *Infra*, §§ 2451 *et seq.*

1. *Infra*, §§ 1791 *et seq.*



common knowledge, the use of reason on the part of a witness implies and requires the transfer into the case of the general or special knowledge of the witness, in the form of his inference, conclusion or judgment.<sup>2</sup> Common knowledge it is the function of the counsel, judge and jury to utilize in course of the reasoning process. The witness, so far as reasonably feasible, must be content to furnish eyes and ears for the tribunal, to place a judge and jury, to the extent of his ability, in the position of original observers of the scene reproduced in the evidence. This is his ancient oath and at all times his characteristic duty.<sup>3</sup> His office is as it were to supply the "raw materials" for judgment, the minor premises of logical syllogisms of which knowledge or, more direct experience, supplies to each a major premise.

**§ 872. (*Special Knowledge*); Administrative Action of Judge.**

— As an administrative matter, the right of a party to prove his case by the best evidence in his power is paramount.<sup>1</sup> Unquestionably it is the general procedural rule, dating from very early times in English law,<sup>2</sup> that jurors should reason and witnesses should not. To harmonize these two administrative or procedural principles, the court is, in effect compelled to say, that so far as the common knowledge of the jury enables them rationally to deal with a particular set of facts, they must be permitted to do so; and that where they are not, the proponent may supplement this general knowledge by special knowledge or even by inferences from such special knowledge. In other words, as to matters of common knowledge, a jury can, generally speaking, gain nothing of essential value from the judgment of witnesses, however experienced or skillful.<sup>3</sup> To form the major premise of the syllogism which gives relevancy to any minor premise supplied by a fact in evidence knowledge is needed. So far as possible, this knowledge should be that of the average juror i. e., common knowledge. Whenever a judge finds, as a matter of administration, that

2. His conclusion is a function of two variables;— (1) the knowledge of the witness and (2) the existence of certain facts as proved by the evidence. To receive his conclusion imports his general knowledge and accepts his *finding* as to the effect of the evidence or phenomena observed by him.

3. *Infra*, § 1800.

1. *Supra*, § 334.

2. *Supra*, § 270i.

3. *Compton v. Bates*, 10 Ill. App. 78 (1881); *Knoll v. State*, 55 Wis. 249, 12 N. W. 369, 42 Am. Rep. 704 (1882); *Wright v. Com.*, 72 S. W. 340, 24 Ky. L. Rep. 1838 (1903); *Hovey v. Sawyer*, 5 Allen 554 (1863); *McCall v. Moschowitz*, 10 N. Y. Civ. Proc. 107 (1886).

in his opinion, the common knowledge of the jury may reasonably be assumed to be insufficient, he may properly allow it to be supplemented by that possessed by persons of special experience. With regularity and little consideration, the judge will permit relevant *facts* of special knowledge and experience to be placed before the jury. With greater hesitancy and the establishment of stronger administrative reasons, he will allow the skilled witness, as an expert, to use his own mental faculties upon the basis of this special knowledge in the formation of judgments, in which the facts in evidence, or certain of them, constitute the minor premise, being submitted to the witness by means of hypothetical questions.<sup>4</sup>

**§ 873. (*Special Knowledge; Administrative Action of Judge*); Necessity of Relevancy.**—It follows from what has been said that evidence of special knowledge is not only supplementary to common, but that it is, in a sense, secondary to it. Under these circumstances, the ordinary rule of administration obtains that the secondary evidence will be admitted only (1) when an adequate forensic necessity has been shown for using it and, (2) that it be affirmatively shown by the proponent or assumed by the court that the secondary evidence is relevant, i. e., is from a person of adequate knowledge and without controlling motive to misrepresent.

**§ 874. (*Special Knowledge; Administrative Action of Judge*); Adequate Knowledge.**—Among the elements of relevancy those which are subjective are of special importance in this connection and, as between the two elements of subjective relevancy, adequate knowledge is of higher consequence. The testimony of a skilled witness may be valuable to the jury if he be suitably equipped by professional knowledge and experience although

4. *Infra*, §§ 2451 *et seq.* The principle being entirely settled that common knowledge is to be primarily relied upon as the major premise for judicial inferences so far as it extends, to the exclusion of "expert knowledge," so called, a ruling or finding as to the admissibility of the judgments of skilled witnesses is, in effect, deciding as to what constitutes common knowledge. If expert testi-

mony is rejected it amounts to a holding that the subject-matter is sufficiently within the common knowledge of the jury to enable them to deal with it in a satisfactory manner.

*Per contra*, admitting expert knowledge is in reality a ruling or finding that the common knowledge of the jury is inadequate to deal with the matter disclosed in the evidence.

biased in favor of the party calling him, while, however disinterested he may be, his evidence will be of little value should he know nothing about the technical subject on which he proposes to testify. It is therefore an important part of the administrative action of the court in this connection that only such technical testimony should be allowed to go to the jury as is reasonably calculated to aid their deliberations. The skilled witness may, as a matter of course, testify to the same facts as would an ordinary witness — the “man on the street.” But he may go further, into fields where an ordinary witness cannot follow him and it is in these that his qualifications become of especial importance. In other words, the skilled observer may testify as to any relevant fact but should it be one of special knowledge<sup>1</sup> i. e., one connected with a particular profession, trade or calling, the court will require that the witness should qualify as possessing the knowledge appropriate to a member of it.<sup>2</sup> Such a fact may either have been one observed by him<sup>3</sup> or generally known in the calling in which his experience lies. An individual fact of common technical knowledge may have fallen but rarely under his own observation; he may not have chanced actually to observe it at all. That makes no difference.<sup>4</sup> Thus the symptoms of poisoning<sup>5</sup> or other bodily disease,<sup>6</sup> the effect of particular drugs<sup>7</sup> on the human system, may be stated, as facts, by a medical witness who has had no occasion to observe them. In a similar way the method of conducting some mechanical operation<sup>8</sup> or the way in which

1. *Supra*, § 870.

2. *Osborne v. Troup*, 60 Conn. 485, 23 Atl. 157 (1891); *Baxter v. Chicago, etc., R. Co.*, 104 Wis. 307, 80 N. W. 644 (1899).

3. *Infra*, §§ 1947 *et seq.*

4. *Boswell v. State*, 114 Ga. 40, 39 S. E. 897 (1901); *Helfenstein v. Medart*, 136 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294 (1896); *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625 (1903); *Fordyce v. Moore*, (Tex. Civ. App. 1893) 22 S. W. 235. Where a witness has never personally done an act of which he has learned the theory, but thinks he could do it if called upon he is not necessarily to be excluded. *Childs v. O'Leary*, 174 Mass. 111, 54 N. E. 490 (1899).

The requirement of actual experience has, however, been made. *Graney v. St. Louis, etc., R. Co.*, 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153 (1900).

5. *Mitchell v. State*, 58 Ala. 417 (1877); *Siebert v. People*, 143 Ill. 571, 32 N. E. 431 (1892).

6. *State v. Wood*, 53 N. H. 484 (1873) (abortion).

7. *Germania L. Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215 (1897) (cyanide of potash); *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228 (1901) (formaldehyde).

8. *Childs v. O'Leary*, 174 Mass. 111, 54 N. E. 490 (1899) (blasting). See, however, to the contrary, *Brad-*

an industrial device performs its work<sup>9</sup> may be stated to the court by a millwright or engineer who has never happened to see the particular combination.

**§ 875. Technical or Scientific Facts.**— The development of the modern law of evidence requires that knowledge, in many and varied directions, should be brought to the jury to supplement their common knowledge. The complexity of business or social life and the rapidly expanding field of knowledge leave common knowledge but a sorry tool with which to shape the reasoned conclusions of the jury. The deficiency is obvious. The best method of supplying it is not so clear. Apart from an essential modification of the jury system and its replacement by a more scholarly and teachable tribunal, the remedies adopted in main are three. 1. A direct extension of the scope of common knowledge through investigations conducted by the presiding judge as the executive officer of the court.<sup>1</sup> 2. Where the jury may be so informed concerning matters outside their judicial knowledge as to be able to co-ordinate them into a reasonable judgment, suitably skilled witnesses will be permitted to state appropriate facts to them. They are then left to exercise their function of judging without further assistance. 3. Where the knowledge required for drawing a reasonable inference from the facts covers matters which are too numerous to be readily imparted to the jury from the witness stand or requires for its adequate appreciation certain specially developed qualities of mind or habits of looking at things only obtained by specialized training, the facts assumed to exist in the jury's mind are placed before the skilled witness in the form of a hypothetical question and he is permitted to state the judgment which his learning, skill and training enable him to form; — the jury, in turn, being at liberty to follow the mental operations of the skilled witness, precisely, within limits of reason, as they see fit. The first of these methods of supplementing the common knowledge of the jury has been considered elsewhere. The third will be considered later, under the head of "expert" testimony; — the term "expert" being reserved for application to the skilled

ford Glycerine Co. v. Kizer, 113 Fed. 894, 51 C. C. A. 524 (1902) (explosion of nitroglycerine).

9. Hall v. Murdock, 114 Mich. 233, 72 N. W. 150 (1897) (elevator).

1. *Supra*, § 852.

witness when examined by the use of hypothetical questions.<sup>2</sup> The second method forms the subject of the present chapter.

§ 876. (*Technical or Scientific Facts*); *Administrative Considerations*.—The incessant operation of slight differences of fact produces, in addition to lack of value as precedents, the effect of great apparent conflict of decision among cases sustaining the same general principle of administration. This contrariety of ruling will be, perhaps, less inexplicable, if certain general considerations affecting the practical administration of the principal be borne in mind. Among these are; (1) The entire state of the case in all particulars must have been considered by the presiding judge in determining how necessary the evidence of the skilled witness actually was to the proponent, and, consequently, how his administrative function should be exercised. (2) The same considerations may very well appear to different judges as possessing different relative importance. (3) In proportion as the subject-matter becomes vital to the issue, the judge's impulse to exclude special knowledge in which an element of inference may lurk is intensified. (4) It is not sufficient that the inquiry relate, more or less directly, to a matter which is largely, or, indeed, almost exclusively, known only to persons who have had a special experience. Certain things may be commonly known about very recondite or technical subjects. (5) The judge may properly consider whether the special knowledge is not of such a nature that the jury could conveniently be *instructed* in the matter sufficiently for all essential purposes of the trial. If the presiding judge, in discharge of his administrative function,<sup>1</sup> is persuaded that the subject-matter is one on which the jury may be adequately instructed during the course of the trial he may require that the jury exercise their own judgment<sup>2</sup> upon facts supplied by skilled witnesses. (6) The court may reasonably admit evidence as to

2. *Wichita v. Coggeshall*, 3 Kan. App. 540, 43 Pac. 842 (1896); *Titus v. Gage*, 70 Vt. 13, 39 Atl. 246 (1896).

1. *Middlebury Bank v. Rutland*, 33 Vt. 414 (1860).

2. *Illinois*.—*Batchelor v. Union Stock Yard, etc., Co.*, 88 Ill. App. 395 (1899).

*Iowa*.—*Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462 (1873).

*Massachusetts*.—*Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63 (1871).

*Missouri*.—*Benjamin v. Metropolitan St. R. Co.*, 50 Mo. App. 602 (1892).

*Nebraska*.—*Read v. Valley Land, etc., Co.*, 66 Neb. 423, 92 N. W. 622 (1902).

*New Hampshire*.—*Nourie v. Theobald*, 68 N. H. 564, 41 Atl. 182 (1896).

the special knowledge of the skilled witness under circumstances where it would decline to permit the same witness to apply this knowledge to the evidence either in the form of a conclusion<sup>3</sup> or that of a judgment.<sup>4</sup> That the special knowledge of an expert should be received in the form of his judgment regarding definite propositions of fact it is necessary that the precise subject of inquiry be outside the realm of common knowledge.<sup>5</sup> If the fact as to which inquiry is made be within the jury's field of knowledge the judgment of the expert is excluded, though as to the great number of correlated facts, knowledge is confined to technically trained persons.

**§ 877. (Technical or Scientific Facts); Scope.**—The range of facts relating to any calling which the witness skilled or experienced in that vocation may state is limited only by the bounds of human knowledge and facts of which the human brain is capable of forming a concept. Obviously, it is not limited to any particular profession.<sup>1</sup> The entire list of human activities physical, business and social are embraced within this range. Any fact not one of particular knowledge which the witness knows and the jury presumably do not, and which the court, in the exercise of its administrative powers, feels would be helpful to the tribunal, may be received,<sup>2</sup> provided that the fact is relevant<sup>3</sup> and that the witness limit himself to giving the fact within his knowledge and

*New York.*—*Roberts v. New York El. R. Co.*, 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499 (1891).

*Vermont.*—*Brown v. Doubleday*, 61 Vt. 523, 17 Atl. 135 (1889).

*West Virginia.*—*Sebrell v. Barrows*, 36 W. Va. 212, 14 S. E. 996 (1892).

*United States.*—*Patten v. U. S.*, 15 Ct. Cl. 288 (1879).

3. *Infra*, §§ 2291 *et seq.*, 2325 *et seq.*

4. *Infra*, §§ 2371 *et seq.*

5. The subject-matter as to which inquiry is made must so far partake of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it. *Wight Fire-proofing Co. v. Poczekai*, 130 Ill. 139, 22 N. E.

543 (1889); *People v. Barber*, 115 N. Y. 475, 22 N. E. 182 (1889); *Fairchild v. Bascomb*, 35 Vt. 398 (1862).

1. *McFadden v. Murdock*, 15 Wkly. Rep. 1079 (1867).

2. *Emerson v. Lowell Gaslight Co.*, 6 Allen (Mass.) 146, 83 Am. Dec. 621 (1863); *Folsom v. Concord, etc., R. Co.*, 68 N. H. 454, 38 Atl. 209 (1896); *Lake Erie, etc., R. Co. v. Mulcahy*, 16 Ohio Cir. Ct. 204, 9 Ohio Cir. Dec. 82 (1898); *Gulf, etc., R. Co. v. Duvall*, 12 Tex. Civ. App. 348, 35 S. W. 699 (1896).

3. *Teall v. Barton*, 40 Barb. (N. Y.) 137 (1863); *Wynn v. Central Park, etc., R. Co.*, 14 N. Y. Suppl. 172 (1891).

does not undertake to state the bearing of the fact upon the truth of a proposition in issue.<sup>4</sup>

*No Moral Requirement.*—No requirement that the trade or calling to which the fact relates should be beneficial to society or even moral in itself has been imposed. The gambler may show the jury how a novice can be cheated by tricks at cards<sup>6</sup> or how to play a gambling game.<sup>6</sup>

*Witnesses not "Experts."*—No reason is perceived for speaking of such witnesses as to matters of special knowledge as "experts"<sup>7</sup> though the use of the term is frequent.<sup>8</sup> So customary a use is, indeed, made natural by the fact that only from among those possessed of technical facts relating to a particular business, etc., can the "expert," as a rule, be selected. Any such witness, moreover, upon an ordinary subpoena, may be required to give his judgment as an expert.<sup>9</sup> Conversely, those competent to testify as experts may fairly be expected to have in mind the facts commonly known to those versed in that specialized pursuit.<sup>10</sup> Frequently such facts form part of the major premise of his judgment when testifying hypothetically.<sup>11</sup>

### § 878. (*Technical or Scientific Facts*); *Properties of Matter.*

—While the more familiar properties of matter are commonly known, the more obscure may be stated to the tribunal by any one adequately versed in an art in which such properties are known<sup>1</sup> or who otherwise, for any reason knows the fact.<sup>2</sup>

*State of the Art.*—The "state of the art" at any given time

4. *Lake Erie, etc., R. Co. v. Mulcahy*, 16 Ohio Cir. Ct. 204, 9 Ohio Cir. Dec. 82 (1898).

5. *Hall v. State*, 6 Baxt. (Tenn.) 522 (1873).

6. *Nuckolls v. Com.*, 32 Gratt. (Va.) 884 (1879) ("keno").

7. *State v. Melvern*, 32 Wash. 7, 72 Pac. 489 (1903).

8. *Shields v. State*, 149 Ind. 395, 49 N. E. 351 (1897); *Cottrill v. Myrick*, 12 Me. 222 (1835).

9. *Larimer County v. Lee*, 3 Colo. App. 177, 32 Pac. 841 (1893).

10. *Emerson v. Lowell Gaslight Co.*, 6 Allen (Mass.) 146, 148, 83 Am. Dec. 621 (1863). "One who is an expert may not only give opinions,

but may state general facts which are the result of scientific knowledge or professional skill." *Emerson v. Lowell Gaslight Co.*, 6 Allen (Mass.) 146, 148, 83 Am. Dec. 621 (1863).

11. *Anderson v. Illinois Cent. R. Co.*, 109 Iowa 524, 80 N. W. 561 (1899).

1. *Shufeldt v. Searing*, 59 Ill. App. 341 (1895) (explosion of dust); *St. Louis Gaslight Co. v. Philadelphia American F. Ins. Co.*, 33 Mo. App. 348 (1889) (gas).

2. *Standard Oil Co. v. Tierney*, 96 Ky. 89, 27 S. W. 983, 16 Ky. L. Rep. 327 (1894) (properties of illuminating oil).

in his trade or calling,<sup>3</sup> and the facts which naturally flow from it, as, for example, whether a certain device has novelty,<sup>4</sup> may be stated by the specially experienced witness. Nor is such a statement deemed objectionable by reason of the fact that it covers the precise proposition in issue.<sup>5</sup> This is apt to be of special prominence in patent causes.<sup>6</sup>

**§ 879. (*Technical or Scientific Facts*); Illustrative Instances.**

— It thus appears that common and special knowledge are, in theory at least, mutually exclusive and supplementary. Admitting, over objection, evidence of special knowledge is, in effect, a ruling that common knowledge is insufficient;— and *vice versa*. To avoid restating the procedural rules as to common knowledge in terms of special, it will be sufficient to refer merely to certain illustrative instances among the innumerable number of cases which, however variant in their individual facts, still unite to sustain this uncontested principle of the administrative necessity for introducing evidence of special knowledge where the common knowledge of the jury is inadequate to enable them to act rationally upon the evidence before them.<sup>1</sup> It is naturally to be expected, moreover, that great confusion in the law must result in treating as precedents what are, in reality, mere administrative rulings. While the principle is settled beyond question that where common knowledge ends it may be reinforced by the special knowledge of experienced men, precisely where, in any particular case, the line between common knowledge, what everyone in the community knows, and special knowledge, which a profession or the like knows is obviously hard to draw. Judges of equal learning and intelligence may rationally differ on the subject, as abundantly appears later in this chapter. To treat such questions as those of *judicial* rather than of common knowledge, seems better designed to encumber reports, digests, and text books with legally inert material than to advance the cause of jurisprudence.

3. *Winans v. New York, etc., R. Co.*, 21 How. (U. S.) 88, 100, 16 L. ed. 68 (1858).

4. *Haley v. Flaccus*, 193 Pa. St. 521, 44 Atl. 566 (1899).

5. *Tillotson v. Ramsay*, 51 Vt. 309 (1878).

6. *Burton v. Burton Stock-Car Co.*, 171 Mass. 437, 50 N. E. 1029 (1898).

1. *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 429, 24 N. E. 179 (1890); *Graham v. Pennsylvania Co.*, 139 Pa. St. 149, 158, 21 Atl. 151, 12 L. R. A. 293 (1891).



§ 880. (*Technical or Scientific Facts*); Business Affairs.—

While many of the more familiar facts relating to business matters are of sufficient notoriety to be covered by common knowledge, a multitude of them are constantly presenting themselves as to which the evidence of an experienced witness is received and still others, of a more technical nature, in proof of which such evidence is required. The competent witness must have more than a general experience though actual training rather than compliance with statutory regulation is the test of competency.<sup>1</sup> The training and experience must be sufficiently specific to enable the witness to answer with adequate knowledge, the question asked. For example, a dealer in genuine precious stones is not, of necessity, competent to state the uses of artificial ones.<sup>2</sup> Any competent witness may give the general methods of carrying on his business,<sup>3</sup> whether conducted on a wholesale<sup>4</sup> or on a retail<sup>5</sup> scale.

*Clerical Assistance.*—The specific duties of clerks and other assistants<sup>6</sup> through whose agency a particular business is carried on, naturally fall into the same category.

*Marks and Designations.*—In any mercantile business, the commodities handled, are, as a rule, graded into classes according to certain standards. These classes are, for convenience for purposes of sale, reference, etc., designated in a particular manner, often by ciphers, marks and the like, intended only for use in the particular establishment itself. What these tests or standards are in case of any given commodity,<sup>7</sup> when any given article is deemed to be covered by a particular trade name or classification,<sup>8</sup> or is to be deemed “merchantable”<sup>9</sup> or unmerchantable, and what is the meaning of ciphers and other private marks<sup>10</sup> can only be

1. *Downing v. State*, 66 Ga. 110 (1880). See *supra*, §§ 809–847, *infra*, §§ 1963, 2383.

2. *Lorsch v. U. S.*, 119 Fed. 476 (1902).

3. *Atwater v. Clancy*, 107 Mass. 369 (1871) (inspecting goods in case); *MacLaren v. Cochran*, 44 Minn. 255, 46 N. W. 408 (1890) (what affects credit; protest of note); *Commercial Bank v. Union Bank*, 19 Barb. (N. Y.) 391 (1853) (negotiating commercial paper).

4. *Crane v. Fry*, 126 Fed. 278, 61 C. C. A. 260 (1903) (logging).

5. *Sexton v. Lamb*, 27 Kan. 426

(1882); *McFadden v. Murdock*, 15 Wkly. Rep. 1079 (1867) (grocer).

6. *Pepper v. Planters Nat. Bank*, 5 Ky. L. Rep. 85 (1883) (cashier).

7. *Downing v. State*, 66 Ga. 110 (1880) (kerosene).

8. *Pollen v. Le Roy*, 10 Bosw. (N. Y.) 38 (1862); *Nordlinger v. U. S.*, 115 Fed. 828 (1902).

9. *Wagar Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 558, 24 So. 949 (1898) (lumber); *Austin v. Hartwig*, 49 N. Y. Super. Ct. 256 (1883) (sauerkraut).

10. *Foley v. Abbott*, 66 Ga. 115 (1880).

stated by one familiar with the details of the business. In general, however, any relevant fact connected with any trade or business not commonly known in the community, and so part of common knowledge, may be stated by a sufficiently experienced witness.

*Profit and Loss.*—Among the innumerable matters which fall under so broad a rule are the elements of profit or of loss, which attend the customary operation of any business or gainful occupation. Thus, what loss to perishable articles<sup>11</sup> is caused by exposure, variations in heat or cold,<sup>12</sup> and how large a percentage of the entire bulk this loss is;<sup>13</sup> what allowance must be made to cover loss in bulk by weighing it out in smaller parcels,<sup>14</sup> are questions which require a special experience to answer with a probative effect.

**§ 881. (Technical or Scientific Facts; Business Affairs); Custom.**—The existence of any custom or usage in business not a matter of general knowledge<sup>1</sup> obtaining in any building,<sup>2</sup> mer-

11. St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. Rep. 238 [affirming 74 Ill. App. 619] (1898) (condensed milk); Wilson v. F. C. Linde Co., 62 N. Y. Suppl. 69, 47 N. Y. App. Div. 327 (1900) (apples).

12. The requisites for a suitable place for storing any given commodity may reasonably be assumed to be known to the dealers in it. Rust v. Eckler, 41 N. Y. 488 (1869).

13. Sexton v. Lamb, 27 Kan. 426 (1882) (handling ice).

14. McFadden v. Murdock, 15 Wkly. Rep. 1079 (1867).

1. Georgia.—Horan v. Strachan, 86 Ga. 408, 12 S. E. 678, 22 Am. St. Rep. 471 (1890).

Illinois.—Wilson v. Bauman, 80 Ill. 493 (1875).

Iowa.—Thayer v. Smoky Hollow Coal Co., 121 Iowa 121, 96 N. W. 718 (1903).

Louisiana.—Suarez v. Duralde, 1 La. 260 (1830).

Massachusetts.—Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 234 (1878).

New York.—Hart v. Brooklyn, 52 N. Y. Suppl. 113, 31 App. Div. 517 (1898).

Ohio.—State v. Ampt, 6 Ohio Dec. (Reprint) 699, 7 Am. L. Rec. 469 (1879).

Rhode Island.—Evans v. Commercial Mut. Ins. Co., 6 R. I. 47 (1859).

Tennessee.—Fry v. New York Provident Sav. L. Assur. Soc., (Ch. App. 1896) 38 S. W. 116.

Texas.—Galveston, etc., R. Co. v. Collins, 31 Tex. Civ. App. 70, 71 S. W. 560 (1902).

Vermont.—King v. Woodbridge, 34 Vt. 565 (1861).

England.—Adams v. Peters, 2 C. & K. 723, 61 E. C. L. 723 (1849).

2. Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 234 (1878) (flues in party walls).

cantile<sup>3</sup> or other trade<sup>4</sup> or calling<sup>5</sup> may be shown by any one whom the court deems competent;<sup>6</sup>—*provided* that the time at which the custom is shown to have existed is so related to that made important by the evidence, that it may fairly and reasonably be assumed to be relevant to the facts or propositions in issue.<sup>7</sup> The custom may with equal admissibility be domestic or obtain in some foreign state<sup>8</sup> or country.<sup>9</sup> It is not essential that the witness be specially skilled in the business affected by the custom or usage,<sup>10</sup> that he should be able to speak with absolute certainty in the matter,<sup>11</sup> or that personal knowledge should be the entire basis of his statement. He is entitled to rely upon the customs by the aid of which he conducts his business as among the grounds upon which his evidence proceeds.<sup>12</sup> But he may also rely in part upon information furnished him by others.<sup>13</sup>

**§ 882. (*Technical or Scientific Facts; Business Affairs*); Technical Terms.**—In any case where the meaning of a trade term or phrase used in a business or calling is a relevant fact,<sup>1</sup> one

3. *Page v. Cole*, 120 Mass. 37 (1876) (selling milk routes by the can); *Atwater v. Clancy*, 107 Mass. 369 (1871) (tobacco sold by sample).

4. *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522 (1870) (insurance).

5. *Worcester v. Northborough*, 140 Mass. 397, 5 N. E. 270 (1886).

6. *Price v. White*, 9 Ala. 563 (1846); *Hamilton v. Nickerson*, 95 Mass. 351 (1866); *Haslam v. Adams Express Co.*, 6 Bosw. (N. Y.) 235 (1860); *Edwards v. Davidson*, (Tex. Civ. App. 1904) 79 S. W. 48.

7. *Hale v. Gibbs*, 43 Iowa 380 (1876).

The statement must be one of fact.—A mere inference as to the existence of the customs is not sufficient. *Mills v. Hallock*, 2 Edw. (N. Y.) 652 (1836); *Austin v. Williams*, 2 Ohio 61 (1825). This is particularly clear where the fact inferred is within the special province of the jury. The witness will not be permitted to state in what manner the existence or notoriety of a custom affects the

terms of a contract. *Haskins v. Warren*, 115 Mass. 514 (1874); *Ford v. St. Louis, etc., R. Co.*, 63 Mo. App. 133 (1895).

8. *Taylor v. Swett*, 3 La. 33, 22 Am. Dec. 156 (1831).

9. *Mostyn v. Fabrigas*, 1 Cowp. 161 (1774).

10. *Wilson v. Bauman*, 80 Ill. 493 (1875).

11. *Hamilton v. Nickerson*, 13 Allen (Mass.) 351 (1866).

12. *Hamilton v. Nickerson*, 13 Allen (Mass.) 351 (1866).

13. *King v. Woodbridge*, 34 Vt. 565 (1861).

1. *Healy v. Brandon*, 66 Hun (N. Y.) 515, 21 N. Y. Suppl. 390 (1892).

The statement of the witness must also be relevant to prove the fact.—Upon the question of the existence of a trade term at a particular time or place, its existence must be shown as either at that special time and place or at some other, so related to them as to tend to show it. *Germania F. Ins. Co. v. Francis*, 52 Miss. 457, 24 Am. Rep. 674 (1876).

found by the court<sup>2</sup> to be sufficiently qualified by experience<sup>3</sup> to do so with probative effect may state whether a given word or phrase has acquired a technical meaning in connection with that business, and, if so, what it is.<sup>4</sup> While the primary meaning of

**2.** The court's action will not, as a rule, be disturbed on appeal. *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 70 Conn. 516, 40 Atl. 534 (1898).

**3.** *Webb v. Mears*, 45 Pa. St. 222 (1863); *Evans v. Commercial Mut. Ins. Co.*, 6 R. I. 47 (1859); *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, 121 Fed. 524, 58 C. C. A. 634 (1903).

Experience in the business rather than formal inclusion in it is the test. In seeking, for example, to testify as to the meaning of terms used in the wholesale grocery business a retail grocer of large transactions may be better qualified as a witness than a wholesale grocer doing a smaller business. *Nordlinger v. U. S.*, 115 Fed. 828 (1902).

Witnesses of this class are frequently spoken of as "experts."—*Wilder v. De Cou*, 26 Minn. 10, 1 N. W. 48 (1879); *Winans v. New York, etc., R. Co.*, 21 How. (U. S.) 88, 100, 16 L. ed. 68 (1858); *Di Sora v. Phillips*, 10 H. L. Cas. 624, 33 L. J. Ch. 129, 2 New Rep. 553, 11 Eng. Reprint 1168 (1863). There seems however, little advantage in such a use of the term. To apply the designation of "expert" to any person who chances to know a fact, which men in general do not know, however simple the fact may be, and however clearly the element of reasoning may be excluded, appears to deprive the term "expert" of any distinctive meaning. This would be a result greatly to be regretted because, in connection with statements of judgment upon assumed facts, the phrase has a valuable use, which should not be disturbed. *Infra*, §§ 2371 *et seq.*

**4.** *California*.—*Myers v. Tirbals*,

72 Cal. 278, 13 Pac. 695 (1887) (marble cutters).

*Georgia*.—*Featherston v. Rounsaville*, 73 Ga. 617 (1884) (cured hams).

*Illinois*.—*Elgin City v. Joslyn*, 136 Ill. 525, 26 N. E. 1090 (1891) ("mason work").

*Indiana*.—*Niagara F. Ins. Co. v. Greene*, 77 Ind. 590 (1881) (reasonable time).

*Iowa*.—*Iowa State Sav. Bank v. Black*, 91 Iowa 490, 59 N. W. 283 (1894).

*Louisiana*.—*Barber Asphalt Pav. Co. v. Howcott*, 109 La. 692, 33 So. 734 (1903) ("running foot").

*Massachusetts*.—*Whitney v. Boardman*, 118 Mass. 242 (1875) ("with all faults").

*Michigan*.—*Skelton v. Fenton Electric Light, etc., Co.*, 100 Mich. 87, 58 N. W. 609 (1894) ("smoke stack").

*Minnesota*.—*Cargill v. Thompson*, 57 Minn. 534, 59 N. W. 638 (1894).

*Missouri*.—*Heyworth v. Miller Grain, etc., Co.*, 174 Mo. 171, 73 S. W. 498 (1902).

*Nebraska*.—*Paxton v. State*, 59 Neb. 460, 81 N. W. 383, 80 Am. St. Rep. 639 (1899).

*New Jersey*.—*Wallace v. Leber*, 65 N. J. L. 195, 47 Atl. 430 (1900) (sugar trade).

*New York*.—*Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453 [affirming 40 N. Y. Super. Ct. 417] (1877) ("port risk").

*Oregon*.—*Williams v. Poppleton*, 3 Or. 139 (1869).

*Pennsylvania*.—*Carey v. Bright*, 58 Pa. St. 70 (1868) (colliery).

*Tennessee*.—*Fry v. Provident Sav. L. Assur. Soc.*, (Ch. App. 1896) 38 S. W. 116 (participating policy).

words in the vernacular is a matter of common knowledge<sup>5</sup> and cannot be given in evidence as a fact of special knowledge,<sup>6</sup> the derived or secondary meaning established in a trade or calling may well be a fact to be stated by experienced witnesses, however familiar and unambiguous the word or phrase may be in its primary meaning.<sup>7</sup>

**§ 883. (*Technical or Scientific Facts*); Carpentering and Other Building.**—Carpenters and others skilled in the building trades who have had experience in connection with the particular subject under inquiry or are otherwise sufficiently informed regarding it,<sup>1</sup> may state how houses, buildings<sup>2</sup> or other erections<sup>3</sup> are or should be constructed or repaired and how minor operations concerning them are properly performed.<sup>4</sup> Such a witness may testify as to the durability of timber of various kinds,<sup>5</sup> its strength<sup>6</sup> and consequent adaptability to special uses as part of a house, for the stringers<sup>7</sup> or other parts of a bridge or a similar structure.<sup>8</sup> The ability of usual building material to resist certain strains,<sup>9</sup> the effect on them of changes in temperature<sup>10</sup> or of

*Texas*.—*Kelly v. Robb*, 58 Tex. 377 (1883) ("saw timber").

*Wisconsin*.—*Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 87 (1875) ("loading off shore").

*United States*.—*Winans v. New York, etc., R. Co.*, 21 How. 88, 16 L. ed. 68 (1858).

5. *Supra*, § 762.

6. *Goodwin v. State*, 96 Ind. 550 (1884) ("monomania").

7. *Whitney v. Boardman*, 118 Mass. 242 (1875); *Erhardt v. Ballin*, 55 Fed. 968, 5 C. C. A. 363 (1893) (unhemmed handkerchiefs).

1. *In re Thompson*, 12 N. Y. Suppl. 182 (1890). See *supra*, § 816, *infra*, §§ 1958, 2382.

2. *Linch v. Paris Lumber, etc., Elevator Co.*, 80 Tex. 23, 15 S. W. 208 (1891).

3. *Caven v. Bodwell Granite Co.*, 97 Me. 381, 54 Atl. 851 (1903) (coal stage).

4. *Rockland First Cong. Church v. Holyoke Mut. F. Ins. Co.*, 158 Mass. 475, 33 N. E. 572, 35 Am. St. Rep. 508, 19 L. R. A. 587 (1893) (removing paint).

Where the matter is one of common knowledge the jury will require no assistance from the witness. *Cramer v. Slade*, 73 N. Y. Suppl. 125, 66 App. Div. 59 (1901).

5. *Morgan v. Fremont County*, 92 Iowa 644, 61 N. W. 231 (1894); *McConnell v. Osage City*, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778 (1890); *Ferguson v. Davis County*, 57 Iowa 601, 10 N. W. 906 (1881) (white oak); *Kuhn v. Delaware, etc., R. Co.*, 92 Hun (N. Y.) 74, 36 N. Y. Suppl. 339 (1895) (hemlock).

6. *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017 (1896).

7. *Blank v. Livonia Tp.*, 79 Mich. 1, 44 N. W. 157 (1889); *Bush v. Delaware, etc., R. Co.*, 166 N. Y. 210, 59 N. E. 838 (1901).

8. *Kuhn v. Delaware, etc., R. Co.*, 92 Hun (N. Y.) 74, 36 N. Y. Suppl. 339 (1895) (scaffolding).

9. *Brady v. Norcross*, 174 Mass. 442, 54 N. E. 874 (1899).

10. *Dixon v. Wachenheimer*, 9 Ohio Cir. Ct. 401, 6 Ohio Cir. Dec. 380 (1895).

weather conditions or from decay<sup>11</sup> or the other processes of nature are distinctly within the province of such a witness.

The effect of certain forces such as fire upon the materials used in building<sup>12</sup> may be stated by a competent expert. What forms of construction would be covered by a given designation, in a building contract or elsewhere, may be a matter of technical knowledge which a suitably experienced witness may state.<sup>13</sup> What are the customary duties at a given time and place of subordinate workers in building trades<sup>14</sup> may be announced, as a fact, by a competent witness.

**§ 884. (*Technical or Scientific Facts*); Chemistry.**— One suitably qualified<sup>1</sup> may testify to the facts of chemistry. He may even invade the field of physiology<sup>2</sup> as where he is asked to state the size of the blood corpuscles in man as related to that of those in other animals.<sup>3</sup> The facts of chemistry may relate to the material substances of which that science treats in their solid, liquid or gaseous<sup>4</sup> forms or as to the usual effects of chemical substances when united as when acid is applied to ink.<sup>5</sup>

**§ 885. (*Technical or Scientific Facts*); Ecclesiastical Matters.**— A bishop, as to the ecclesiastical affairs of his diocese and communion,<sup>1</sup> or other competent person may testify as to facts of an ecclesiastical nature;— as the organization of a parish and its

11. *Morgan v. Fremont County*, 92 Iowa 644, 61 N. W. 231 (1894).

12. *N. & M. Friedman Co. v. Atlas Assur. Co.*, 133 Mich. 212, 94 N. W. 757 (1903).

13. *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530 (1852) (brick houses).

14. *Western Stone Co. v. Muscial*, 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325 (1902) (master's foreman).

1. *Citizens' Gaslight, etc., Co. v. O'Brien*, 15 Ill. App. 400 (1884); *Otey v. Hoyt*, 47 N. C. 70 (1854).

While one duly licensed may be assumed to have the knowledge usual to those possessing such a certificate, it is the knowledge rather than the certificate which constitutes the qualification. *Dane v. State*, 36 Tex. Cr. 84, 35 S. W. 661 (1896). See *infra*, § 1964.

2. *Birmingham Nat. Bank v. Bradley*, 116 Ala. 142, 23 So. 53 (1896); *People v. Dole*, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50 (1898); *State v. Knight*, 43 Me. 11 (1857); *St. Louis Gaslight Co. v. Philadelphia American F. Ins. Co.*, 33 Mo. App. 348 (1889).

3. *State v. Knight*, 43 Me. 11, 27 (1857).

4. *Citizens' Gas Lt. Co. v. O'Brien*, 15 Ill. App. 400 (1884) (top of gas works).

5. *Birmingham Nat. Bank v. Bradley*, 116 Ala. 142, 23 So. 53 (1896); *People v. Dole*, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50 (1898); *Otey v. Hoyt*, 47 N. C. 70 (1854) (acid applied to ink).

1. *Bird v. St. Mark's Church*, 62 Iowa 567, 11 N. W. 747 (1883); *Sussex Peerage Case*, 11 Cl. & F. 85,

admission into a diocese,<sup>2</sup> or as to a system of church government. The ecclesiastical law in regard to marriage<sup>3</sup> may be proved by a church official within whose special knowledge the rules lie. Under the English chancery practice, matters of ecclesiastical law may also be referred to civilians<sup>4</sup> whose opinions may guide the court. In general, persons devoting themselves to ecclesiastical concerns may state such facts as come within the scope of their experience. Thus, a clergyman may give the marriage laws of any jurisdiction in which he has exercised the powers of his office.<sup>5</sup>

**§ 886. (*Technical or Scientific Facts*); Engineering Questions.**—Those who are qualified to follow the profession of an engineer may properly state the facts known to those in that calling.

*Civil.*—The civil engineer, for example, may properly state what the terms employed in his art designate<sup>1</sup> what constitutes good construction in case of bridges<sup>2</sup> or other structures; how the roadbed of a railroad should be graded,<sup>3</sup> or in what manner to compute the cubic contents of a certain form of construction.<sup>4</sup>

*Electric.*—The electrical engineer may give facts familiar to those called upon to deal with this mysterious form of energy;—as, for example, what combination of circumstances will result in the receipt of an electric shock,<sup>5</sup> or what is the proper method of stringing overhead wires across a highway,<sup>6</sup> or elsewhere.<sup>7</sup>

*Hydraulic.*—One skilled in the hydraulic branch of engineering may state the facts with which this branch of the engineering

8 Jur. 793, 8 Eng. Reprint 1034 (1844) (Roman Catholic).

2. *Bird v. St. Mark's Church*, 62 Iowa 567, 17 N. W. 747 (1883).

3. *Sussex Peerage Case*, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844) (coadjutor to bishop apostolic).

4. *Sayre v. Cramp*, 2 Wkly. Rep. 438 (1854); *Hurst v. Beach*, 5 Madd. 351, 21 Rev. Rep. 304 (1819).

5. *People v. McQuaid*, 85 Mich. 123, 48 N. W. 161 (1891).

1. *Union Pac. R. Co. v. Clopper*, 131 U. S. appendix xcii, 26 L. ed. 243 (1881) (bridge and abutments). See *infra*, §§ 1967, 2384.

2. *Hart v. Hudson River Bridge Co.*, 84 N. Y. 56 (1881).

3. *Scott v. Astoria R. Co.*, 43 Or. 26, 72 Pac. 594, 99 Am. St. Rep. 710, 62 L. R. A. 543 (1903).

4. *Moelering v. Smith*, 7 Ind. App. 451, 34 N. E. 675 (1893) (wall).

5. *Ludwig v. Metropolitan St. R. Co.*, 75 N. Y. Suppl. 667, 71 App. Div. 210 (1902).

6. *Houston, etc., R. Co. v. Hopson*, (Tex. Civ. App. 1902) 67 S. W. 458.

7. *Excelsior Electric Co. v. Sweet*, 57 N. J. L. 224, 30 Atl. 553 (1894).

art is concerned; — as the course of formation etc., ascertained to be peculiar to alluvial streams.<sup>8</sup>

*Mining.*— The mining engineer may testify how boring<sup>9</sup> should be done, and other facts of special knowledge related to his calling.

**§ 887. (*Technical or Scientific Facts*); Farming and Stock-Raising; Farming.**— One acquainted with agricultural matters may state relevant facts generally known, in any given locality, among members of this calling. He may state the right time<sup>1</sup> and approved method<sup>2</sup> for conducting farming operations. How fire should be used in clearing land,<sup>3</sup> and what is its usual effect on different soils or kinds of vegetation,<sup>4</sup> what is the average yield of a particular crop<sup>5</sup> and as to any other definite probability in the business of agriculture,<sup>6</sup> may be stated by any witness who has knowledge on the subject. He may testify as to what is a proper fence<sup>7</sup> from the farmer's point of view.

**§ 888. (*Technical or Scientific Facts; Farming and Stock-Raising*); Stock-Raising.**— The farmer, as a cattle raiser, and other persons of suitable knowledge<sup>1</sup> may state facts, not within the common knowledge of the jury<sup>2</sup> which are generally known to those who are following that business<sup>3</sup> in any particular locality.

8. Ohio, etc., R. Co. v. Nuetzel, 143 Ill. 46, 32 N. E. 529 [reversing 43 Ill. App. 108] (1892).

9. Clark v. Babcock, 23 Mich. 164 (1871) (salt wells).

1. Farmers', etc., Nat. Bank v. Woodell, 38 Or. 294, 61 Pac. 837, 65 Pac. 520 (1900). *Supra*, § 811, *infra*, §§ 1971, 2387.

2. Thresher v. Gregory, (Cal. 1895) 42 Pac. 421.

3. Krippner v. Biehl, 28 Minn. 139, 9 N. W. 671 (1881); Wells v. Eastman, 61 N. H. 507 (1881); Ferguson v. Hubbell, 26 Hun (N. Y.) 250 (1882).

4. Pennsylvania Co. v. Hunsley, 23 Ind. App. 37, 54 N. E. 1071 (1899) (muck); Swanson v. Keokuk, etc., R. Co., 116 Iowa 304, 89 N. W. 1088 (1902) (hedge); Bradley v. Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996 (1900) (meadow).

5. Farmers', etc., Bank v. Woodell,

38 Or. 294, 61 Pac. 837, 65 Pac. 520 (1900).

6. Folsom v. Concord, etc., R. Co., 68 N. H. 454, 38 Atl. 209 (1896).

7. Louisville, etc., R. Co. v. Spain, 61 Ind. 460 (1878).

1. St. Louis, etc., R. Co. v. Edwards, 26 Kan. 72 (1881); Lockridge v. Fesler, 37 S. W. 65, 18 Ky. L. Rep. 469 (1896); *supra*, § 814, *infra*, §§ 1975, 2389.

2. Tyler v. State, 11 Tex. App. 388 (1882) (time required to gather cattle).

3. Dunham v. Rix, 86 Iowa 300, 53 N. W. 252 (1892); Folsom v. Concord, etc., R. Co., 68 N. H. 454, 38 Atl. 209 (1896); Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834 (1891); New York, etc., R. Co. v. Estill, 147 U. S. 591, 612, 13 S. Ct. 444, 37 L. ed. 292 (1893); Missouri Pac. R. Co. v. Hall, 66 Fed. 868, 14 C. C. A. 153 (1895).



Such facts may relate to the breeding of cattle and the difficulties attendant upon it,<sup>4</sup> or as to the pedigree of an animal,<sup>5</sup> the diseases of animals, and what constitutes unsoundness.<sup>6</sup> In like manner a witness possessing the required experience may testify as to how animals would be affected in weight,<sup>7</sup> health, or other particulars,<sup>8</sup> by proper or improper<sup>9</sup> treatment, or other occurrence connected with the business.<sup>10</sup> The seasons, methods and other facts relating to the butchering of animals<sup>11</sup> may be stated by any qualified witness. Stockraisers share with other persons familiar with the subject, competency to testify concerning the habits,<sup>12</sup> physical<sup>13</sup> or mental, of stock and such matters as the proper handling<sup>14</sup> of horses and other domestic animals.

**§ 889. (Technical or Scientific Facts); Insurance Matters.—**

That the witness offered should be regarded as competent to state facts of a technical nature relating to the business of insurance in some one or more of its various branches proof must be made to the court that the witness is so qualified by experience as to make his statement of assistance to the tribunal.<sup>1</sup> The statement of persons not so qualified is properly rejected as irrelevant.<sup>2</sup> In other words, no person who, in relation to insurance matters

4. *Fitzgerald v. Evans*, 49 Minn. 541, 52 N. W. 143 (1892) (persistence of parent's defects); *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 L. ed. 292 (1893) (causes of abortion).

5. *Fleming v. McClaffin*, 1 Ind. App. 537, 27 N. E. 875 (1891).

6. *Moore v. Haviland*, 61 Vt. 58, 17 Atl. 725 (1883).

7. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834 (1891); *Missouri Pac. R. Co. v. Hall*, 66 Fed. 868, 14 C. C. A. 153 (1895).

8. *Cooke v. Kansas City, etc., Ry. Co.*, 57 Mo. App. 471 (1894) (appearance and value).

9. *Proctor v. Irvin*, 22 Mont. 547, 57 Pac. 183 (1899) (excessive driving in calving season); *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834 (1891) (delay in feeding); *Southern Pac. Co. v. Arnett*, 111 Fed. 849, 50 C. C. A. 17 (1901) (delay on passage); *Missouri Pac. R. Co. v.*

*Hall*, 66 Fed. 868, 14 C. C. A. 153 (1895) (bad handling while in transit).

10. *Cooke v. Kansas City, etc., R. Co.*, 57 Mo. App. 471 (1894) (stamped).

11. *Taylor v. State*, (Tex. Cr. App. 1897) 42 S. W. 285.

12. *Folsom v. Concord, etc., R. Co.*, 68 N. H. 454, 38 Atl. 209 (1896) (taking fright at moving trains).

13. *Dunham v. Rix*, 86 Iowa 300, 53 N. W. 252 (1892) (stallion's testicles hang low in summer).

14. *Lockridge v. Fesler*, 37 S. W. 65, 18 Ky. L. Rep. 469 (1896) (halter and hitch).

1. *Pepper v. Planters' Nat. Bank*, 5 Ky. L. Rep. 85 (1883). See *supra*, §§ 818, 819, *infra*, §§ 1976, 2391.

2. *Lee v. Agricultural Ins. Co.*, 79 Iowa 379, 44 N. W. 683 (1890); *Brooklyn First Baptist Church v. Brooklyn F. Ins. Co.*, 28 N. Y. 153 (1863).

is a mere layman will be allowed to testify as to a fact known only to those possessing a certain degree of familiarity with the business.<sup>3</sup>

**§ 890. (Technical or Scientific Facts; Insurance Matters);**

**Fire.**—When compared with the business of insuring life, that of insuring property from loss by fire presents comparatively few facts of technical knowledge, so far as relates either to the physical or the moral hazard. Many relevant facts in such a connection are matters of common knowledge. As is the case regarding mortality tables in the business of life insurance,<sup>1</sup> certain facts connected with fire insurance are near the line which a presiding judge must draw between special and common knowledge. Among these, is the fact that leaving an insured building unoccupied increases the danger of destruction by fire. This may be proved as a technical fact<sup>2</sup> by persons acquainted with the business<sup>3</sup> or, in other courts, it may be claimed as part of common knowledge, as a matter of experience.<sup>4</sup> In other connections in the business of fire insurance, skilled witnesses may state facts within their knowledge affecting the risk;—as, for example, proximity to a railroad.<sup>5</sup> The classification of the various forms of policy,<sup>6</sup> and the incidents attaching to each class, are treated as technical matters i. e., as subjects of special knowledge.

**§ 891. (Technical or Scientific Facts; Insurance Matters);**

**Life.**—Thus, for example, special experience is required to testify as to facts of life insurance.<sup>1</sup> Only a technically skilled witness will be permitted to state in what manner and to what extent the

3. *Perrette v. Kansas City*, 162 Mo. 238, 62 S. W. 448 (1901).

1. *Supra*, §§ 732, 859c. See also *supra*, § 818, *infra*, § 2393.

2. *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595 (1896); *Cornish v. Farm Buildings F. Ins. Co.*, 74 N. Y. 295 [*affirming* 10 Hun 466] (1878). See also *Pepper v. Planters' Nat. Bank*, 5 Ky. L. Rep. 85 (1883).

3. What is much the same thing the fact may be established, circumstantially, by the action of those conversant with the subject in raising the premium. *Traders' Ins. Co. v. Catlin*,

163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595 (1896).

4. *Southern Mut. Ins. Co. v. Hudson*, 115 Ga. 638, 42 S. E. 60 (1902); *Kirby v. Phoenix Ins. Co.*, 9 Lea (Tenn.) 142 (1882).

5. *Harrington v. St. Paul, etc., R. Co.*, 17 Minn. 215 (1871).

6. *Brooklyn First Baptist Ch. v. Brooklyn F. Ins. Co.*, 28 N. Y. 153 (1863) (permanent).

1. *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207 (1891); *Fry v. New York Provident Sav. L. Assur. Soc.*, (Tenn. Ch. App. 1896) 38 S. W. 116. See *supra*, § 819, *infra*, § 2396.

expectancy is affected by the existence of certain habits of life;—for example, that of drinking alcoholic liquors.<sup>2</sup>

**§ 892. (*Technical or Scientific Facts; Insurance Matters; Life*); Mortality Tables.**—Certain facts are, however, so commonly known or recognized sources of authentic information so readily accessible, as not properly to fall within the field of technical knowledge. Such a fact is expectancy of life. It may be treated as a matter of common knowledge<sup>1</sup> and the judge may use or permit the jury to employ standard mortality tables for the purpose of ascertaining relevant facts<sup>2</sup> from their examination.

The fact is, however, close to the line between common and special knowledge;—which, as has been said,<sup>3</sup> is frequently hard to draw. The fact of expectancy of life may be regarded not only as a matter of common knowledge, but it may be treated, justly enough, as one of a technical nature and made the subject of the testimony of one properly equipped by experience to testify with regard to it.<sup>4</sup> Such a witness, in connection with his testimony may refer to and incorporate in his evidence data furnished by the American Mortality Tables<sup>5</sup> or other tabulations regarded as authoritative by those engaged in the business.

**§ 893. (*Technical or Scientific Facts; Insurance Matters*); Marine.**—Facts of a technical nature are more frequently met in marine than in either fire or life insurance. The experienced witness is frequently the only person within whose knowledge such facts lie. He is, therefore, at liberty to state them.<sup>1</sup>

**§ 894. (*Technical or Scientific Facts*); Interstate or Foreign Law.**—The existence of written or unwritten law in a foreign country<sup>1</sup> or sister state of the American Union<sup>2</sup> is a fact and, in

2. *Atchison, etc., Ry. Co. v. Snedeger*, 5 Kan. App. 700, 49 Pac. 103 (1897); *Perrette v. Kansas City*, 162 Mo. 238, 62 S. W. 448 (1901).

1. *Supra*, §§ 732, 859c.

2. *Supra*, § 54.

3. *Supra*, § 879.

4. *Chicago, etc., R. Co. v. Neff*, 25 Ind. App. 107, 56 N. E. 927 (1900); *Rowley v. London, etc., R. Co.*, L. R. 8 Exch. 221, 42 L. J. Exch. 153, 29 L. T. Rep. (N. S.) 180, 21 Wkly. Rep. 869 (1873).

5. *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207 (1891).

1. *Leitch v. Atlantic Mut. Ins. Co.*, 66 N. Y. 100 (1876); *Hawes v. New England Mut. Mar. Ins. Co.*, 11 Fed. Cas. No. 6,241, 2 Curt. 229 (1855). See *infra*, § 2397.

1. *Connecticut*.—*Dyer v. Smith*, 12 Conn. 384 (1837).

*Iowa*.—*Crafts v. Clark*, 38 Iowa 237 (1874) (Cuba).

*New Hampshire*.—*Hall v. Costello*,

the absence of statutory regulation, is to be proved, as other facts are proved, by the statement of one who knows it. In any event, the answer of the witness must, in order to be relevant, cover specifically the question raised,<sup>3</sup> and, where the evidence is in conflict, it has been held, that the court must examine text-books and other authorities and decide the point for itself.<sup>4</sup>

*The written law* of a foreign country<sup>5</sup> or sister state<sup>6</sup> stands in the same position. Anyone who, in the opinion of the court, knows what the foreign law is, may state it;—identifying, if convenient to the judge, the volume in which the written law is contained, and pointing out, if desired, the written law itself. The general way in which this is done is indicated by a decision of

48 N. H. 176, 2 Am. Rep. 207 (1868) (Canada).

*New York*.—Matter of Roberts, 8 Paige 446 (1840) (France).

*North Carolina*.—Temple v. Pasquotank County, 111 N. C. 36, 15 S. E. 886 (1892) (Cuba).

*Texas*.—Sierra Madre Constr. Co. v. Brick, (Civ. App. 1900) 55 S. W. 521 (Mexico).

*United States*.—Ennis v. Smith, 14 How. 400, 14 L. ed. 472 (1852) (France).

*England*.—De Bodes' Case, 8 Q. B. 208, 55 E. C. L. 208 (1845) (France).

*Canada*.—Rice v. Gunn, 4 Ont. 579 (1884).

2. *Alabama*.—Walker v. Forbes, 31 Ala. 9 (1857) (Pennsylvania).

*Arkansas*.—Union Cent. L. Ins. Co. v. Caldwell, 68 Ark. 505, 58 S. W. 355 (1900) (Ohio).

*Georgia*.—Chattanooga, etc., R. Co. v. Jackson, 86 Ga. 676, 13 S. E. 109 (1890).

*Illinois*.—Milwaukee, etc., R. Co. v. Smith, 74 Ill. 197 (1874).

*Iowa*.—Greasons v. Davis, 9 Iowa 219 (1859).

*Kansas*.—Palmer v. Hudson River State Hospital, 10 Kan. App. 98, 61 Pac. 506 (1900).

*Kentucky*.—Tyler v. Trabue, 8 B. Mon. 306 (1848).

*Louisiana*.—Taylor v. Swett, 3 La. 33, 22 Am. Dec. 156 (1831).

*Maryland*.—Jackson v. Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773 (1895).

*Massachusetts*.—Mowry v. Chase, 100 Mass. 79 (1868) (Rhode Island).

*Nebraska*.—Barber v. Hildebrand, 42 Neb. 400, 60 N. W. 594 (1894).

*New Hampshire*.—Kennard v. Kennard, 63 N. H. 303 (1884).

*New Jersey*.—Title Guarantee, etc., Co. v. Trenton Potteries Co., 56 N. J. Eq. 441, 38 Atl. 422 (1897).

*New York*.—Genet v. Delaware, etc., Canal Co., 13 Misc. 409, 35 N. Y. Suppl. 147 (1895).

*Pennsylvania*.—Dougherty v. Snyder, 15 Serg. & R. 84, 16 Am. Dec. 520 (1826).

*Rhode Island*.—Barrows v. Downs, 9 R. I. 446, 11 Am. Rep. 283 (1870) (New York).

*Texas*.—State v. De Leon, 64 Tex. 553 (1885).

3. Clardy v. Wilson, 24 Tex. Civ. App. 196, 58 S. W. 52 (1900)

4. Rice v. Gunn, 4 Ont. 579 (1884).

5. Short v. Kingsmill, 7 U. C. Q. B. 350 (1850).

6. Love v. McElroy, 106 Ill. App. 294 (1902); People v. McQuaid, 85 Mich. 123, 48 N. W. 161 (1891); Brady v. Palmer, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27 (1899).

the supreme court of Michigan. Passing on an objection to the testimony of a Pennsylvania clergyman as to the written law of that state relating to the celebration of marriages the court say; — “It is claimed that the witness was not shown to be an expert, and therefore not competent. The question of his competency was one for the court, and not for the jury. It was within the knowledge of the trial court that Brightly’s Digest is not a fugitive publication, but that it has been published for a quarter of a century as a compilation of the statutes of the state of Pennsylvania; that it occupies a place in every bar library of our own State, and in many of our private libraries; that its existence must be a matter of as general knowledge in that state as the existence of Howell’s compilation is here. The information called for from the witness comes within the range of what is denominated “expert testimony,” if at all, only because of the place where the testimony was to be given. In Pennsylvania the information called for was within the range of ordinary observation and intelligence, and the witness was a resident of that state. The inquiry involved not what was the law of that state upon a particular subject, but simply in what form the statutes of that state were published, and whether the books presented were received and recognized as authority. The witness was a minister, empowered by statute to perform the marriage ceremony, and required as such to observe certain prescribed formulas. He would naturally consult statutory provisions, and testified that he did habitually consult the statutes of that state. A cardinal has been held competent to prove the Roman matrimonial law. Here a minister, authorized by statute to perform the marriage ceremony, is called simply to identify the book in which the law is published, and to show the common acceptance of the publication as authority. The testimony was competent, and there was no error in the admission of the digest, nor was there error in the admission of the reports for the purpose of showing what construction the courts of that state had put upon the statute.”<sup>7</sup>

§ 895. (*Technical or Scientific Facts; Interstate or Foreign Law*); Oral Testimony as to Written Law.—A conflict of views exist as to whether the oral evidence of a qualified witness is still competent in jurisdictions which prescribe that the written law of a sister state may be proved by official printed

7. *People v. McQuaid*, 85 Mich. 123-125 (1891).

copies of its laws and decisions. In the view of certain courts, the witness' oral statement may still be received.<sup>1</sup> Other courts have adopted a different administrative principle and hold that the means of proof provided by the statute constitute the "best evidence" i. e., the original or primary grade of evidence and must be produced or a sufficient reason given for its absence.<sup>2</sup> Where the printed book or written document is received affirmative proof of its authentic nature must be offered<sup>3</sup> as called for by the laws of the forum.<sup>4</sup>

A witness properly qualified may testify, as a fact, concerning the result<sup>5</sup> and legal validity<sup>6</sup> of acts done in accordance with a particular construction of the foreign written law.

A rule of practice in the foreign country<sup>7</sup> or American state<sup>8</sup> may be established equally well with a rule of substantive law. It need not be proved by the use of reported cases.<sup>9</sup>

**§ 896. (Technical or Scientific Facts; Interstate or Foreign Law); Interpretation.**— The interpretation given to the law of the foreign country,<sup>1</sup> state,<sup>2</sup> or territory, by its tribunals is an integral and essential part of the law itself and should be stated by the witness.

1. *Brady v. Palmer*, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27 (1899).

2. *Johnson v. Hesser*, 61 Neb. 631, 85 N. W. 894 (1901).

3. *Mexican Nat. R. Co. v. Ware*, (Tex. Civ. App. 1900) 60 S. W. 343.

4. *Mexican Nat. R. Co. v. Ware*, (Tex. Civ. App. 1900) 60 S. W. 343.

5. *Badische Anilin, etc., Fabrik v. Klipstein*, 125 Fed. 543 (1903) (incorporation).

6. *Baltimore Consol. Real Estate, etc., Co. v. Cashow*, 41 Md. 59 (1874).

7. *Patterson v. Kennedy*, 122 Mich. 343, 81 N. W. 91 (1899) (Canada); *U. S. v. Gardiner*, 25 Fed. Cas. No. 15,186a, 2 Hayw. & H. 89 (1853).

8. *Barkman v. Hopkins*, 11 Ark. 157 (1850); *Crafts v. Clark*, 38 Iowa 237 (1874); *Mowry v. Chase*, 100 Mass. 79 (1868).

9. *Patterson v. Kennedy*, 122 Mich. 343, 81 N. W. 91 (1899).

1. *Barrows v. Downs*, 9 R. I. 446, 11 Am. Rep. 283 (1870); *Mexican*

*Nat. R. Co. v. Slater*, 115 Fed. 593, 53 C. C. A. 239 (1902); *Concha v. Murrieta*, 40 Ch. D. 543, 60 L. T. Rep. (N. S.) 798, (1889) (Peru).

2. *Alabama*.—*Walker v. Forbes*, 31 Ala. 9 (1857) (Louisiana).

*Connecticut*.—*Dyer v. Smith*, 12 Conn. 384 (1837) (Rhode Island).

*Iowa*.—*Crafts v. Clark*, 38 Iowa 237 (1874) (Pennsylvania).

*Kentucky*.—*Barker v. Brown*, 33 S. W. 833, 17 Ky. L. Rep. 1172 (1896).

*New Hampshire*.—*Jenne v. Harrisville*, 63 N. H. 405 (1885).

*New Jersey*.—*Title Guarantee, etc., Co. v. Trenton Potteries Co.*, 56 N. J. Eq. 441, 38 Atl. 422 (1897) (New York).

*Ohio*.—*Smith v. Bartram*, 11 Ohio St. 690 (1860) (Pennsylvania).

*Pennsylvania*.—*Bollinger v. Gallagher*, 163 Pa. St. 245, 29 Atl. 751, 43 Am. St. Rep. 791 (1894) (Maryland).

*Opinion Excluded.*—The mere opinion which the witness says, the attorneys of the foreign jurisdiction feel *should be* the construction given by the court of the foreign jurisdiction is not sufficient to admit the evidence of the witness on that point.<sup>3</sup> Special skill is required where the document is in a foreign language or is in the form of a translation from it.<sup>4</sup>

§ 897. (*Technical or Scientific Facts; Interstate or Foreign Law*); Skilled Witness; English Rule.—It must be remembered, however, that the actual state of the foreign law may be the resultant of a large number of legal facts of which the written law is but a single one.<sup>1</sup> It is accordingly the English rule, well grounded on administrative principles, that the proper one to state the law — though partly or in whole in written form — is a skilled witness adequately familiar with it. It is significant that this rule of practice was reached by overruling a number of decisions holding, in accordance with a current American view, that a written law could be proved by an authenticated copy of it.<sup>2</sup>

§ 898. (*Technical or Scientific Facts; Interstate or Foreign Law; Skilled Witness*); Qualifications; English Rule.—Such a witness is no more of an “expert” than one who knows facts of any other class. His evidence is admitted because the fact to which he testifies is one of special knowledge; — i. e., is not within the general or common knowledge of the jury.<sup>1</sup> Persons admitted to testify as skilled witnesses as to foreign law are, however, frequently spoken of as “experts.”<sup>2</sup> So far as this practice is anything more than a habitual confusion of terms, it rests upon the fact that the judge examines into the qualifications of the witness; — though this course is merely a result of the obvious consideration that, in order to expedite trials and prevent loss of time in the hearing of surmises, guesses or conjectures from witnesses who have not the subjective qualifications necessary to enable them to know that as to which they are proposing to testify, the judge must either be able to assume or become con-

3. *Hennessey v. Farrelly*, 13 Daly (N. Y.) 468 (1886).

4. *Mexican Nat. R. Co. v. Slater*, 115 Fed. 593, 53 C. C. A. 239 (1902).

1. *De Bode's Case*, 8 Q. B. 208, 55 E. C. L. 208 (1845).

2. *Lacon v. Higgins*, D. & R. N. P.

38, 16 E. C. L. 425, 3 Stark. 178, 3 E. C. L. 643, 25 Rev. Rep. 779 (1822).

1. *Supra*, §§ 691 *et seq.*

2. *Jackson v. Jackson*, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773 (1895).

vinced by evidence, that the witness has adequate knowledge to give probative weight to his statement. The English rule requires that, in order to testify as to the unwritten law of a foreign country, the witness should have practiced the law of that country. It is not sufficient that he is, in a general way, a learned man, that he is connected with the legal profession, claims to know the foreign law,<sup>3</sup> or that he has studied, at a foreign university<sup>4</sup> or elsewhere<sup>5</sup> in a country other than that whose laws are in question, the law as to which he is proposing to testify. Nor is it, in itself, an adequate qualification that the witness has been obliged to act upon his knowledge of the foreign law, as on trials before the privy council<sup>6</sup> or otherwise had occasion to verify the accuracy of his knowledge in regard to it.

*Practical experience of the law* in the country over which it is operative is the test of qualification for skilled witnesses as to foreign law which English administration very sensibly prescribes, as the result of managing a commercial empire of wide extent. If this element is present in satisfactory measure, it is not necessary that the witness should be an attorney of the country in question. Legal officials not professionally trained, as an attorney general who is not a lawyer;<sup>7</sup> diplomatic representatives of the government of the forum living in the foreign country;<sup>8</sup> or even, on an appropriate subject, merchants,<sup>9</sup> and other private citizens doing business in the foreign country will be admitted to testify as skilled witnesses.

**§ 899. (Technical or Scientific Facts; Interstate or Foreign Law; Skilled Witness; Qualifications); American Rule.—**

The standard of administrative requirement prevailing in many

3. *McKenzie v. Gordon*, 1 Nova Scotia Dec. 153 (1867).

4. *Bristow v. Sequeville*, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289 (1850); *In re Bonelli*, 1 P. D. 69, 45 L. J. P. & Adm. 42, 34 L. T. Rep. (N. S.) 32, 24 Wkly. Rep. 255 (1875).

5. *In re Bonelli*, 1 P. D. 69, 45 L. J. P. & Adm. 42, 34 L. T. Rep. (N. S.) 32, 24 Wkly. Rep. 255 (1875); *Cartwright v. Cartwright*, 26 Wkly. Rep. 684 (1878).

6. *Reg. v. Savage*, 13 Cox C. C. 178 (1875).

7. *Picton's Case*, 30 How. St. Tr. 226, 806 (1804).

8. *In re Dost Aly Khan*, 6 P. D. 6, 49 L. J. P. & Adm. 78, 29 Wkly. Rep. 80 (1880) (ambassador); *Lacon v. Higgins*, D. & R. N. P. 38, 16 E. C. L. 425, 3 Stark. 178, 3 E. C. L. 643, 25 Rev. 779 (1822) (vice-consul).

9. *Vander Donckt v. Thellusson*, 8 C. B. 812, 19 L. J. C. P. 12, 65 E. C. L. 812 (1849) (presentation of rates).



jurisdictions of the American Union regarding the qualifications for testifying as to foreign law is much lower than that prevailing in England.

*Attorneys, Counsel, etc.*—The practicing attorney of the foreign country or sister state<sup>1</sup> or one who has so practiced<sup>2</sup> for a reasonable time, is deemed competent to testify as a skilled witness on the subject. Attorneys<sup>3</sup> practicing in the sister state or foreign country,<sup>4</sup> and other persons deemed by the judge to be sufficiently qualified<sup>5</sup> to do so may state the existence and effect of an unwritten law in their respective jurisdictions, all other witnesses being rejected.<sup>6</sup>

*Non-professional.*—It is not, however, necessary that the witness should be a lawyer.<sup>7</sup> All that is required is what the presiding judge regards as a sufficiently intelligent and thorough acquaintance with the foreign law;<sup>8</sup>—the connection through which the knowledge may have been acquired being regarded as a matter of comparative indifference. It is, therefore, looked at as adequate qualification should the witness be an attorney of the forum who has studied the foreign law in the preparation of a case,<sup>9</sup> acted as a magistrate under it<sup>10</sup> or advised clients regarding its provisions.<sup>11</sup> The proposed witness will also be deemed com-

1. *Baltimore Consol. Real Estate, etc., Co. v. Cashow*, 41 Md. 59 (1874); (law of New York); *Sierra Madre Constr. Co. v. Brick*, (Tex. Civ. App. 1900) 55 S. W. 521.

2. *Union Cent. L. Ins. Co. v. Caldwell*, 68 Ark. 505, 58 S. W. 355 (1900) (law of Ohio).

3. *Baltimore Consol. Real Estate, etc., Co. v. Cashow*, 41 Md. 59 (1874) *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207 (1868); *Bristow v. Sequeville*, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289 (1850); *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 54 (1811).

4. *Concha v. Murrieta*, 40 Ch. D. 543, 60 L. T. Rep. (N. S.) 798 (1889); *In re Dost Aly Khan*, 6 P. D. 6, 49 L. J. P. & Adm. 78, 29 Wkly. Rep. 80 (1880); *In re Pearn*, 1 P. D. 70, 45 L. J. P. & Adm. 31, 33 L. T. Rep. (N. S.) 705, 24 Wkly. Rep. 143 (1875).

5. "In proof of the laws of a foreign country, the testimony of any person, whether a professed lawyer or not, who appears to the court to be well informed on the point, is competent." *Hall v. Costello*, 48 N. H. 176, 179, 2 Am. Rep. 207 (1868).

6. *Phelps v. Town*, 14 Mich. 374 (1866) (banker); *City Sav. Bank v. Kensington Land Co.*, (Tenn. Ch. App. 1896) 37 S. W. 1037.

7. *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207 (1868).

8. *State v. Behrman*, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449 (1894).

9. *Temple v. Pasquotank County*, 111 N. C. 36, 15 S. E. 886 (1892) (law of Maryland).

10. *Pickard v. Bailey*. 26 N. H. 152 (1852).

11. *Dauphin v. U. S.*, 6 Ct. Cl. 221 (1870) (adviser to French legation).

petent to testify where, for any other reason, he has been called upon to make a special study as to the law concerning which he proposes to speak;<sup>12</sup> — as, for example, by being graduated from a foreign university<sup>13</sup> or other institution of learning in which the study of the law in question is required, or from having intended to follow the practice of that law as a profession.<sup>14</sup> But studying the foreign law, in order to amount to a qualification, must possess to the witness a pointed and definite interest, of intimate personal concern. Mere reading on similar topics, with no specific connection to the branch of foreign law under investigation does not suffice. Reading the code of Justinian, for example, does not, in itself, qualify a witness to speak as to a special provision of the Mexican law.<sup>15</sup> Still less will the duty to enforce these foreign laws in a subordinate and routine capacity as, for example, in serving as a policeman,<sup>16</sup> be deemed a sufficient qualification for testifying as a skilled witness with regard to the provisions of a foreign law.

*The witness may refresh his memory* and correct or confirm his impression as to the foreign law by a resort to treatises<sup>17</sup> or documents,<sup>18</sup> deemed authoritative in the foreign jurisdiction. But the testimony of the witness, rather than facts furnished by his written aids is that which is to be taken as the conclusion of the witness.<sup>19</sup>

**§ 900. (*Technical or Scientific Facts; Interstate or Foreign Law*); Function of the Judge.**— The fact that the question is one of law naturally places it, in many points of administration, within the hands of the presiding judge, familiar with the decisions of questions of domestic law. His finding is not absolutely controlled by the testimony of the witness; — even when uncontradicted. Thus, the most unequivocal testimony of a skilled witness as to the construction given to the foreign law,

12. *Barber v. Mexico International Co.*, 73 Conn. 587, 48 Atl. 758 (1901).

13. *Dauphin v. U. S.*, 6 Ct. Cl. 221 (1870) (University of Paris).

14. *Dauphin v. U. S.*, 6 Ct. Cl. 221 (1870) (French law).

15. *Banco De Sonora v. Bankers' Mut. Casualty Co.*, (Iowa 1903) 95 N. W. 232.

16. *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49 (1858).

17. *Sussex Peerage Case*, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844).

18. *Sussex Peerage Case*, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844).

19. *Nelson v. Bridport*, 8 Beav. 527, 10 Jur. 871 (1845).

cannot control the court's understanding of the meaning of the written law and the plain decisions of the foreign court.<sup>1</sup> In other words, the presiding judge may examine for himself the documents which the skilled witness refers to as a correct statement of the foreign law, "not as evidence *per se* but as part of the testimony of the witness."<sup>2</sup> That is, the court of the forum is not relieved of the duty of construing the written document as would be imposed in case of any other legal writing even though the work of translation has been performed by a witness familiar with the foreign language.<sup>3</sup> The written document bearing on the foreign law is read to the court; it cannot be read to the jury.<sup>4</sup> A witness will not be permitted to testify to the construction given a statute, if its meaning is regarded by the presiding judge as being perfectly plain, and there has been no official judicial decision.<sup>5</sup>

**§ 901. (*Technical or Scientific Facts*); Maritime Affairs.—**

The sea has also its technical side. Men of nautical experience or training may state the special facts known to those who "follow the sea." Principal among these are the influences of the natural forces of winds and waves<sup>1</sup> upon vessels<sup>2</sup> or, to put the same idea in different words, what a vessel will do under given conditions<sup>3</sup> may be proved in this way. In like manner an experienced witness may state the duties of the captain,<sup>4</sup> officers<sup>5</sup>

1. China, etc., *Bank v. Morse*, 168 N. Y. 458, 61 N. E. 774, 85 Am. St. Rep. 676, 56 L. R. A. 139 (1901).

2. *Concha v. Murrieta*, 40 Ch. D. 453, 60 L. T. Rep. N. S. 798 (1889).

3. *Stearine, etc., Co. v. Heintzmann*, 17 C. B. N. S. 56, 10 Jur. N. S. 881, 11 L. T. Rep. N. S. 272, 112 E. C. L. 56 (1864); *Di Sora v. Phillipps*, 10 H. L. Cas. 624, 33 L. J. Ch. 129, 2 New Rep. 553, 11 Eng. Reprint 1168 (1863).

4. *Darby v. Ouseley*, 1 H. & N. 1, 2 Jur. N. S. 497, 25 L. J. Exch. 227, 4 Wkly. Rep. 463 (1856).

5. *Molson's Bank v. Boardman*, 47 Hun (N. Y.) 135 (1888).

1. "We entertain no doubt that those who are accustomed to the responsibility of command, and whose lives are spent on the ocean, are qual-

ified as experts to prove the practical effect of cross seas and heavy swells, shifting winds and sudden squalls." *Eastern Transp. Line v. Hope*, 95 U. S. 297, 299, 24 L. ed. 477 (1877). See *infra*, §§ 1983, 2400.

2. *Western Ins. Co. v. Tobin*, 32 Ohio St. 77 (1877) (certain type of vessel will leak).

3. *Price v. Hartshorn*, 44 N. Y. 94, 4 Am. Rep. 645 (1870); *Walsh v. Washington Mar. Ins. Co.*, 32 N. Y. 427 (1865); *Western Ins. Co. v. Tobin*, 32 Ohio St. 77 (1877); *Folkes v. Chadd*, 3 Doug. 157, 26 E. C. L. 111 (1782).

4. *Sills v. Brown*, 9 C. & P. 601, 38 E. C. L. 351 (1840).

5. *Malton v. Nesbit*, 1 C. & P. 70, 12 E. C. L. 51 (1824).

and crew of a vessel under a given set of circumstances and the general usages of navigation<sup>6</sup> are important matters of nautical knowledge. Other practical matters of maritime concern as how far a light can be seen from a vessel<sup>7</sup> what acts are practically possible<sup>8</sup> and how such acts as can be done are properly done,<sup>9</sup> stand in the same position. Viewing navigation as a transportation business rather than as presenting questions of seamanship or the ways and usages of the ocean, a suitably qualified witness may state how different classes of merchandise are graded, as "inflammable"<sup>10</sup> or how a cargo should be stowed.<sup>11</sup>

**§ 902. (*Technical and Scientific Facts*); *Mechanic Arts*.<sup>1</sup>**

— Manufacturing and the mechanic arts present a favorite field for the employment of evidence regarding technical facts, which, when relevant may be stated by those qualified either through experience<sup>2</sup> or technical training<sup>3</sup> to do so. The knowledge of the witness must be affirmatively shown or reasonably assumed to be as specific as is the fact which the testimony covers. Mere general knowledge and experience in a particular branch of manufacturing is not sufficient unless it may be assumed to qualify the witness as to the precise question which is asked him.<sup>4</sup> For a still stronger reason, absence of even this general experience disqualifies the witness.<sup>5</sup>

6. *The Alaska*, 33 Fed. 107 (1887).

7. *Case v. Perew*, 46 Hun (N. Y.) 57, 10 N. Y. St. 811 (1887); *Fenwick v. Bell*, 1 C. & K. 312, 47 E. C. L. 312 (1844).

8. *Louisville Ins. Co. v. Monarch*, 99 Ky. 578, 36 S. W. 563, 18 Ky. L. Rep. 444 (1896) (striking an obstacle without knowing the fact).

9. *Walker v. Protection Ins. Co.*, 29 Me. 317 (1849) (abandon vessel).

10. *A. J. Tower Co. v. Southern Pac. Co.*, 184 Mass. 472, 69 N. E. 348 (1904) (oil cloth).

11. *Price v. Powell*, 3 N. Y. 322 (1850).

1. *Supra*, §§ 765, 820, *infra*, §§ 1988, 2404.

2. *Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 972 (1903) (engineer); *Pullman's Palace-Car Co. v. Harkins*, 55 Fed. 932, 5 C. C. A. 326 (1893) (machinist).

3. *Bradley v. District of Columbia*, 20 App. Cas. (D. C.) 169 (1902).

**Familiarity with a physical effect** of natural laws will not, of itself, qualify the person to speak as to the operation of these laws. A fireman, for instance, is not qualified to state the natural process by which a fire creates its own current of air. *State v. Watson*, 65 Me. 74 (1876). Nor is a millwright competent to testify as to the cause of anchor ice in a particular stream. *Woods v. Allen*, 18 N. H. 28 (1845).

4. *Fraim v. National F. Ins. Co.*, 170 Pa. St. 151, 32 Atl. 613, 50 Am. St. Rep. 753 (1895) (gasoline in silver plating).

5. *Merchants Wharf-Boat Assoc. v. Wood*, (Miss. 1887) 3 So. 248. A carpenter and builder is not necessarily qualified to testify as to the strength of or the strain upon a wire

§ 903. (*Technical or Scientific Facts; Mechanic Arts*); **Dangers.**—The physical dangers<sup>1</sup> and disease producing quality<sup>2</sup> of manufacturing in any particular line, under what conditions these may be avoided, and the business rendered safe<sup>3</sup> or as to how far the injurious effect of an industry may be modified in the case of any individual by his own personal equation;<sup>4</sup>—these, and similar facts may become relevant, and, when stated by persons of sufficient technical knowledge, admissible. The dangers to be guarded against in the use of particular appliances<sup>5</sup> or incident to the use of modern machinery<sup>6</sup> are, in the same way, matters of special knowledge.

§ 904. (*Technical or Scientific Facts; Mechanic Arts*); **Proper Management of Business.**—The proper way in which a given manufacturing operation as making ice tongs<sup>1</sup> or firing

rope. *Caven v. Bodwell Granite Co.*, 97 Me. 381, 54 Atl. 851 (1903).

1. *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718 (1895) (powder mill); *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257 (1886) (roller mills); *Bearden v. State*, 44 Tex. Cr. 578, 73 S. W. 17 (1903).

2. *Fox v. Peninsular White Lead, etc., Works*, 92 Mich. 243, 52 N. W. 623 (1892) (manufacture of paris green).

3. *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718 (1895) (powder manufacturing); *Richardson v. Douglas*, 100 Iowa 239, 69 N. W. 530 (1896) (sparks from threshing machine); *Sawyer v. J. M. Arnold Shoe Co.*, 90 Me. 369, 38 Atl. 332 (1897) (elevator); *Baltimore, etc., Road v. Leonhardt*, 66 Md. 70, 5 Atl. 346 (1886).

4. *Birmingham Furnace, etc., Co. v. Gross*, 97 Ala. 220, 12 So. 36 (1893) ("stand more gas").

5. *Charter Gas-Engine Co. v. Kellam*, 79 N. Y. App. Div. 231, 79 N. Y. Suppl. 1019 (1903) (gasoline engine).

6. *Pullman's Palace-Car Co. v. Harkins*, 55 Fed. 932, 5 C. C. A. 326 (1893) (rapidly revolving shafting).

1. *California.*—*Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 972 (1903) (use of derricks).

*Massachusetts.*—*Leslie v. Granite R. Co.*, 172 Mass. 468, 52 N. E. 543 (1899) (derricks for stone).

*Minnesota.*—*Nutzmann v. Germania L. Ins. Co.*, 78 Minn. 504, 81 N. W. 518 (1900) (hydraulic elevator); *Neubauer v. Northern Pac. R. Co.*, 60 Minn. 130, 61 N. W. 912 (1895) (ice tongs).

*New York.*—*Scheider v. American Bridge Co.*, 78 N. Y. App. Div. 163, 79 N. Y. Suppl. 634 (1903) (guying derricks).

*Utah.*—*Fritz v. Western Union Tel. Co.*, 25 Utah 263, 71 Pac. 209 (1902) (telephone wires); *Palmquist v. Mine, etc., Supply Co.*, 25 Utah 257, 70 Pac. 994 (1902) (loading boilers).

*Virginia.*—*Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467 (1904) (erecting hoisting gear); *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509 (1897) (moving heavy articles).

**Conjecture rejected.**—Statements which partake of the nature of conjectures, as whether an experienced operator would deem a certain precaution necessary. [*Dallas Electric Co. v. Mitchell*, (Tex. Civ. App. 1903)

tiles<sup>2</sup> should be conducted is an appropriate subject for testimony of this class. But the mere fact that the witness<sup>3</sup> or some other person<sup>4</sup> has been in the habit of doing a mechanical operation in a particular way may well be rejected as irrelevant. It gives rise to no legitimate inference as to what the proper and reasonable way is. What would be an improper way of doing such work<sup>5</sup> is, by a parity of reasoning, equally to be received in evidence. The method and effect in detail<sup>6</sup> of operating a particular machine, may be stated by those sufficiently acquainted with it. How far a defect in a mechanical device<sup>7</sup> can be discovered by ordinary observation or inspection seems to present a question of this simple order.

**§ 905. (Technical or Scientific Facts; Mechanic Arts); Strength of Mechanical Appliances.**—Strength of mechanical appliances,<sup>1</sup> or of stagings<sup>2</sup> and other combinations of materials for mechanical purposes,<sup>3</sup> or the metals or other substances of which they are composed for resisting tensile<sup>4</sup> or other<sup>5</sup> strains<sup>6</sup>

76 S. W. 935] may be rejected. An additional reason is furnished when the statement invades the appropriate function of the jury. *Dallas Electric Co. v. Mitchell*, (Tex. Civ. App. 1903) 76 S. W. 935 (electric foreman's duty).

2. *Wiggins v. Wallace*, 19 Barb. (N. Y.) 338 (1855).

3. *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467 (1904).

4. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509 (1897).

5. *Wiggins v. Wallace*, 19 Barb. (N. Y.) 338 (1855).

6. *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714 (1892) (makes hard floor slippery).

7. *Silveira v. Iversen*, 128 Cal. 187, 60 Pac. 687 (1900) (rope); *International, etc., R. Co. v. Collins*, (Tex. Civ. App. 1903) 75 S. W. 814 (brake-staff).

1. *Louisville, etc., R. Co. v. Berkey*, 136 Ind. 181, 35 N. E. 3 (1893) (coupling pin); *Lau v. Fletcher*, 104 Mich. 295, 62 N. W. 357 (1895) (saw).

2. *Prendible v. Connecticut River*

Mfg. Co., 160 Mass. 131, 35 N. E. 675 (1893).

3. *Stanwick v. Butler-Ryan Co.*, 93 Wis. 430, 67 N. W. 723 (1896) (stringer).

4. *Kentucky*.—*Claxton v. Lexington, etc., R. Co.*, 13 Bush (Ky.) 636 (1878) (iron hook).

*Maine*.—*Caven v. Bodwell Granite Co.*, 97 Me. 381, 54 Atl. 851 (1903) (wire-rope).

*Massachusetts*.—*Murphy v. Marston Coal Co.*, 183 Mass. 385, 67 N. E. 342 (1903).

*New Hampshire*.—*Little v. Head, etc., Co.*, 69 N. H. 494, 43 Atl. 619 (1898) (iron hook).

*New York*.—*Favo v. Remington Arms Co.*, 73 N. Y. Suppl. 788, 67 App. Div. 414 (1901) (gun metal).

5. The strength of the metal in a gun can be stated only by one who is familiar with the subject. *Favo v. Remington Arms Co.*, 73 N. Y. Suppl. 788, 67 App. Div. 414 (1901).

6. *Boettger v. Scherpe, etc., Iron Co.*, 124 Mo. 87, 27 S. W. 466 (1894) (timber).

The amount of a given strain may

may be stated as a fact of special knowledge by any witness deemed competent by the court. What strain is sufficient to overcome the resisting power of a given mechanical appliance or combination of materials is equally a proper subject for the evidence of a skilled witness. Where, however, the phenomena attending a practical experiment in the law of strains have been made the subject of observation by a skilled witness, as, for example, what caused the collapse of a house or other given structure,<sup>7</sup> the statement is not so much one of fact as of inference.<sup>8</sup> Some question may often arise as to whether the statement of the specially-trained witness is properly one of fact, or, on the contrary, is reached by a more elaborate line of reasoning. Much, in each individual case, will be found to depend upon how necessary the inference may be, i. e., how instinctive would be the reaction of the mind upon presentation of the facts to a competent and experienced person.<sup>9</sup>

**§ 906. (Technical or Scientific Facts; Mechanic Arts); Use of Firearms.**—Persons experienced in the use of firearms may give, as of their personal knowledge, facts familiar to them concerning the mechanical effects attending the discharge of such weapons.<sup>1</sup> The witness may state as to how widely the projectiles

be stated. *Caven v. Bodwell Granite Co.*, 97 Me. 381, 54 Atl. 851 (1903).

7. *Tremblay v. Mapes-Reeve Constr. Co.*, 169 Mass. 284, 47 N. E. 1010 (1897); *Quigley v. H. W. Johns Mfg. Co.*, 26 N. Y. App. Div. 434, 50 N. Y. Suppl. 98 (1898).

8. *Infra*, § 1802.

9. In general, a conclusion regarding the adequacy of any mechanical device or appliance for the purpose for which it was intended, in connection with any close, doubtful or equivocal situation, i. e., where the cases "close to the line" can seldom be stated as facts of special knowledge but only in terms of inference. On the other hand, extreme cases where there can be but one answer, may properly be stated as facts.

*Colorado*.—*McGonigle v. Kane*, 20 Colo. 292, 38 Pac. 367 (1894) (elevator).

*Indiana*.—*Sievers v. Peters Box*,

etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399 (1898) (elevator).

*Iowa*.—*Stonne v. Hanford Produce Co.*, 108 Iowa 137, 78 N. W. 841 (1899) (elevator).

*Massachusetts*.—*Lang v. Terry*, 163 Mass. 138, 39 N. E. 802 (1895) (derriek).

*New Jersey*.—*Excelsior Electric Co. v. Sweet*, 57 N. J. L. 224, 30 Atl. 553 (1894) (pulley for electric lights).

*New York*.—*Charter Gas-Engine Co. v. Kellam*, 79 N. Y. Suppl. 1019, 79 App. Div. 231 (1903).

*Texas*.—*Austin Rapid Transit R. Co. v. Groethe*, (Civ. App. 1895) 31 S. W. 197 (elevating cars).

1. *Long v. Travellers' Ins. Co.*, 113 Iowa 259, 85 N. W. 24 (1901) (effect of gas generation by discharge of a gun). See also *Dugan v. Com.*, 102 Ky. 241, 43 S. W. 418, 19 Ky. L. Rep. 1273 (1897).

from a given make of fire arm will scatter at certain distances;<sup>2</sup> how far a pistol<sup>3</sup> or other firearms<sup>4</sup> will powder burn, or facts of a similar nature.

**§ 907. (Technical or Scientific Facts; Mechanic Arts); Value of Materials.**—Prominent among the almost innumerable technical facts relating to the mechanic arts which may properly be a subject of special knowledge to be stated by skilled witnesses are those relating to the value, in various connections, of the materials used. For example, the weight or comparative lightness<sup>1</sup> of metals or other material employed for a mechanical object, the relative strength of different materials<sup>2</sup> or how this strength is affected by a particular flaw, imperfection<sup>3</sup> or impaired condition,<sup>4</sup> may be stated as matters of special knowledge.

**§ 908. (Technical or Scientific Facts); Mining.**<sup>1</sup>—The art of mining presents a number of facts not covered by the scope of common knowledge though in communities where mining forms a large part of the industrial life, general knowledge may well be more extensive, in this respect, than in others not so situated. Miners of experience, mining engineers and others familiar with the business of mining may testify as to the facts regarding the state of human knowledge in connection with the art.<sup>2</sup> As to what dangers are recognized, and whether any,<sup>3</sup> and, if so, what satisfactory preventative exists, are, in equal degree, matters of special knowledge.

*Construction.*—The details of mine construction present a number of such facts. The methods by which mines are timbered<sup>4</sup>

2. *Bearden v. State*, 44 Tex. Cr. 578, 73 S. W. 17 (1903) (muzzle loading shot gun); *State v. Melvern*, 32 Wash. 7, 72 Pac. 489 (1903) (shot gun).

3. *Head v. State*, 40 Tex. Cr. 265, 50 S. W. 352 (1899).

4. *Long v. Travellers' Ins. Co.*, 113 Iowa 359, 85 N. W. 24 (1901).

1. *People v. Goldsworthy*, 130 Cal. 600, 62 Pac. 1074 (1900) (aluminum).

2. *McFaul v. Madera Flume, etc., Co.*, 134 Cal. 313, 66 Pac. 308 (1901) (wrought and cast iron); *Caven v. Bodwell Granite Co.*, 97 Me. 381, 54 Atl. 851 (1903) (wood and iron).

3. *Boettger v. Scherpe, etc., Iron Co.*, 124 Mo. 87, 27 S. W. 466 (1894) (knot).

4. *Slack v. Harris*, 200 Ill. 96, 65 N. E. 669 [*affirming* 101 Ill. App. 527] (1902) (bolts loosened).

1. See *supra*, §§ 795, 822, *infra*, §§ 2032, 2430.

2. *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771 (1895).

3. *Acme Coal Co. v. Kusnir*, 71 Ill. App. 446 (1897) (no preventative against falling stones).

4. *Monahan v. Kansas City Clay, etc., Co.*, 58 Mo. App. 68 (1894).



or roofed<sup>5</sup> or in what way the shafts and workings<sup>6</sup> are arranged may well be the subject of testimony by experienced miners or other competent witnesses.

*Operation.*—An equally large number of technical facts relate to the method of operating mines of different classes,<sup>7</sup> the work of various mining machines, tools or appliances, any facts as to the details of their employment,<sup>8</sup> or of the dangers, if any, attending their use, are also within the province of a specially skilled witness. Such a witness may state the particular duties of persons in designated positions connected with the mine.<sup>9</sup> He may testify, if he knows, the expense at which the various operations of any particular kind of mining are conducted, and what mine workings, in view of this expense, are profitable.<sup>10</sup>

**§ 909. (*Technical or Scientific Facts*); Natural History.**—One who has made an adequate study of the subject or has enjoyed and utilized special and extended opportunities for observation,<sup>1</sup> may state to a tribunal relevant facts of special knowledge relating to the characteristics or habits of men or animals. Thus, a witness familiar with the facts of ethnology, or the different races of men may detail the respective physical characteristics of the white and negro races.<sup>2</sup> In the same way a naturalist or other persons acquainted with the habits of fish, their ability to ascend rivers or streams presenting particular obstacles<sup>3</sup> and what conditions are favorable to their growth<sup>4</sup> may state them. In like manner the habitat<sup>5</sup> and life history of animals may be given;—not only by a scientifically trained naturalist but by any observer sufficiently acquainted with the facts.

5. *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771 (1895).

6. *McNamara v. Logan*, 100 Ala. 187, 14 So. 175 (1893) (safe distance between wall and car).

7. *Ohio, etc., Torpedo Co. v. Fishburn*, 61 Ohio St. 608, 56 N. E. 457, 76 Am. St. Rep. 437 (1899) (blasting); *Beaman v. Martha Washington Min. Co.*, 23 Utah 139, 63 Pac. 631 (1900) ("skip" out of an incline shaft).

8. *Diamond Block Coal Co. v. Edmonson*, 14 Ind. App. 594, 73 N. E. 242 (1895) (within what distance a dropping cage can be caught).

9. *Eureka Block Coal Co. v. Wells*,

29 Ind. App. 1, 61 N. E. 236, 94 Am. St. Rep. 259 (1901).

10. *Wilson v. Harnette*, (Colo. Sup. 1904) 75 Pac. 395.

1. *Cottrill v. Myrick*, 12 Me. 222 (1835).

2. *Daniel v. Guy*, 19 Ark. 121 (1857).

3. *Smith v. People*, 46 Ill. App. 130 (1891); *Cottrill v. Myrick*, 12 Me. 222 (1835).

4. *Lewis v. Hartford Dredging Co.*, 63 Conn. 221, 35 Atl. 1127 (1896) (seeding oysters).

5. *State v. McIntosh*, 109 Iowa 209, 80 N. W. 349 (1899) (wolf).

**§ 910. (Technical or Scientific Facts); Professional Facts; Law.**<sup>1</sup>—Legal practitioners and other persons duly qualified by experience<sup>2</sup> may state facts of a technical nature usually known to members of the legal profession.<sup>3</sup> Among these, is the price commonly charged by attorneys or counsellors at law for designated services.<sup>4</sup> The fact stated may be one of domestic practice or relate to a system of jurisprudence foreign to the forum.<sup>5</sup>

**§ 911. (Technical or Scientific Facts; Professional Facts); Medicine.**<sup>1</sup>—Few lines of professional activity are more prolific in facts of special knowledge likely to become important in judicial proceedings than that of medicine. A medical practitioner,<sup>2</sup> or other person<sup>3</sup> shown to the satisfaction of the court to have adequate knowledge concerning the matter which he proposes to state,<sup>4</sup> may testify as to facts known to the science or art of medicine.

*Familiar Medical Facts.*—Facts entirely familiar to the average member of the community—as, for example, the liability of horses to die suddenly<sup>5</sup>—do not become medical facts because they concern a medical subject. They are still part of common knowledge.<sup>6</sup>

**§ 912. (Technical or Scientific Facts; Professional Facts; Medicine); Effect of Drugs, Poisons, etc.**—The physician knows not only the symptoms of disease but the operation of the drugs<sup>1</sup>

1. See *supra*, § 824.

3. *Thompson v. Boyle*, 85 Pa. St. 477 (1877); *Vilas v. Downer*, 21 Vt. 419 (1849); *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983 (1876).

4. *Thompson v. Boyle*, 85 Pa. St. 477 (1877); *Vilas v. Downer*, 21 Vt. 419 (1849); *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983 (1876).

5. *Columbia v. Cauca Co.*, 106 Fed. 337 (1901). For proof of interstate or foreign law, see *supra*, §§ 894 *et seq.*

1. See *supra*, §§ 766, 825, *infra*, §§ 1991, 2413.

2. *Thompson v. Bertrand*, 23 Ark. 730 (1861); *Hook v. Stovall*, 26 Ga. 704 (1859); *Siebert v. People*, 143 Ill. 571, 32 N. E. 431 (1892).

3. *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556 (1890).

4. A physician without special experience on the subject is not necessarily qualified to speak as to the effects upon the human system of inhaling illuminating gas. *Emerson v. Lowell Gaslight Co.*, 6 Allen (Mass.) 146, 83 Am. Dec. 621 (1863).

5. *McPherrin v. Jennings*, 66 Iowa 622, 24 N. W. 242 (1885).

6. The court is justified in requiring production of a specialist as a witness if the subject is one where such a witness would alone be able to aid the jury. *Emerson v. Lowell Gaslight Co.*, 6 Allen (Mass.) 146, 83 Am. Dec. 621 (1863).

1. *Indiana*.—*Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228 (1901) (formaldehyde).

*New Hampshire*.—*Rochester v. Chester*, 3 N. H. 349 (1826).

and medicines used to correct unfavorable conditions. In like manner he knows the effect of poisons<sup>2</sup> upon men or animals.<sup>3</sup> But the operation of particular drugs upon the moral nature of the person using them;— as, for example, the relation between the use of morphine and a lack of veracity,<sup>4</sup> is, if a fact at all, not one of medical science.<sup>5</sup>

**§ 913. (*Technical or Scientific Facts; Professional Facts; Medicine*); Qualifications of Witnesses.**— The presiding judge will receive as a witness to facts of special knowledge relating to the medical profession any person who has been proved to his satisfaction or whom he can reasonably assume to know the fact as to which he proposes to testify with such fullness and accuracy as to make his evidence helpful to the jury. As in other matters presenting administrative questions regarding the adequacy of the knowledge of a witness, the qualification required is only such as is commensurate with the testimony which is offered. Were the question asked a medical practitioner one which involved a wide experience and mature judgment the court might well insist upon receiving testimony of a professional witness who might be assumed to possess these qualities. But certain professional facts, obtainable in their entirety by reading may be equally well known, or even better remembered, by a young doctor just graduated from the medical school than by an older and more experienced practitioner. The presiding justice, in exercising his administrative power, may reasonably, in dealing with elementary

*Pennsylvania.*— *Mertz v. Detweiler*, 8 Watts & S. 376 (1845).

*Washington.*— *State v. Robinson*, 12 Wash. 491, 41 Pac. 884 (1895) (morphine).

*West Virginia.*— *State v. Perry*, 41 W. Va. 641, 24 S. E. 634 (1896) (chloroform).

*Wisconsin.*— *Gates v. Fliescher*, 67 Wis. 504, 30 N. W. 674 (1886).

2. *Colorado.*— *Germania L. Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215 (1897) (cyanide of potassium).

*Illinois.*— *Siebert v. People*, 143 Ill. 571, 32 N. E. 431 (1892) (arsenic); *Shorb v. Webber*, 89 Ill. App. 474 (1900) (alcohol).

*Kansas.*— *State v. Cook*, 17 Kan. 392 (1877).

*Michigan.*— *Brown v. Marshall*, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728 (1882).

*Missouri.*— *State v. Meyers*, 99 Mo. 107, 121, 12 S. W. 516 (1889).

*New York.*— *Stephens v. People*, 4 Park. Cr. 396 (1859) (arsenic).

*South Carolina.*— *State v. Green*, 48 S. C. 136, 26 S. E. 234 (1896).

3. *State v. Sheets*, 89 N. C. 543 (1883); *Coyle v. Baum*, 3 Okl. 695, 41 Pac. 389 (1895).

4. *State v. Robinson*, 12 Wash. 491, 41 Pac. 884 (1895).

5. *People v. Royal*, 53 Cal. 62 (1878) (indecent familiarities).

facts of special knowledge, allow any witness to testify provided he feels that he probably knows the fact in question.

*Under such a rule*, medical students may well be adjudged competent to testify as to the simple facts of medicine which may be learned from study alone;<sup>1</sup> and chemists,<sup>2</sup> toxicologists<sup>3</sup> and others learned in subjects whose facts run into medical relations are undoubtedly competent. But nurses,<sup>4</sup> undertakers<sup>5</sup> and other nonscientific and nonprofessional witnesses, will, as a rule, not be received merely by virtue of their occupation, though, in such case, as in that of any other witness, proof of special and adequate knowledge and experience, *quoad* the fact to be elicited will render them competent witnesses. No such assumption of knowledge will be made by the court in favor of a nonprofessional witness as is frequently done in case of a regularly graduated physician of a certain length of practice. The difference, however, is merely a matter of the burden of evidence.<sup>6</sup> With the nonprofessional witness, the burden, in the first instance, is upon the party who offers him; in case of the regular practitioner the burden is upon the party who objects to the admission of his evidence. The same facts, by whomever produced to the court, are decisive of the question.

**§ 914. (Technical or Scientific Facts; Professional Facts; Medicine); State of Medical Knowledge.**—The witness may state the meaning of medical terms, what is professionally known regarding a given subject.<sup>1</sup> He may testify as to how far a given professional subject is fully covered by medical knowledge;<sup>2</sup> whether any bodily or mental<sup>3</sup> disease corresponding to certain detailed symptoms is known to medical science and, if so, what it is. Though the fact perhaps partakes somewhat of the nature

1. *Tullis v. Kidd*, 12 Ala. 648 (1847); *Murphy v. Murphy*, 65 S. W. 165, 23 Ky. L. Rep. 1460 (1901) (effect of alcoholism on the human will).

2. *Citizens' Gaslight, etc., Co. v. O'Brien*, 19 Ill. App. 231 (1885) (effects of coal gas on human system).

3. *State v. Cook*, 17 Kan. 392 (1877).

4. *Osborne v. Troup*, 60 Conn. 485, 23 Atl. 157 (1891).

5. *Com. v. Farrell*, 187 Pa. St. 408, 41 Atl. 382 (1898) (assistant).

6. *Infra*, §§ 967 *et seq.*

1. *State v. Knight*, 43 Me. 11 (1857) (blood stains); *Johnson v. Winston*, (Neb. 1903) 94 N. W. 607.

2. *State v. Miller*, 9 Houst. (Del.) 564, 32 Atl. 137 (1892) (human blood); *State v. White*, 76 Mo. 96 (1882) (undergoing child birth while standing).

3. *People v. Osmond*, 138 N. Y. 80, 33 N. E. 739 (1893).

of a conclusion, a competent witness may state the tendency and trend of medical opinion on a given topic.<sup>4</sup>

**§ 915. (Technical or Scientific Facts; Professional Facts; Medicine); Symptoms of Bodily or Mental Disease, Injuries, etc.—** The nature<sup>1</sup> and customary symptoms or effects<sup>2</sup> of any physical disease,<sup>3</sup> change of condition,<sup>4</sup> form of injury<sup>5</sup> or other operative

4. *Powers v. Mitchell*, 77 Me. 361 (1885).

1. *State v. Meyers*, 99 Mo. 107, 121, 12 S. W. 516 (1889).

2. *Lake Erie, etc., R. Co. v. Wills*, 39 Ill. App. 649 (1890) (pain); *State v. Meyers*, 99 Mo. 107, 121, 12 S. W. 516 (1889).

Conversely, the witness may testify as to what certain medical phenomena indicate as to disease; its cause, etc., assuming the inference is a necessary and unreasoned one. *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908 (1885); *Kelly v. Erie Tel., etc., Co.*, 34 Minn. 321, 25 N. W. 706 (1885); *Dilleber v. Home L. Ins. Co.*, 87 N. Y. 79 (1881); *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625 (1903) (no water in stomach).

3. *Kentucky*.—*Murphy v. Murphy*, 65 S. W. 165, 23 Ky. L. Rep. 1460 (1901) (alcoholism).

*Maryland*.—*Baltimore, etc., Co. v. Cassell*, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175 (1887).

*Minnesota*.—*Johnson v. Northern Pac. R. Co.*, 47 Minn. 430, 50 N. W. 473 (1891).

*New York*.—*Cole v. Fall Brook Coal Co.*, 159 N. Y. 59, 53 N. E. 670 (1899); *Smith v. Emery*, 42 N. Y. Suppl. 258, 11 App. Div. 10 (1896) (smallpox).

*West Virginia*.—*Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217 (1891) (syphilis).

*Canada*.—*Napier v. Ferguson*, 18 N. Brunsw. 415 (1878).

4. *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556 (1890) (death); *Washburn v. National Acc.*

*Soc.*, 10 N. Y. Suppl. 366 (1890) (instantaneous death); *Lord v. Beard*, 79 N. C. 5 (1878) (old age).

The conditions attending gestation may be stated as medical facts. *People v. Johnson*, 70 Ill. App. 634 (1896); *Alsop v. Bowtrell*, Cro. Jac. 541 (1619); *Buller v. Crips*, 6 Mod. 29 (1703).

5. *California*.—*Healy v. Visalia, etc., R. Co.*, 101 Cal. 585, 36 Pac. 125 (1894) (blow).

*Illinois*.—Supreme Tent K. of M. of W. *v. Stensland*, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137 (1903) (strangulation); *Morton v. Zwierzykowski*, 192 Ill. 328, 61 N. E. 413 (1901).

*Iowa*.—*Sanders v. O'Callaghan*, 111 Iowa 574, 82 N. W. 969 (1900) (dog bite); *State v. Vincent*, 24 Iowa 570, 95 Am. Dec. 753 (1868).

*Kentucky*.—*Muldraughs Hill, etc., Turnpike Co. v. Maupin*, 1 Ky. L. Rep. 404 (1870) (rupture).

*New Hampshire*.—*State v. Greenleaf*, 71 N. H. 606, 54 Atl. 38 (1902) (fall).

*New York*.—*Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363 (1890) (impregnation by an act of rape).

*North Carolina*.—*State v. Morgan*, 95 N. C. 641 (1886) (death leaving no marks on body).

*Pennsylvania*.—*Coyle v. Com.*, 104 Pa. St. 117 (1883) (self abuse).

*Wisconsin*.—*Crites v. New Richmond*, 98 Wis. 55, 73 N. W. 322 (1897) (sprain).

*Canada*.—*Napier v. Ferguson*, 18 N. Brunsw. 415 (1878). See also *Murray v. Salt Lake City R. Co.*, 16 Utah 356, 52 Pac. 596 (1898).

force affecting the body or mind<sup>6</sup> are facts of medical knowledge. It is equally open to the practitioner to state the ordinary physical indicia of insanity or other pathological condition of mind<sup>7</sup> and may even go so far as to state whether a particular act,<sup>8</sup> idea<sup>9</sup> or any physical or mental manifestation<sup>10</sup> is indicative of insanity, in some of its types,<sup>11</sup> or other mental state or condition.

**§ 916. (Technical or Scientific Facts; Professional Facts; Medicine); Treatment; Possibilities and Probabilities.**—The treatment established to be used under certain medical conditions and the effects attendant upon its use<sup>1</sup> are facts within the special knowledge of the medical practitioner.

*Possibilities.*—What possibilities as to diagnosis,<sup>2</sup> alleviation or cure and even what possibilities are recognized among competent physicians under given circumstances, are classed as facts of special medical knowledge;—always provided that these possibilities are definitely established and generally accepted rather than based upon a process of reasoning and constitute little more than conjecture. There is not, under these conditions, valid objection to asking a medical witness whether, for example, a given cause could produce a certain physical or mental effect.<sup>3</sup>

The effect of gun shot wounds cannot be stated by one not skilled along medical lines. *State v. Justus*, 11 Or. 178, 8 Pac. 337, 50 Am. Rep. 470 (1883).

6. *State v. Reddick*, 7 Kan. 143 (1871); *Clark v. Com.*, 63 S. W. 740, 23 Ky. L. Rep. 1029 (1901) (abortion; shock to a single as compared with a married woman); *State v. Maier*, 36 W. Va. 757, 15 S. E. 991 (1892) (love, jealousy, etc.). See also *Murphy v. Murphy*, 65 S. W. 165, 23 Ky. L. Rep. 1460 (1901).

7. *State v. Reddick*, 7 Kan. 143 (1871); *State v. Meyers*, 99 Mo. 107, 121, 12 S. W. 516 (1889).

8. *Williams v. State*, (Fla. 1903) 34 So. 279; *State v. Reddick*, 7 Kan. 143 (1871); *State v. Meyers*, 99 Mo. 107, 121, 12 S. W. 516 (1889).

9. *People v. Goldsworthy*, 130 Cal. 600, 62 Pac. 1074 (1900) (portable aluminum boiler).

10. An alienist may properly say

that a certain characteristic is rather a *vice* than evidence of mental unsoundness. *U. S. v. Guiteau*, 1 Mackey (D. C.) 498, 47 Am. Rep. 247 (1882).

11. *Williams v. State*, (Fla. 1903) 34 So. 279 (delusional).

1. *State v. Meyers*, 99 Mo. 107, 121, 12 S. W. 516 (1889); *Bonart v. Lee*, (Tex. Civ. App. 1898) 46 S. W. 906 ("medical treatment").

2. *Hartung v. People*, 4 Park. Cr. (N. Y.) 319 (1859) (cause of inflammation discovered on *post mortem* examination); *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599 (1902).

3. *Florida*.—*Baker v. State*, 30 Fla. 41, 11 So. 492 (1892).

*Illinois*.—*Wabash Western R. Co. v. Friedman*, 41 Ill. App. 270 (1891).

*Massachusetts*.—*Flaherty v. Powers*, 167 Mass. 61, 44 N. E. 1074 (1896).

*Missouri*.—*Seckinger v. Philibert, etc., Mfg. Co.*, 129 Mo. 590, 31 S. W. 957 (1895).

*Probabilities.*—Much the same observation applies to the matter of medical *probability*. If a definite probability is recognized as a part of medical knowledge, something beyond mere guess work or conjecture, the witness may state it;—otherwise, he will not be permitted to do so. Whether a person suffering from a given disease or injury will probably recover<sup>4</sup> and, if so, after what interval;<sup>5</sup> whether, on the other hand, the results are apt to be permanent,<sup>6</sup> or followed<sup>7</sup> or attended by other bodily or mental troubles, are, in many instances, perfectly fair questions regarding facts of special knowledge.

**§ 917. (*Technical or Scientific Facts; Professional Facts*); Surgery.**—A surgeon shown to be properly qualified to do so<sup>1</sup> may state the technical or special facts relating to his branch of the medical profession.<sup>2</sup> If knowledge is shown to be adequate as to the subject of inquiry, it need not be required that the witness should have handled cases of exceptional difficulty.<sup>3</sup> The physical effects of a given injury,<sup>4</sup> the proper treatment of it, and other surgical facts of a like nature, may be stated by him. A

*New York.*—*Cole v. Fall Brook Coal Co.*, 87 Hun (N. Y.) 584, 34 N. Y. Suppl. 572 (1895).

*Wisconsin.*—*Block v. Milwaukee St. R. Co.*, 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365 (1895). But see also *Wabash Western R. Co. v. Friedman*, 41 Ill. App. 270 [*reversed* on other points in 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111] (1891).

4. *Jackson v. Boone*, 93 Ga. 662, 20 S. E. 46 (1894); *Morton v. Zwierzykowski*, 192 Ill. 328, 61 N. E. 413 (1901) (uniting bones); *Cole v. Lake Shore, etc., R. Co.*, 95 Mich. 77, 54 N. W. 638 (1893).

5. *Morton v. Zwierzykowski*, 192 Ill. 328, 61 N. E. 413 (1901); *Western Union Tel. Co. v. Church*, 3 Neb. (Unoff.) 22, 90 N. W. 878, 57 L. R. A. 905 (1902) (parturition); *Collins v. Janesville*, 111 Wis. 348, 87 N. W. 241, 1087 (1901) (chronic inflammation).

6. *Illinois.*—*Girard Coal Co. v. Wiggins*, 52 Ill. App. 69 (1893).

*Iowa.*—*Sanders v. O'Callaghan*, 111 Iowa 574, 82 N. W. 969 (1900).

*New York.*—*Maher v. New York Cent., etc., R. Co.*, 46 N. Y. Suppl. 847, 20 App. Div. 161 (1897).

*Oklahoma.*—*Coyle v. Baum*, 3 Okl. 693, 41 Pac. 389 (1895).

*United States.*—*Reed v. Pennsylvania R. Co.*, 56 Fed. 184 (1893).

7. *Jacksonville Southeastern R. Co. v. Southworth*, 32 Ill. App. 307 (1889) (spinal disease); *Lago v. Walsh*, 98 Wis. 348, 74 N. W. 212 (1898).

1. *Johnson v. Winston*, (Neb. 1903) 94 N. W. 607; *Crites v. New Richmond*, 98 Wis. 55, 73 N. W. 322 (1897); *Kelly v. U. S.*, 27 Fed. 616 (1885). *Infra*, § 2017.

2. In states which permit it, the evidence of technical facts may be elicited on cross examination. *Rowell v. Lowell*, 11 Gray (Mass.) 420 (1858).

3. *Kelly v. U. S.*, 27 Fed. 616 (1885).

4. *Powers v. Mitchell*, 77 Me. 361 (1885) (concussion of the spine).

surgeon may acceptably testify as to the method in which a particular surgical operation is conducted; what ligaments<sup>5</sup> or tissues are severed in connection with it or as to what parts of the body may fairly be designated as vital.<sup>6</sup>

**§ 918. (*Technical or Scientific Facts; Professional Facts*); Veterinary Surgery.**—A competent veterinary surgeon<sup>1</sup> or any person whom the court finds to be sufficiently qualified by experience<sup>2</sup> regarding the diseases of animals as to be able to make a relevant, i. e., probative statement regarding the subject involved in the inquiry, may give facts relating to veterinary science. Personal and practical experience is the satisfactory qualification as a witness. Nothing quite takes its place. Reading on the subject,<sup>3</sup> listening to the evidence of experienced witnesses<sup>4</sup> or observing the methods of treating disease employed by those learned on a given veterinary subject,<sup>5</sup> even editing a journal devoted to the interests of stock raising,<sup>6</sup> are not necessarily adequate qualifications for a witness. He may testify as to the effects of a given disease<sup>7</sup> or injury<sup>8</sup> upon animals and may depose as to the operation of drugs or poisons<sup>9</sup> upon the system.

5. *Johnson v. Winston*, (Neb. 1903) 94 N. W. 607.

6. *Sebastian v. State*, 41 Tex. Cr. 248, 53 S. W. 875 (1899).

1. *Grayson v. Lynch*, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230 (1896).

2. *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113 (1891); *Johnson v. Moffett*, 19 Mo. App. 159 (1885); *Nations v. Love*, (Tex. Civ. App. 1894) 26 S. W. 232.

A physician, though he has never acted as a veterinary surgeon regarding it may state the symptoms of a given disease. *State v. Sheets*, 89 N. C. 543 (1883). Qualifications may be prescribed by statute. *McCann v. Ullman*, 109 Wis. 574, 85 N. W. 493 (1901).

**Cross examination may bring out such facts.**—In jurisdictions which permit a party to prove his own case upon cross examination of his opponent's witnesses, it is error to reject a question calculated to bring into evidence a relevant fact of this

nature from a competent witness. *See WITNESSES. Titus v. Gage*, 70 Vt. 13, 39 Atl. 246 (1896).

3. *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550, 16 Pac. 951 (1888); *Rouse v. Youard*, 1 Kan. App. 270, 41 Pac. 426 (1895).

4. *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550, 16 Pac. 951 (1888).

5. *Rouse v. Youard*, 1 Kan. App. 270, 41 Pac. 426 (1895).

6. *Dole v. Johnson*, 50 N. H. 452 (1870).

7. *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113 (1891); *Johnson v. Moffett*, 19 Mo. App. 159 (1885); *Nations v. Love*, (Tex. Civ. App. 1894) 26 S. W. 232; *Grayson v. Lynch*, 163 U. S. 468, 10 S. Ct. 1064, 41 L. ed. 230 (1896) ("Texas fever").

8. *State v. Sheets*, 89 N. C. 543 (1883).

9. *State v. Sheets*, 89 N. C. 543 (1883).



**§ 919. (*Technical or Scientific Facts*); Railroad Facts.<sup>1</sup> —**

The great prominence of the railroad in the social and industrial life of the modern community and in the practical work of the courts not only make a number of facts relating to such a carrier matters of common or judicial knowledge<sup>2</sup> but constantly call for proof of cognate facts more or less technical in their nature, as to which special knowledge is required. Facts of the latter class may be furnished by those who are found by the court to have had adequate technical training or practical experience in regard to the fact in question.<sup>3</sup> A person not in the railroad business may state a fact relating to railroad matters; — provided it be shown that he knows it,<sup>4</sup> and not merely that he has had sufficient opportunities for observation to enable him to ascertain it.<sup>5</sup> The experience must be commensurate with the question; consequently, in view of the highly specialized character of the modern railroad organization, the witness must, as a rule, except in case of very general matters, be connected with the particular department to which the inquiry relates; — though it is by no means necessary that the qualifying experience should have been acquired on the railroad concerning which a query is made.<sup>6</sup>

**§ 920. (*Technical or Scientific Facts; Railroad Facts*); Duties of Officers or Employees.**— Any experienced railroad man may state the ordinary established duties of the officials or conductors, engineers,<sup>1</sup> brakemen<sup>2</sup> or other employees<sup>3</sup> with whose work he is familiar.

1. *Supra*, §§ 796, 826, *infra*, 2035 *et seq.*, 2435 *et seq.*

2. *Supra*, §§ 691 *et seq.*, 826.

Skilled witnesses are not required to state such facts.— For example, the community knows how a cattle guard should be constructed. *New York, etc., R. Co. v. Zumbaugh*, 12 Ind. App. 272, 39 N. E. 1058 (1894); *Swartout v. New York Cent., etc., R. Co.*, 7 Hun (N. Y.) 571 (1876).

3. Qualifications must be affirmatively shown. Unless this is done, the witness may be rejected. *Born v. Philadelphia, etc., R. Co.*, 198 Pa. St. 409, 48 Atl. 263 (1901).

4. *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291 (1885); *Chesapeake, etc., R. Co. v. Stephens*,

15 Ky. L. Rep. 815 (1894); *Detroit, etc., R. Co. v. Van Steinburg*, 17 Mich. 99 (1868) (mail clerk); *Robertson v. Wabash, etc., R. Co.*, 84 Mo. 119 (1884).

5. *Manhattan, etc., R. Co. v. Stewart*, 30 Kan. 226, 2 Pac. 151 (1883); *Mammerberg v. Metropolitan St. R. Co.*, 62 Mo. App. 563 (1895).

6. *Conway v. Fitzgerald*, 70 Vt. 103, 39 Atl. 634 (1897).

1. *Galveston, etc., R. Co. v. Brown*, (Tex. Civ. App. 1900) 59 S. W. 930.

2. *Alabama*.— *Culver v. Alabama Midland R. Co.*, 108 Ala. 330, 18 So. 827 (1895) (proper position).

*Iowa*.— *Quinlan v. Chicago, etc., R. Co.*, 113 Iowa 89, 84 N. W. 960 (1901).

### § 921. (*Technical or Scientific Facts; Railroad Facts*);

**Operation.**—A large number of experienced persons are, as a rule, qualified to speak as to facts of operation. Such a witness is competent to testify as to how acts in the line of duty such as stopping trains,<sup>1</sup> coupling cars<sup>2</sup> and the like<sup>3</sup> are customarily<sup>4</sup> and suitably<sup>5</sup> performed. In the same way, the witness may properly state what consequences usually attend a particular combination of circumstances;<sup>6</sup> whether any particular act is safe<sup>7</sup> or dangerous<sup>8</sup> and

*Ohio.*—*Cincinnati, etc., R. Co. v. Smith*, 22 Ohio St. 227, 10 Am. Rep. 729 (1871).

*South Carolina.*—*Price v. Richmond etc., R. Co.*, 38 S. C. 199, 17 S. E. 732 (1892).

*Texas.*—*Missouri, etc., R. Co. v. Baker*, (Civ. App. 1900) 58 S. W. 964.

3. *Alabama.*—*Schlaff v. Louisville, etc., R. Co.*, 100 Ala. 377, 14 So. 105 (1893).

*Illinois.*—*Louisville, etc., R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448, 51 N. E. 824 (1898) (signals and switchmen).

*Kansas.*—*Missouri Pac. R. Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291 (1885) (fireman).

*Nebraska.*—*Missouri Pac. R. Co. v. Fox*, 60 Neb. 531, 83 N. W. 744 (1900).

*South Carolina.*—*Price v. Richmond, etc., R. Co.*, 38 S. C. 199, 17 S. E. 732 (1892).

1. *Birmingham, etc., Ry. Co. v. Harris*, 98 Ala. 326, 13 So. 377 (1893).

2. *Kerns v. Chicago, etc., R. Co.*, 94 Iowa 121, 62 N. W. 692 (1895) (pilot bar); *Price v. Richmond, etc., R. Co.*, 38 S. C. 199, 17 S. E. 732 (1892) (make up train); *Mexican R. Co. v. King*, 14 Tex. Civ. App. 290, 37 S. W. 34 (1896).

3. *Walker v. Lake Shore, etc., R. Co.*, 104 Mich. 606, 62 N. W. 1032 (1895) (using lantern); *Louisville, etc., R. Co. v. Reagan*, 96 Tenn. 128, 33 S. W. 105 (1895) (uncoupling).

4. *Miller v. Illinois Cent. R. Co.*, 89 Iowa 567, 57 N. W. 418 (1894).

5. *Alabama.*—*Birmingham Mineral R. Co. v. Harris*, 98 Ala. 326, 13 So. 377 (1893).

*Iowa.*—*Kerns v. Chicago, etc., R. Co.*, 94 Iowa 121, 62 N. W. 692 (1895).

*Michigan.*—*Walker v. Lake Shore, etc., R. Co.*, 104 Mich. 606, 62 N. W. 1032 (1895).

*Pennsylvania.*—*Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631 (1887).

*South Carolina.*—*Price v. Richmond, etc., R. Co.*, 38 S. C. 199, 17 S. E. 732 (1892).

*Tennessee.*—*Louisville, etc., R. Co. v. Reagan*, 96 Tenn. 128, 33 S. W. 1050 (1895).

*Texas.*—*Houston, etc., R. Co. v. Cowser*, 57 Tex. 293 (1882).

*Utah.*—*Wright v. Southern Pac. Co.*, 15 Utah 421, 49 Pac. 309 (1897).

6. *Louisville, etc., R. Co. v. Binion*, 107 Ala. 645, 18 So. 75 (1894) (stuck brake).

7. *Alabama.*—*Mobile, etc., R. Co. v. George*, 94 Ala. 199, 10 So. 145 (1891).

*Indiana.*—*New York, etc., R. Co. v. Grand Rapids, etc., R. Co.*, 116 Ind. 60, 18 N. E. 182 (1888).

*Kentucky.*—*Louisville, etc., R. Co. v. Scott*, 108 Ky. 392, 56 S. W. 674, 22 Ky. L. Rep. 30, 50 L. R. A. 381 (1900).

*New York.*—*Flanagan v. New York, etc., R. Co.*, 83 Hun 522, 32 N. Y. Suppl. 84 (1895).

*Texas.*—*Galveston, etc., R. Co. v. Ford*, 22 Tex. Civ. App. 131, 54 S. W. 37 (1899).

8. *Schlaff v. Louisville, etc., R. Co.*,

which of two methods of performing the same railroad operation, is the safer way of doing it.<sup>9</sup> What physical qualifications are required in order to perform the duties of a given position<sup>10</sup> is equally a matter of special knowledge.

**§ 922. (Technical or Scientific Facts; Railroad Facts; Operation); Freight Transportation.**—Those whose experience has been with freight transportation<sup>1</sup> may give the regular and special freight rates,<sup>2</sup> the capacity of foreign cars<sup>3</sup> and other facts relating to his branch of the business.

*Shipping Goods.*—An experienced witness may, in the same way, declare what are the terms or customary methods of shipment of merchandise by rail and within what class, as that of "C. O. D.,"<sup>4</sup> the facts of a given shipment place it. He will be permitted to give his opinion as to what constitutes a proper covering for merchandise<sup>5</sup> and what are the duties of the carrier under a given set of circumstances;—as where stock in transit is suffering from heat.<sup>6</sup> Such a witness may further declare under what circumstances it would be proper to do a specific thing—e. g., put up partitions for cattle.<sup>7</sup>

**§ 923. (Technical or Scientific Facts; Railroad Facts; Operation); Minor Facts.**—The multitudinous details of running a passenger or other train<sup>1</sup> may any of them become of importance and received by the court when detailed by a witness of sufficient special knowledge.

100 Ala. 377, 14 So. 105 (1893); Mobile, etc., R. Co. v. George, 94 Ala. 199, 10 So. 145 (1891); Louisville, etc., R. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594 (1886).

9. Schlaff v. Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105 (1893); Mobile, etc., R. Co. v. George, 94 Ala. 199, 10 So. 145 (1891).

10. Richmond, etc., R. Co. v. Greenwood, 99 Ala. 501, 14 So. 495 (1892) (one armed brakeman).

1. Price v. Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732 (1892).

2. Vicksburg, etc., R. Co. v. Stocking, (Miss. 1892) 13 So. 469.

3. Conway v. Fitzgerald, 70 Vt. 103, 39 Atl. 634 (1897) (lumber).

4. Davidson v. State, (Tex. Cr. App. 1903) 73 S. W. 808.

5. Schwinger v. Raymond, 105 N. Y. 648, 11 N. E. 952 (1887).

6. Lindsley v. Chicago, etc., R. Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692 (1887).

7. Louisville, etc., R. Co. v. Landers, 135 Ala. 504, 33 So. 482 (1902).

1. Prosser v. Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814 (1895); Galveston, etc., R. Co. v. Robinett, (Tex. Civ. App. 1899) 54 S. W. 263 (train orders); Smith v. Canada Pac. R. Co., 34 Nova Scotia 22 (1901) (train motion).

§ 924. (*Technical or Scientific Facts; Railroad Facts; Operation*); Passenger Transportation.—Engineers,<sup>1</sup> firemen, conductors, brakemen or other persons engaged in the operation of trains may state their special knowledge relating to passenger transportation,—as the effect upon the comfort of the passengers of certain acts,<sup>2</sup> methods of running a train, or other incidents of travel.<sup>3</sup>

§ 925. (*Technical or Scientific Facts; Railroad Facts; Operation*); Possibilities and Probabilities.—A definite and determined possibility is not so much a matter of estimate or conjecture as of fact. A competent witness<sup>1</sup> may state railroad facts of this nature;—as within what distance it is possible to stop a train going with a given momentum;<sup>2</sup> how far a certain object can be seen<sup>3</sup> or whether other given railroad acts can be done. So of doing many other acts,<sup>4</sup> or whether certain events could have occurred.<sup>5</sup> These may be questions purely of *fact*;—most readily proved in

1. Union Pac. R. Co. v. Novak, 61 Fed. 573, 9 C. C. A. 629 (1894).

2. Louisville, etc., R. Co. v. Banks, 132 Ala. 471, 31 So. 573 (1901); Louisville, etc., R. Co. v. Binion, 107 Ala. 645, 18 So. 75 (1894).

3. Louisville, etc., R. Co. v. Mother-shed, 97 Ala. 261, 12 So. 714 (1893) (running over misplaced switch).

1. It is not sufficient to be in the railroad business. A section man, as such, would be incompetent. Igo v. Chicago, etc., R. Co., 38 Mo. App. 377 (1889).

2. Alabama.—Alabama Great Southern R. Co. v. Linn, 103 Ala. 134, 15 So. 503 (1893).

Iowa.—Grimmell v. Chicago, etc., R. Co., 73 Iowa 93, 34 N. W. 758 (1887).

Michigan.—Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99 (1868).

Missouri.—Eckert v. St. Louis, etc., R. Co., 13 Mo. App. 352 (1883).

New York.—Mott v. Hudson River R. Co., 8 Bosw. 345 (1861).

North Carolina.—Cox v. Norfolk, etc., R. Co., 126 N. C. 103, 35 S. E. 237 (1900).

United States.—Union Pac. R. Co. v. Novak, 61 Fed. 573, 9 C. C. A. 629 (1894).

3. Chicago, etc., R. Co. v. Kreig, 22 Ind. App. 393, 53 N. E. 1033 (1899) (spark).

4. Iowa.—Whitsett v. Chicago, etc., R. Co., 67 Iowa 150, 25 N. W. 104 (1885).

Minnesota.—Kolsti v. Minneapolis, etc., R. Co., 32 Minn. 133, 19 N. W. 655 (1884).

New York.—Frace v. New York, etc., R. Co., 68 Hun 325, 22 N. Y. Suppl. 958 (1893).

Ohio.—Bellefontaine, etc., R. Co. v. Bailey, 11 Ohio St. 333 (1860) (prevent accident).

Vermont.—Conway v. Fitzgerald, 70 Vt. 103, 39 Atl. 634 (1897).

United States.—Union Pac. R. Co. v. Novak, 61 Fed. 573, 9 C. C. A. 629 (1894).

5. Davidson v. St. Paul, etc., R. Co., 34 Minn. 51, 24 N. W. 324 (1885) (throw sparks); Jamieson v. New York, etc., R. Co., 162 N. Y. 630, 57 N. E. 1113 (1900) (spark arrester door open); Frace v. New York etc., R. Co., 68 Hun (N. Y.) 325, 12 N. Y. Suppl. 958 (1893) (throw large sparks).

this way, unless the question is one covered by the common knowledge of the jury.<sup>6</sup> In many, if not most instances, however, the element of reasoning enters in larger measure, and the witness is asked to state his *conclusion* if he has seen the constituting phenomena and his judgment if he has not.

*Probabilities.*—A definite probability as to railroad matters, e. g., whether a man struck by a locomotive while standing or walking upon a railroad track would probably be thrown aside or run over,<sup>7</sup> may also be a question of fact to be covered by the evidence of specially skilled witnesses.

**§ 926. (*Technical or Scientific Facts; Railroad Facts*); Roadbed and Equipment.**—Accordingly, one familiar with the roadbed department<sup>1</sup> may state how a highway crossing is planked<sup>2</sup> and other facts<sup>3</sup> concerning his special field.

*Equipment.*—One experienced in the equipment department or who is familiar with the mechanical devices commonly employed may testify as to facts concerning the apparatus used in drawing<sup>4</sup> or stopping<sup>5</sup> trains; the general function and operation of specific railroad appliances;<sup>6</sup> the relative value of different devices for attaining the same mechanical results<sup>7</sup> and similar facts, e. g., regarding the rolling stock.<sup>8</sup>

6. *Bailey v. Rome, etc., R. Co.*, 55 Hun (N. Y.) 509, 8 N. Y. Suppl. 780 (1890) (displace a brake-rod without removing the pin).

7. *Gulf, etc., R. Co. v. Matthews*, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788 (1902).

1. *Kerns v. Chicago, etc., R. Co.*, 94 Iowa 121, 62 N. W. 692 (1895); *Walker v. Lake Shore, etc., R. Co.*, 104 Mich. 606, 62 N. W. 1032 (1895) (roadmaster).

2. *Kelly v. Southern Minnesota R. Co.*, 28 Minn. 98, 9 N. W. 588 (1881).

3. *State v. Toledo R., etc., Co.*, 24 Ohio Cir. Ct. 321 (1903) (side track); *Ft. Worth, etc., R. Co. v. Wilson*, 3 Tex. Civ. App. 583, 24 S. W. 686 (1893) (good construction).

4. *Baltimore, etc., R. Co. v. Elliott*, 9 App. Cas. (D. C.) 341 (1896) (draw head); *McDonald v. Michigan Cent. R. Co.*, 108 Mich. 7, 65 N. W. 597 (1895) (cross-bar).

5. *Louisville, etc., R. Co. v. Binion*,

107 Ala. 645, 18 So. 75 (1894) (brake); *Price v. Richmond, etc., R. Co.*, 38 S. C. 199, 17 S. E. 732 (1892).

6. *McDonald v. Michigan Cent. R. Co.*, 108 Mich. 7, 65 N. W. 597 (1895) (push bar); *Carley v. New York, etc., R. Co.*, 1 N. Y. Suppl. 63 (1888) (spark arrester).

7. *Galveston, etc., R. Co. v. Hughes*, 22 Tex. Civ. App. 134, 54 S. W. 264 (1899) (switches).

8. *Nebraska*.—*Missouri Pac. R. Co. v. Fox*, 60 Neb. 531, 83 N. W. 744 (1900).

*New York*.—*Peck v. New York Cent., etc., R. Co.*, 165 N. Y. 347, 59 N. E. 206 (1901).

*Ohio*.—*Pittsburg, etc., R. Co. v. Sheppard*, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732 (1897).

*Texas*.—*Missouri, etc., R. Co. v. St. Clair*, 21 Tex. Civ. App. 345, 51 S. W. 666 (1899).

*Wisconsin*.—*Paulson v. State*, 118 Wis. 89, 94 N. W. 771 (1903).

**§ 927. (Technical or Scientific Facts); Street Railway Matters.**<sup>1</sup>—Facts relating to the construction, equipment and operation of street railways which are of special rather than common knowledge;—e. g., the value of certain mechanical appliances for railway purposes,<sup>2</sup> are numerous. Any witness shown to possess an adequate familiarity with the subject-matter of the inquiry gained from observation<sup>3</sup> and the intelligent possession of the requisite data with which to utilize it<sup>4</sup> may testify from his special knowledge; any other witness will be rejected.<sup>5</sup> The requirement that the knowledge must be shown to be commensurate with the information to be imparted is a persistent one, and applies also in this connection.<sup>6</sup> Where the experiences are similar<sup>7</sup> or analogous<sup>8</sup> training on a steam railroad may qualify a witness to testify regarding street railway matters and *vice versa*. The higher officials of the street railway company may give to the court facts relating to the general management.<sup>9</sup> On the other hand, specific facts concerning the details of operating cars may be stated by the conductors,<sup>10</sup> motormen<sup>11</sup> or drivers<sup>12</sup> within whose immediate province these details are and who, by consequence, are familiar with them.

1. *Supra*, §§ 835 *et seq.*, *infra*, §§ 2041, 2447.

2. *North Kankakee St. Ry. Co. v. Blatchford*, 81 Ill. App. 609 (1898) (use of fenders); *Ashtabula Rapid Transit Co. v. Dagenbach*, 11 Ohio Cir. Dec. 307 (1900) (life guards).

3. *Chicago City R. Co. v. McLaughlin*, 146 Ill. 353, 34 N. E. 796 (1893).

4. *Geist v. Detroit City R. Co.*, 91 Mich. 446, 51 N. W. 1112 (1892); *Hoffman v. Metropolitan St. R. Co.*, 51 Mo. App. 273 (1892).

5. *North Kankakee St. R. Co. v. Blatchford*, 81 Ill. App. 609 (1898); *Barry v. Second Ave. R. Co.*, 1 Misc. (N. Y.) 502, 20 N. Y. Suppl. 871 (1892). If the court should receive the statement of an inexperienced witness it would not support a verdict. *Mulligan v. Third Ave R. Co.*, 70 N. Y. Suppl. 530, 61 App. Div. 214 (1901).

6. *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284 (1901).

7. *Maxwell v. Wilmington City R.*

*Co.*, 1 Marv. (Del.) 199, 40 Atl. 945 (1893) (using sand).

8. *Atlanta R., etc., Co. v. Monk*, 118 Ga. 449, 45 S. E. 494 (1903) (speed as affected by curves).

9. *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533 (1897) (president).

10. *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551, 55 N. W. 742 (1893); *Mammerberg v. Metropolitan St. R. Co.*, 62 Mo. App. 563 (1895). See also *Blondel v. St. Paul City R. Co.*, 66 Minn. 284, 68 N. W. 1079 (1896).

11. *Tholen v. Brooklyn City R. Co.*, 10 Misc. (N. Y.) 283, 30 N. Y. Suppl. 1081 (1894); *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284 (1901).

12. *Chicago City R. Co. v. McLaughlin*, 146 Ill. 353, 34 N. E. 796 (1893); *Czezewzka v. Benton-Bellefontaine R. Co.*, 121 Mo. 201, 25 S. W. 911 (1894).

§ 928. (*Technical or Scientific Facts; Street Railway Matters*); Duties of Officers or Employees.—Such employees may testify as to the proper station<sup>1</sup> and other duties of those engaged in this line of work.

§ 929. (*Technical or Scientific Facts; Street Railway Matters*); Operation; Possibilities.—Definite possibilities established in the operation of street railways;—as, for example, within what distance it would be possible to stop a car of a given weight going at a certain speed,<sup>1</sup> or as to the practical possibility of doing other acts in connection with the conduct of the business<sup>2</sup> are matters of special knowledge which may be stated by a witness skilled in such matters.

1. *Czezewzka v. Benton-Bellefontaine R. Co.*, 121 Mo. 201, 25 S. W. 911 (1894).

1. *California*.—*Howland v. Oakland Consol. St. R. Co.*, 110 Cal. 513, 42 Pac. 983 (1895).

*Delaware*.—*Maxwell v. Wilmington City R. Co.*, 1 Marv. 199, 40 Atl. 945 (1893).

*Illinois*.—*Chicago City R. v. McLaughlin*, 146 Ill. 353, 34 N. E. 796 (1893).

*Minnesota*.—*Watson v. Minneapolis St. R. Co.*, 53 Minn. 551, 55 N. W. 742 (1893).

*Missouri*.—*Mammerberg v. Metropolitan St. R. Co.*, 62 Mo. App. 563 (1895).

*New York*.—*O'Neill v. Dry Dock, etc., R. Co.*, 59 N. Y. Super. Ct. 123, 15 N. Y. Suppl. 84 [*affirmed* in 129 N. Y. 125, 29 N. E. 84, 26 Am. St. Rep. 512] (1891).

*Washington*.—*Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284 (1901).

2. *Chicago City R. Co. v. McLaughlin*, 146 Ill. 353, 34 N. E. 796 (1893); *Geist v. Detroit City R. Co.*, 91 Mich. 446, 51 N. W. 1112 (1892); *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551, 55 N. W. 742 (1893); *Mammerberg v. Metropolitan St. R. Co.*, 62 Mo. App. 563 (1895).











